LATIF V. OBAMA: THE EPISTEMOLOGY OF INTELLIGENCE INFORMATION AND LEGAL EVIDENCE

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All the business of war, and indeed all the business of life, is to endeavor to find out what you don't know by what you do.

– Arthur Wellesley, First Duke of Wellington (1769–1852)[1]

I. INTRODUCTION

On October 14, 2011, the Court of Appeals for the District of Columbia Circuit issued its opinion in *Latif v. Obama*, a Guantanamo habeas corpus case concerning the detention of a Yemeni national who was alleged to be a member of the Taliban.[2] The U.S. District Court for the District of Columbia had 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."[3]

Writing for the majority of the District of Columbia Circuit panel, Judge Janice Rogers Brown ruled that the District Court erred by not affording the government's intelligence report a rebuttable "presumption of regularity,"[4] which "supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that [such officers] have properly discharged their official duties."[5] The presumption

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1. CHARLES A. LATHROP, THE LITERARY SPY: THE ULTIMATE SOURCE FOR QUOTATIONS ON ESPIONAGE & INTELLIGENCE (2004).

2. Latif v. Obama, 666 F.3d 746, 747 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012).

3. Abdah v. Obama, 2010 WL 3270761, at *9 (D.D.C. Aug. 16, 2010), *vacated and remanded by* 677 F.3d 1775 (D.C. Cir. 2011).

4. *Latif*, 666 F.3d at 747.

5. *Id.* at 748.

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."[6]

Judge David S. Tatel strongly dissented from the majority's position and made it 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 observed 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."[7] The opaque nature of the intelligence report stood in contrast to other forms of evidence that receive a presumption of regularity. For example, "[s]tate court judgments and fact findings 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."[8] 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."[9]

The majority rejected Judge Tatel's requirement that a presumption of regularity apply only to evidence produced through a process that is transparent and familiar. The majority stated that the presumption of regularity is "founded on inter-branch and inter-governmental comity, not [the courts'] judicial expertise with the relevant government conduct."[10] Additionally, Judge Brown noted that the court knew "far more about the personnel, process, and standards involved in producing intelligence records" like the report in question than "about the foreign and state governmental organs whose records we also presume to be reliable, and we have no reason to suspect such documents are fundamentally unreliable."[11]

In considering the *Latif* case, the three-justice panel of the Court of Appeals did not act in a vacuum. Instead, they were part of a larger process involving numerous actors at varying stages of judicial proceedings. The *Latif* proceedings, like all judicial proceedings, were an interactive process, designed in part to determine questions of "fact." In other words, judicial proceedings are social, veritistic processes, or a fact-finding process.

6. *Id.* at 755.
7. *Id*. at 772 (Tatel, J., dissenting).
8. *Id*.
9. *Id*.
10. *Id*. at 752 (majority opinion).
11. *Id.*

Furthermore, at the heart of the Court of Appeals' opinion is the question of what weight courts should give to information derived from a particular social, veritistic process of the United States government's intelligence cycle. Although the Supreme Court denied certiorari in *Latif*,[12] the issue remains pressing because numerous Guantanamo habeas corpus proceedings remain active,[13] and it is likely that intelligence information will be introduced as evidence in future Guantanamo military commissions.[14]

This Article examines what weight courts should give information derived from the intelligence cycle and proposes a framework for admitting and weighing intelligence information as evidence that places primacy on the value of achieving veritistic efficacy. Part II of this Article sets forth three epistemological criteria for evaluating the efficacy of social veritistic processes. In Parts III and IV, these criteria are applied to the judicial process and intelligence cycle respectively. Finally, Part V addresses the epistemological challenges associated with considering "facts" from one social process (the intelligence cycle) in making veritistic determinations in another social process (judicial proceedings).

II. SOCIAL EPISTEMOLOGY

The Oxford English Dictionary defines epistemology as "[t]he theory or science of the method or grounds of knowledge."[15] According to Alvin Goldman, traditional epistemology is "highly individualistic, focusing on mental operations of cognitive agents in isolation or abstraction from other persons."[16] 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), humans derive a great amount of knowledge from interaction with other human

12. Latif v. Obama, 132 S. Ct. 2741 (2012), *denying cert. to* 666 F.3d 746 (D.C. Cir. 2011).

13. As of September 29, 2012, 166 detainees remain at Guantanamo. *By the Numbers*, MIAMI HERALD, Sept. 29, 2012, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html. As of February 2011, approximately 140 Guantanamo detainees had active habeas corpus petitions. *See* Tony West, Assistant Attorney Gen., Speech at the ABA Standing Committee on Law and National Security Breakfast, U.S. DEP'T OF JUSTICE (Feb. 18, 2011), *available at* http://www.justice.gov/iso/opa/civil/speeches/2011/civ-speech-1102181.html.

14. *See* Mark Martins, Brigadier Gen., Remarks at Guantanamo Bay (Jan. 18, 2012) (commenting on a hearing concerning a defense objection to the government's ex parte application seeking safeguards of national security information under the Military Commissions Act of 2009), *available at* http://www.lawfareblog.com/2012/01/brig-gen-mark-martins-remarks-after-second-day-of-al-nashiri-hearing.

15. 5 OXFORD ENGLISH DICTIONARY 338 (2d ed. 1989).

16. ALVIN GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 4 (1999).

beings.[17] 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."[18] Goldman's work focuses not simply on positively describing how social processes inculcate belief, but also on the more normative study, what he calls "social veritistic epistemology," of "[w]hich practices have a comparatively favorable impact on knowledge as contrasted with error and ignorance?"[19]

In attempting to determine "which social practices have a favorable impact on knowledge," one quickly realizes that several predicate questions may be posed, which in turn draw upon various academic disciplines. First, one may ask the philosophical question, what comprises "knowledge" or "truth"? Second, one may turn to psychology to ask how human beings form beliefs.[20] Third, one may adopt a sociological approach by examining how society structures itself in order to render judgments. 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. These scholars argue that philosophical attempts at providing accounts of how individuals justify beliefs face insurmountable challenges, such as the fact that all justifications are ultimately based on sensory perceptions.[21] Thus, replacement naturalism merely seeks to explain how knowledge and beliefs are formed, rather than attempting to make normative determinations as to which methods are more likely to result in justifiable, accurate, or true beliefs.

Despite replacement naturalism's beliefs, these foundational questions are not trivial. As such, there is a vast amount of literature dedicated to answering such questions.[22] However, this Article is not intended to

17. *Id.* at 3–4.

18. Ronald Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1497 (2001).

19. GOLDMAN, *supra* note 16, at 5.

20. *See* Alvin I. Goldman, *Epistemics: The Regulative Theory of Cognition*, 75 J. PHIL. 509, 509 (1978).

21. *See* Mike Redmayne, *Rationality, Naturalism, and Evidence Law*, 2003 MICH. ST. L. REV. 849, 851 (2003) ("[S]timulation of his sensory receptors is all the evidence anybody has to go on, ultimately, in arriving at his picture of the world.").

22. *See, e.g.*, GOLDMAN, *supra* note 16, at 10–40 (summarizing six major criticisms of truth-based epistemology, including the "performative" theory of truth espoused by Richard Rotty, which holds that stating that a sentence is "true" simply means we agree with it).

address such questions, nor does it advocate for a particular approach to social epistemology. Instead, the purpose of this Article is to provide a positive description of the social epistemic processes of the intelligence cycle and judicial proceedings, and highlight the normative problems inherent in using "knowledge" derived through one process as a factual "input" in another process.

Accomplishing this goal does require making some predicate assumptions. Thus, for the purpose of this Article, it is assumed that objective truth can be known and that certain epistemic processes produce better veritistic results than other processes. Furthermore, certain criteria are required in order to assess the efficacy of a social process in producing veritistic results. For simplicity's sake, I will employ the following three criteria: (1) whether a social process is likely to achieve the "desideratum of completeness"; (2) whether actors within the social process are likely to effectively communicate information to each other; and (3) 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 available evidence. As Susan Haack notes, "[f]or evidence to have probative force, it must be not only correct, but also complete; evidence which is true so far as it goes but which omits some essential point can be thoroughly misleading."[23] Imagine, for example, that a marketing firm wishes to determine what movie genre 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 10 percent of all tickets sold were for romance films, 20 percent were for action films, 20 percent were for dramas, and 50 percent were for comedies. Based on this information, the researcher could conclude that comedy is the most popular movie genre in the community. However, if the researcher failed to notice that a second theater exists in the community, and as a result the other theater's ticket sales were not included in the researcher's data, the researcher's inference that comedy is the most popular genre may not be warranted.

One important limitation to the desideratum of completeness should be noted. Haack states that evidence may be misleading if it omits "some

23. Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 AM. J. JURIS. 43, 56 (2004).

essential point," which essentially means that the rule of total evidence is the "rule of total, relevant evidence."[24] Because social epistemology must relate to human actors, concessions to human ability must be made. Consideration of all pertinent information to a certain factual proposition may be impractical and possibly beyond human comprehension. Thus, in setting forth the criterion that a social veritistic process ought to consider all information, this criterion is constrained by Goldman's proposition that "ought" implies "can."[25] Turning again to the movie theater hypothetical, the seasonal weather conditions in the community and the presence of a public library may affect whether community members go to the cinema. However, such information will not likely significantly impact the decision of which film cinema patrons see once they are at the theater and to include this information would be distracting and wasteful.

The desideratum of completeness is not unique to social epistemology and may apply equally to veritistic conclusions made by an individual and by a group. However, the second criterion—that information be effectively communicated—is essential for evidence held by an individual to be converted into "social" knowledge. To this end, Richard Friedman identifies four elements of testimony: perception, memory, sincerity, and articulateness.[26] Thus, for a fact to become testimony, a witness must (1) perceive the fact; (2) accurately remember the fact at the time of testimony; (3) intend to communicate the fact; and (4) adequately articulate the fact. If the witness fails in any of these elements, the testimony will be less effective. Drawing on the film genre example above, if the researcher mischaracterized the genre of films—for example, by including a particular film's ticket sales in the action genre when it was a drama—then the researcher committed a critical failure of perception. 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. Finally, if the marketing firm interpreted the researcher's report of the high percentage of comedy tickets sold to mean that drama was the most popular genre, then a failure of articulateness would have occurred.

24. Under the Federal Rules of Evidence ("FRE"), "relevant evidence" is defined as having "any tendency to make a fact more or less probable than it would be without the evidence." FED. R. EVID. 401.

25. *See* Goldman, *supra* note 20, at 510.

26. Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 685 (1987).

The final criterion by which the social veritistic processes of the intelligence cycle and judicial proceedings are judged is whether such processes employ dialogical argumentation. Dialogical argumentation occurs when two or more individuals discourse with each other in a manner designed to achieve better veritistic results. Goldman notes several requirements for effective dialogical argumentation, which may be summarized as follows: (1) each speaker has a justified belief in his premises, which support the speaker's conclusions; (2) the speaker communicates his premises and conclusions to his audience clearly; and (3) the argument is credible and novel to at least some of the audience.[27] A speaker's argument may be effectively rebutted by defeating a premise of the argument, providing an additional premise which undermines the conclusion, denying the truth of a premise, or denying the strength of the premise-conclusion relationship.[28] Additionally, Goldman notes several fallacies which undermine effective argumentation, including appealing to authority, syllogistic argumentation (which Goldman calls "begging the question"), [29] ad hominem attacks (attacking the speaker rather than the argument), and the use of straw man arguments.[30]

To return to the film example, assume that the researcher reports his observations to the marketing firm, which must interpret the results to determine the most popular genre. If a member of the firm fully believed the researcher's results (in other words, she believed in the premise of the argument), then that member could logically argue that because 50 percent of theater audience ticket sales were for comedy films, comedy was the most popular genre in the community. According to Goldman, a dissenting member of the firm could potentially argue against this conclusion by noting that the argument's premise was incorrect.[31] Alternatively, the dissenter could note that the connection of the premise to the conclusion was weak[32]—for example, simply because a majority of theater audiences preferred comedies, it does not follow that the entire community prefers that genre. Perhaps community members who watch movies at home prefer dramas. According to Goldman, such counterarguments demonstrate weaknesses in the original argument, and thus lead to better veritistic

27. GOLDMAN, *supra* note 16, at 134–38.

28. *Id.* at 140.

29. *Id.* at 151.

30. *Id.* at 150–54.

31. *Id.* at 140. A dissenting member of the firm may argue, for example, the researcher only studied one theater in the community, and ignored data from other theaters.

32. *Id.*

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.

Desideratum of completeness, effective communication, and effective dialogical argumentation provide a three criteria framework for assessing social practices' veritistic effectiveness. Employing this framework, the next section examines the social veritistic processes of judicial proceedings and the intelligence cycle and then evaluates the interaction between the two veritistic processes.

III. THE VERITISTIC PROCESS OF JUIDICIAL FACT-FINDING

A. PERCEPTION AND COGNITIVE ERRORS

This section explores how facts become "known" in the American judicial system. A comprehensive examination of the rules of evidence and judicial procedure is beyond the scope of this Article. Instead, this section's purpose is to provide a brief overview of the juidicial process. Furthermore, while veritistic judgments are conducted in both civil and criminal litigation, this Article's review is confined to criminal prosecutions for the sake of brevity and simplicity. Despite this, 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 civil disputes as much as they do to criminal trials.

Haack notes a trial "is a late stage of a whole process in which a decision is made as to a defendant's guilt."[33] In the beginning of the criminal process, law enforcement personnel must investigate a crime through the collecting physical evidence, interviewing of witnesses, and identifying an individual as a suspect in the crime.[34] Then, numerous evidentiary assessments are made by a host of official actors long before a criminal defendant ever appears before a jury.[35] During this process, the individuals involved, such as witnesses, law enforcement personnel, or forensic investigators, may be affected by any one of several common cognitive flaws that influence how beliefs are formed, decisions are made,

33. *See* Haack, *supra* note 23, at 50.
34. *Id.* at 50–51.
35. *Id.*

and conflicting information is considered. A large body of psychological research has been conducted on cognitive decisionmaking, and a full evaluation of this field is beyond the scope of this Article. However, because the potential for individual cognitive error exists not only for those actors involved in the pre-trial stage of judicial fact-finding, but rather for any human actor at any stage of both the judicial and intelligence processes, it is appropriate to conduct a cursory review of the potential bases for cognitive error.

One example of cognitive error is that people tend to perceive what they expect to perceive,[36] and people tend to use their prior experience to "fill in the gaps" of their actual perception.[37] Once perceptions and beliefs are formed, they tend to persist,[38] and information that is subsequently learned is assimilated to existing belief.[39] Therefore, people tend to give greater credence to information that confirms existing beliefs and discredit contradictory information.[40] Incorrect perceptions that are initially based on ambiguous information may be stubbornly persistent, requiring exposure to increased amounts of unambiguous, correct information before the perception is changed.[41]

The manner in which people perceive information may also affect their cognitive assessment of that information, with vivid and personally perceived information influencing their thinking more than abstract information.[42] Furthermore, people may be disposed towards patterns, constancy, and order.[43] If someone detects a pattern of internal consistency in his or her informational perception, he or she will ascribe a greater degree of confidence in judgments derived from those perceptions.[44] People tend to seek cause and effect,[45] and to ascribe purpose to events, rather than perceiving such events as potentially random and unrelated.[46] Similarly, people tend to view the actions of others as being the product of their nature, while those same people view their own personal behavior has

36. RICHARD J. HEUER, PSYCHOLOGY OF INTELLIGENCE ANALYSIS 8 (1999).

37. Beryl Blaustone, *Improving Clinical Judgment in Lawyering with Multidisciplinary Knowledge About Brain Function and Human Behavior*, 40 U. BALT. L. REV. 607, 627 (2011).

38. HEUER, *supra* note 36, at 10.

39. *Id.* at 11.

40. Blaustone, *supra* note 37, at 624.

41. *See* HEUER, *supra* note 36, at 13.

42. *Id.* at 116.

43. *Id.* at 120.

44. *Id.*

45. *Id.* at 129.

46. *Id.* at 131–32.

being conditioned by the situation and context in which they find themselves.[47]

B. THE INVESTIGATION PHASE: THE HALSEY CASE STUDY

As noted above, cognitive flaws may affect any actor at any stage of the judicial process.[48] Furthermore, due to the sequential nature of the judicial process, it is possible that a factual omission or error that results from a cognitive error early in the process could be compounded by similar cognitive errors at later stages of the process. 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.[49] In 1985, Halsey was living with Margaret Urquhart and her two children.[50] On the night of November 14, 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.[51] For two hours after dropping Halsey off, Hall's whereabouts were unknown. During that time, however, Halsey's presence with his friends was corroborated by several witnesses. After a couple hours of socializing, Halsey walked home and 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 children's whereabouts. The following morning, the bodies of the two children were discovered in the basement of the apartment building.

Although they initially suspected Hall, the investigating police extensively interrogated Halsey. Halsey had severe learning disabilities, only a sixth-grade education, and little sleep during the thirty hour interrogation.[52] One of the investigating detectives characterized Halsey's statements as "gibberish."[53] Moreover, Halsey routinely gave incorrect answers concerning aspects of the crime and had to repeatedly guess before

47. *Id.* at 135.

48. *Id.* at 13.

49. *After 19 Years in Prison for One of the Most Heinous Crimes in NJ History Byron Halsey is Proven Innocent Through DNA*, INNOCENCE PROJECT (May 15, 2007), 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 [hereinafter *19 Years in Prison*].

50. State v. Halsey, 748 A.2d 634, 637–38 (N.J. Super. Ct. App. Div. 2000).

51. *19 Years in Prison*, *supra* note 49.

52. *Id. See also Halsey*, 748 A.2d at 636–37 (describing generally Halsey's experience while being questioned and polygraphed by the police).

53. *Halsey*, 748 A.2d at 636–37.

providing accurate details.[54] The resulting interrogation report, prepared by the police and signed by Halsey, contained only Halsey's accurately guessed details and excluded the inaccurate statements he initially provided.[55] Due to Halsey's "confession," the police stopped investigating Hall as a suspect.[56] Based in large part on Halsey's signed confession and testimony from Hall, Halsey was subsequently convicted of sexual assault and murder and sentenced to two consecutive life terms.[57] Nineteen years following Halsey's conviction, a DNA test revealed that it was Hall who committed the crimes, and Halsey's conviction was subsequently vacated.[58]

Halsey's case demonstrates how cognitive errors made by actors during the early stages of an investigation may affect, or be compounded by, similar errors in subsequent stages of the judicial process.[59] For example, consider the information that the interrogating police likely knew at the time they interrogated Halsey. First, they were probably aware of his relationship to the children.[60] Second, they likely knew details of the crime scene and the sequence of events surrounding the crime.[61] If the facts already known to the police made them consider Halsey as their main suspect, then the fact that the police gave greater weight to Halsey's accurate descriptions than his previous inaccurate statements may be a product of the psychological proclivity to favor information that confirms preexisting beliefs. [62]

If cognitive errors on behalf 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.[63] 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.[64] Second, it is likely

54. Specifically, Halsey described a pair of scissors found at the scene. *Id.* at 637. However, he initially described them as being much larger than their actual size, and Halsey reduced the size of scissors after further questioning. *Id.* Halsey's erroneous initial description was not included in the interrogation report. *Id.*

55. *Id.*

56. *19 Years in Prison*, *supra* note 49.

57. Tina Kelley, *DNA in Murders Frees Inmate After 19 Years*, N.Y. TIMES, May 16, 2007, http://www.nytimes.com/2007/05/16/nyregion/16dna.html.

58. *19 Years in Prison*, *supra* note 49.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See* HEUER, *supra* note 36, at 10–11.

63. *See id.* at 13.

64. *See 19 Years in Prison*, *supra* note 49.

that the prosecutors had opportunities to speak with the interrogating detectives.[65] One may also 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.[66] 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 despite the presence of conflicting information, such as other witnesses' testimony at trial.[67]

Employing the three assessment criteria, the cognitive failures outlined above may undermine the veritistic efficacy of judicial proceedings. Cognitive failures would provide a false sense that the desideratum of completeness has been fulfilled. For example, the police may not have sought out additional evidence concerning who committed the crime because they believed Halsey's confession provided all of the necessary information.[68] Additionally, cognitive failures in the form of inaccurate perception may also undermine the criterion of effective communication. 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, in turn, communicated inaccurate information to the court.

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 choices the prosecutor makes that impact the nature and course of trials.[69] First, the prosecutor has discretion over which crimes to charge the defendant with.[70] As long as the charge chosen is supported by "probable cause," Rule 8 of the Federal Rules of Criminal Procedure ("FRCP") provides that "[t]he indictment or information may charge a defendant in separate counts with two or more

65. The rules of professional conduct make it is unlikely that the prosecutors met with Halsey unless Halsey had his court appointed counsel present. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (2004).

66. *See* HEUER, *supra* note 36, at 11.

67. *See id.* at 124–26.

68. *See 19 Years in Prison*, *supra* note 49.

69. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–77 (2009).

70. *Id.*

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."[71] Thus, the prosecutor is not required to indict a suspect on all conceivable counts arising out of a "common scheme or plan."[72] Conceivably, a prosecutor may select charges based on a variety of factors.[73] 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.[74] 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 on the relationship between the evidence and the elements of the crime, rather than the likelihood of the evidence to contribute to the desideratum of completeness.[75]

Additionally, the prosecutor has discretion to choose whom to bring charges against.[76] This decision could be based on whether the defendant will be sympathetic with the jury. Additionally, the prosecutor may grant immunity to an individual associated with a crime for the purpose of securing that individual's testimony against another defendant.[77] 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 *United States v. Gray*,[78] a case concerning the prosecution of three correctional officers working at a private correctional facility in New York. On April 1, 2010, supervising Lieutenant Marvin Wells overheard Rex Eguridu, one of the prisoners at the facility, make a sexual remark toward a correctional officer.[79] In response, Wells instructed two other

71. FED. R. CRIM. P. 8(a).
72. *See id.*
73. *See* Barkow, *supra* note 69, at 876–77, 881.
74. *See id.* at 877, 881.
75. *See* Haack, *supra* note 23, at 56–57.
76. *See* Barkow, *supra* note 69, at 876–77.
77. *Id.* at 899.
78. United State v. Gray, 642 F.3d 371 (2d Cir. 2011).
79. *Id.* at 373.

correctional officers, Kirby Gray and Stephan Rhodes, to move Eguridu to the shower room. In the shower room Wells, Gray, and Rhodes strip searched Eguridu and repeatedly struck him in the head and throat. Wells forced Eguridu to apologize and 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.[80]

Based on the above facts, one may find it surprising that Wells and Rhodes were ultimately convicted of obstruction of justice by filing false reports and making false statements.[81] Intuition suggests that the defendants should have been charged at the very least with assault, since the beating of Eguridu was arguably the more heinous offense, as well as the event triggering the subsequent false statements. However, several factors may have caused the prosecutors to shift their focus away from the precipitating event to focus more on the subsequent cover-up. First, the federal assault statute applies "within the special maritime and territorial jurisdiction of the United States."[82] 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 for the original alleged offence. 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 the delay of communication of information relating to a crime,[83] and falsifying records relevant to a federal investigation.[84]

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 initial attack. It is probable that most of the physical evidence of Eguridu's attack was lost (other than the records of Eguridu's medical treatment), because the federal investigation began

80. *Id.* at 373–74.

81. *Id.* at 374. Note 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. *See* 18 U.S.C. § 242 (2006). 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. *Gray*, 642 F.3d at 374.

82. 18 U.S.C. § 113 (2006).

83. *Id.* § 1512(b)(3).

84. *Id.* § 1519.

several months after the precipitating event. As a result, the prosecution would have had to rely solely on witness testimony, most likely from Eguridu. Such a prospect may have been discouraging to the prosecution because, as a federal prisoner, Eguridu may have appeared as a less-than-sympathetic victim and as a witness who is not credible. In contrast, the evidence in the cover-up case was both compelling and well-documented. Not only did the prosecution have the false reports filed by the defendants, but the prosecution also elicited testimony and conflicting reports of two other correctional officers, Hananiah Day and Leslie Andrews, whom Wells pressured to file false reports.[85]

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 presenting evidence concerning the assault, no charge relating to excessive force was brought against the other correctional officers that participated in the assault.[86] While it is possible that testimony about the actions of those officers was elicited during impeachment or foundational testimony, the jury was not responsible for determining the degree of culpability those officers bore for the attack. Therefore, while the Eguridu trial may have resulted in the prosecution of the correctional officers for illegal behavior, what it likely did not accomplish was a complete examination of all the information surrounding the actions of the officers, leaving something to be desired as a veritistic process.[87]

D. PRETRIAL DISCOVERY

In federal felony cases, the indictment of a defendant is followed by arrest[88] and arraignment.[89] Theoretically, up until this point, there exists an asymmetry in the information possessed by the prosecution and defense. On one hand, the prosecution is aware of the evidence in its possession, which the prosecution plans to introduce at trial. On other hand, the defendant presumably knows whether he or 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

85. *Gray*, 642 F.3d at 373.
86. *Id.* at 374.
87. *See* Haack, *supra* note 23, at 56–57.
88. FED. R. CRIM. P. 9.
89. FED. R. CRIM. P. 10.

information available to the other side. For example, FRCP 15 permits both sides to depose prospective witnesses, and FRCP 17 provides both sides with the opportunity to serve subpoenas. Furthermore, while FRCP 16(a)(1)(E) requires the prosecution to make available (upon the defendant's request) documents and objects in the government's possession, FRCP 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. FRCP 16 imposes certain production burdens not shared by the defendant. For example, statements made by the defendant[90] and the defendant's prior criminal record must be provided to the defendant by the prosecution at the defendant's request.[91] Furthermore, pursuant to *Brady v. Maryland*, prosecutors are required to produce "evidence favorable to [the] accused."[92] In contrast, the Fifth Amendment protects the defendant from being forced to provide evidence favorable to the prosecution through self-incrimination.[93] *Giglio v. United States* extended the ruling of *Brady* by requiring prosecutors to produce information concerning the credibility of government witnesses.[94] Beyond a symmetrical requirement that the parties produce relevant statements of their witnesses,[95] the defense is not required to produce to the prosecution any *Giglio*-like material that would tend to undermine the credibility of his or her witnesses. However, while the discovery production burden falls primarily on the prosecution, it is necessary to note that the defense's right to information in the possession of the government is not absolute. For example, Grand Jury transcripts are generally exempt from disclosure.[96]

When one considers in aggregate the parties' respective discovery production burdens, it becomes evident that pretrial discovery may distort the veritistic process of trial in two ways. First, pretrial discovery may limit

90. FED. R. CRIM. P. 16(a)(1)(A)–16(a)(1)(B).

91. FED. R. CRIM. P. 16(a)(1)(D).

92. Brady v. Maryland, 373 U.S. 83, 87 (1963).

93. U.S. CONST. amend. V.

94. Giglio v. United States, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.").

95. *See* FED. R. CRIM. P. 26.2(a); Jencks v. United States, 353 U.S. 657, 672 (1957) ("[T]he criminal action must be dismissed when the Government . . . elects not to comply with an order to produce, for the accused's inspection . . . relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.").

96. FED R. CRIM. P. 16(a)(3).

the total volume of information presented to the trier of fact, undermining the desideratum of completeness. To use the *Gray* example above, the officers involved in the assault of Eguridu almost certainly possessed information about events prior to, during, and after the assault, which, due to their constitutional right against self-incrimination, they were not required to present to the court. Second, limited discovery between two parties may affect each party's perception of the case, coloring the 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 reduce the degree to which the parties are justified in their beliefs, which from a veritistic perspective, calls into question the effectiveness of trial "arguments."

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 American judicial process the vast majority of criminal cases are resolved through pleas of guilt or no contest.[97] In such cases, the truth-finding aspect of criminal prosecution essentially ceases, with the exception of the limited judicial inquiry required under FRCP 11 before a judge may accept a defendant's guilty plea.[98]

Assuming, however, 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; a 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."[99] In this system, each side presents evidence in a manner that tells a story supporting their position, and the fact finder must decide between these two positions.[100] In order to present the most compelling argument to the jury, the opposing parties are incentivized to emphasize the information that best supports their case. Likewise, the

97. For example, between October 1, 2007, and September 30, 2008, 82,823 of 91,728 defendants were convicted in the federal system. Of those convicted, 80,184, or 97 percent, entered pleas of guilt or no contest. *See* BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2008, Table 4.2, (Nov. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st402.pdf.

98. FED. R. CRIM P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

99. *See* Herring v. New York, 422 U.S. 853, 862 (1975).

100. 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).

parties will give less priority to, or outright exclude, information that is less supportive for their case, provided doing such does not violate exculpatory burdens or infringe on 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 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.[101] Thus, the defense may knowingly communicate false information. For these reasons, the defense will fail to meet the second criteria of effective communication

Beyond the polemic nature of 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, the fact finder is often not presented with a complete picture of the evidence until closing arguments.[102] Such sequential presentations may affect decisions about evidence admission. While certain pre-trial proceedings and ex parte proffers may alert the judge to contentious issues that 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,[103] with only his or her experience from pre-trial proceedings and the evidence already admitted to guide her decision of whether evidence being offered is relevant or prejudicial. Therefore, it is possible that a judge may exclude potentially relevant information because the relevance of the information was not immediately apparent at the time the evidence was offered, which undermines the desideratum of completeness.[104]

101. For an exposition of the "strong adversarialism" that condones such actions by a defense attorney, see Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client Is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature*, 18 S. CAL. INTERDISC. L.J. 229, 234–35 (2009).

102. Allen & Leiter, *supra* note 18, at 1507 ("Factfinders typically have no good sense of what is going on until the end of the trial at closing arguments.").

103. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975). Note that Judge Frankel wrote before the Federal Rules of Evidence were introduced.

104. Under the theory of "conditional relevancy," the admissibility of fact A (a statement putting a plaintiff on notice about a product's defect) is dependent on fact B (that the plaintiff heard the statement), so that to produce a relevant factor the party must offer both A and B into evidence. *See* Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 1249–50 (2003). Presumably, the exclusion of conditionally relevant information would be prevented by FRE 104(b), which states that "when the relevance of evidence

Furthermore, it is possible that presenting evidence in a sequential manner reinforces psychological and cognitive biases of the jury, in particular, by playing to their predisposition to give greater weight to consistent information,[105] to continue to give weight to evidence even once it has been discredited,[106] and toward perceiving cause and effect.[107]

Finally, in addition to the bias that derives from common law trials sequential evidence presentation, judicial proceedings may also have limits on the technical sophistication of evidence that can be presented because they rely heavily on visual and oral evidence.[108] The characteristics of judicial trials may undermine the desideratum of completeness because attorneys will most likely present only evidence that judges and juries can comprehend with fairly little explanation.[109] Also, the need to convey highly technical information through a witness's oral testimony could lead to a failure of communication. There could be a failure of communication in that the testifying expert does not understand the information he is presenting, the expert witness fails to adequately explain the technical concepts, or the jury does not comprehend the testimony provided to them.

F. JURY DELIBERATIONS

In common law trials the question of guilt or innocence is committed to the trier of fact, either the judge or jury.[110] However, describing the social process of fact-finding at trial is difficult because it is unknown how juries make decisions, although a considerable amount of research has been dedicated to the subject.[111] To some degree this lack of knowledge about jury deliberations can be attributed to two features of common law juries.

depends on whether a fact exists, proof must be introduced to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later." FED. R. EVID. 104(b). 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.

105. HEUER, *supra* note 36, at 120.

106. *Id.* at 124.

107. *Id.* at 127–30.

108. Bert Black, Francisco J. Ayala & Carol Saffran-Brinks, *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).

109. *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-or-false questions about such DNA accurately, but not perfectly).

110. FED. R. CRIM. P. 23.

111. *See, e.g.*, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001).

First, juries conduct their deliberations in secret,[112] and jurors in the federal system are precluded from testifying about their deliberations.[113] Second, common law juries are ad hoc, in that they are assembled for a specific trial and disband once the trial has concluded.

In United States judicial proceedings, the opaqueness of jury deliberations is tempered by jury instructions, such as those setting forth the elements of the crime charged and standards of proof.[114] Effective application of some jury instructions may have positive veritistic effects. For example, exhorting jurors to refrain from forming an opinion until the end of trial may assist in achieving the desideratum of completeness.[115] Nonetheless, due to courts' presumption that jurors understand and follow jury instructions,[116] there is no insight into jurors' comprehension of or the degree of adherence to the instructions they are given.[117] Additionally, instructions are usually not provided to the jury until the end of the trial. Therefore, jury members may not be aware of the parameters of their adjudicatory role when those parameters are most important—the moment the evidence is presented to them.[118]

Additionally, jurors do not enjoy complete and unfettered access to evidence once deliberations have begun,[119] resulting in jurors relying 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 testifying individuals accurately remember the information they wish to convey; such a requirement applies

112. Douglas G. Smith, *Structural and Functional Aspects Of The Jury: Comparative Analysis And Proposals For Reform*, 48 ALA. L. REV. 441, 497 (1997).

113. 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.").

114. FED. R. CRIM. P. 30.

115. Robert Augustus Harper & Michael Robert Ufferman, *Jury Questions in Criminal Cases: Neutral Arbiters or Active Interrogators?*, 78 FLA. B.J. 8, 10 (2004).

116. Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993).

117. *See, e.g.*, William H. Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285, 291 (1993).

118. Smith, *supra* note 112, at 526.

119. KEVIN O'MALLEY, JAY GRENIG & WILLIAM LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS 887 (6th ed.).

equally to jurors communicating with each other during deliberations.[120] Thus, failure by a jury member to accurately remember and communicate evidence during jury discussions could distort other jury members' understanding of the evidence presented. Third, under Goldman's model, effective argumentation could be frustrated if faulty recollection of evidence results in jurors adopting faulty premises for their arguments.

Some final observations about judicial proceedings are warranted. First, judicial proceedings must produce an answer—either conviction, acquittal, or mistrial.[121] Second, judicial proceedings are time limited;[122] as a practical matter, juries cannot be empanelled forever, and as a constitutional matter, the Sixth Amendment guarantees a "speedy and public trial."[123] Thus, courts cannot continue proceedings indefinitely until the evidentiary record supports adjudication. The practical effect of these two characteristics is that judicial proceedings must culminate in a point of decision, regardless of whether the proceedings have produced optimal veritistic results.

IV. THE VERITISTIC PROCESS OF THE INTELLIGENCE CYCLE

Having explored the veritistic process of judicial fact-finding, this Article now examines the social processes associated with the collection and use of government "intelligence." 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 terrorists."[124] 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

120. Friedman, *supra* note 26, at 685.

121. *See, e.g.*, FED. R. CRIM. P. 29, 31.

122. *See* Haack, *supra* note 23, at 50.

123. U.S. CONST. amend. VI.

124. 50 U.S.C. § 401a(2) (2006). 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." *Id.* § 1801(e)(2).

> past experience regarding an adversary, it gives rise to a new set of facts 'intelligence.'[125]

Thus, this doctrinal definition reveals the veritistic process in its most succinctly stated form: that a piece of data is collected, examined, and that a subjective assessment is made as to its degree of truth. Within the United States' Intelligence Community ("IC")[126] 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 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 IC's methods of acquiring and verifying information.[127] However, while the intelligence process cannot be examined to the same level of fine detail as the judicial process, there are nonetheless several aspects of the intelligence process that are openly acknowledged and available for examination.

A. THE INTELLIGENCE CYCLE

According to IC doctrine, the intelligence cycle consists of six steps.[128] The initial step in the process is "planning and direction," in which "[d]ecisions are made regarding what types of information to collect and how to collect it."[129] This step is followed by "collection," wherein "[t]he Intelligence Community gathers the raw data used to produce finished intelligence products. Collection can be comprised from open sources, such

125. U.S. DEP'T OF DEF., JOINT INTELLIGENCE, JOINT PUBLICATION 2-0, at ix (June 22, 2007), *available at* http://www.dtic.mil/doctrine/new_pubs/jp2_0.pdf [hereinafter JOINT PUBLICATION 2-0].

126. The Intelligence Community is a group of executive branch agencies and organizations that work separately and together to engage in intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States. OFFICE OF THE DIR. OF NAT'L INTEL., U.S. NATIONAL INTELLIGENCE: A CONSUMER'S GUIDE 7 (2009), *available at* http://www.dni.gov/files/documents/IC_Consumers_Guide_2009.pdf [hereinafter A CONSUMER'S GUIDE].

127. Because most of the details concerning intelligence processes are classified, this article will rely on public sources, such as public statutes, directives and doctrinal works published by the Director of National Intelligence and Department of Defense, to provide a basic model of the intelligence process.

128. OFFICE OF THE DIR. OF NAT'L INTEL., U.S. NATIONAL INTELLIGENCE: AN OVERVIEW 10–12 (2011), *available at* http://www.dni.gov/files/documents/IC_Consumers_Guide_2011.pdf.

129. *See* A CONSUMER'S GUIDE, *supra* note 126, at 17.

as newspapers, or from clandestine sources, such as other people or technical means."[130]

Broadly speaking, collection occurs through the main intelligence "disciplines," which include Human Intelligence ("HUMINT"):

> [I]ntelligence 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 foreign nationals and U.S. citizens who travel abroad, official contacts with foreign governments, and direct observation.[131]

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."[132] Furthermore, Measurement and Signature Intelligence ("MASINT"), is "technically derived intelligence"[133] whereby "quantitative and qualitative analysis" is conducted of the "physical attributes of targets and events in order to characterize and identify them."[134] Collection in the MASINT discipline includes "radar, spectroradiometric, electro-optical, acoustic, radio frequency, nuclear detection, and seismic sensors."[135] Additional intelligence collection is conducted through the disciplines of Open Source Intelligence ("OSINT"), which is "produced from publicly available information,"[136] and Signals Intelligence ("SIGINT"), which is "produced by exploiting foreign communications systems and noncommunications emitters."[137]

After collection, the intelligence cycle moves to the "processing and exploitation" step, during which "raw collected data is converted into forms

130. *Id. See also* JOINT PUBLICATION 2-0, *supra* note 125, at 1-11 (explaining that "a variety of collection sources are required so that information from one source can be tested or confirmed by others").

131. A CONSUMER'S GUIDE, *supra* note 126, at 12.

132. U.S. DEP'T OF THE ARMY, INTELLIGENCE: FM 2-0, at 1-22 (Mar. 2010), *available at* http://www.fas.org/irp/doddir/army/fm2-0.pdf.

133. *Id.*

134. A CONSUMER'S GUIDE, *supra* note 126, at 12.

135. U.S. DEP'T OF THE ARMY, INTELLIGENCE: FM 2-0, *supra* note 132, at 1-22–1-23.

136. *Id.* at 1-23.

137. *Id.* The Department of the Army also classifies Counterintelligence, Geospatial Intelligence, and Technical Intelligence as disciplines that provide intelligence assessments. However, these three disciplines utilize information acquired through another discipline in order to develop an intelligence assessment. *Id.* at 1-22. For example, Geospatial Intelligence may draw on imagery acquired through Imagery Intelligence.

readily useable by commanders, decisionmakers at all levels, intelligence analysts, and other consumers."[138] The is process is followed by the "analysis and production step," when "intelligence production occurs . . . [a]ll available processed information is integrated, evaluated, analyzed, and interpreted."[139] The differences between these two steps illustrate the definitional distinction discussed above: in the former step, data or information 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."[140] 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."[141] Finally, after the intelligence has been received by the consumers, the final step in the intelligence cycle of "evaluation" occurs.[142] Here, "intelligence personnel at all levels assess how well each of the various types of intelligence operations are being performed."[143] Presumably, intelligence officials use the feedback and evaluations they have received in order to plan and improve future intelligence operations. Thus, the cycle begins again.

B. OBSERVATIONS ON THE INTELLIGENCE CYCLE

This description of the intelligence process, while general and somewhat opaque, permits a few general observations. First, from the description of the "analysis and production step," it is clear that information is not considered intelligence until it has been vetted through all-source intelligence, in other words, once the analysts have referenced all

138. *Id.* at 2-6.

139. *Id.* The National Security Act requires that analysis be derived from all sources, and that the intelligence community "regularly conduct competitive analysis of analytic products." 50 U.S.C. § 403-1(h) (2006). 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 DIR. OF NAT'L INTEL., INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 203, at 2 (June 21, 2007), *available at* http://www.fas.org/irp/dni/icd/icd-203.pdf [hereinafter DIRECTIVE NUMBER 203].

140. *Id.*

141. OFFICE OF THE DIR. OF NAT'L INTEL., THE NATIONAL INTELLIGENCE STRATEGY OF THE UNITED STATES OF AMERICA 5 (Aug. 2009), *available at* http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/2009_NIS.pdf.

142. OFFICE OF THE DIR. OF NAT'L INTEL., U.S. NATIONAL INTELLIGENCE: AN OVERVIEW, *supra* note 128, at 12.

143. JOINT PUBLICATION 2-0, *supra* note 125, at 2-6.

available sources of information. The reasoning behind this is that a specific piece of information is more likely to be true if it is confirmed by multiple sources and through multiple intelligence disciplines.

Second, it is also clear that intelligence is an iterative process, where numerous actors may contribute data, and may also make analytical assessments about the accumulated pool of information. Thus, the intelligence process may be characterized as dialectic in nature, in that 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 of this process might be illustrative. Suppose that policymakers, when deciding issues of military procurement, believe that the optimal structure of the armed forces will depend on the military capabilities of an adversarial state. Accordingly, the IC plans and conducts collection through the various "intelligence disciplines." The IC obtains imagery of the adversary's weapons systems, and recruits human sources with knowledge of the adversary's military. 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 then 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 above example demonstrates an important difference between intelligence and judicial evidence. Judicial trials are sequential processes that culminate in a single moment of factual determination—the verdict. This determination is made from the limited universe of information admitted into trial, and the verdict is unlikely to be revised.[144] 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 the Supreme Court characterizes as subjecting someone "to embarrassment, expense and ordeal and compelling

144. The typical appellate standard for the review of factual matters is "clear error." *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 558 (1988).

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."[145] 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 may reveal new facets of the problem requiring new information collection. Thus, the intelligence process could result in factual determinations that are constantly subject to revision.[146]

Furthermore, because of the open-ended nature of intelligence assessments, options exist for intelligence collectors and analysts that are unavailable to their judicial counterparts. For example, reviewing an incomplete record of information 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,[147] and courts generally do not order the prosecution to collect additional evidence.[148] Likewise, many jurisdictions discourage or outright prohibit the practice of permitting juries to ask questions,[149] even though allowing such questions may produce positive effects, such as helping jurors discern the truth, increasing jurors'

145. Green v. United States, 355 U.S. 184, 187–88 (1957).

146. *See* DIRECTIVE NUMBER 203, *supra* note 139, at 4 ("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.").

147. Rule 608(a) restricts the circumstances under which evidence may be introduced concerning the credibility of a witness. FED. R. EVID. 608(a) 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 attacked. *Id.* Thus, it is not certain that a witness's history of accurate testimony would be admissible in a court proceeding.

148. 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 (2d Cir. 1999) (holding 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, 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, 274 (1894). However, these 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. *Id.* at 460. 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. (9 Wheat.) 579 (1824).

149. *See* State v. Costello, 646 N.W.2d 204, 213 (Minn. 2002). The Second Circuit has discouraged its use, such as in *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995).

attentiveness, and giving jurors a greater sense of satisfaction in their service and more confidence in their verdicts.[150]

The iterative nature of the intelligence process, combined with the diversity of participants (collectors, analysts, etc.) and customers of intelligence (policymakers, diplomats, military units in the field, etc.), permits a third observation about the intelligence cycle: communication within the cycle must be designed so as to distribute information expeditiously to individuals located across a vast physical expanse.[151] For example, imagery intelligence suggesting 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 it with the necessary "customers," it is instead likely that the imagery—combined with a written analysis of its implications—would be distributed through electronic communications.[152]

Thus, the intelligence cycle places greater emphasis on visual information and the written word than oral communication.[153] The recipients of intelligence reports lack the visual, oral, and physical cues that the judicial fact finder use for assessing the validity of information. Furthermore, degrees of uncertainty cannot be deciphered through tone of voice, and a declarant's sincerity cannot be assessed through body language. Instead, assessments of the credibility of the information underlying intelligence reports must be distilled into written caveats,[154] and a natural consequence is that subtle shades of certainty and bias may be lost in translation. Thus, from a veritistic perspective, the criterion of effective

150. Harper & Ufferman, *supra* note 115, at 9 (citing State v. Fisher, 789 N.E.2d 222, 228–29 (Ohio 2003)).

151. *See* JOINT PUBLICATION 2-0, *supra* note 125, at I-19.

152. *See* OFFICE OF THE DIR. OF NAT'L INTEL., U.S. NATIONAL INTELLIGENCE: AN OVERVIEW, *supra* note 128, at 12.

153. *See, e.g.*, OFFICE OF THE DIR. OF NAT'L INTEL., INTELLIGENCE COMMUNITY DIRECTIVE NUMBER 208, at 2 (Dec. 17, 2008), *available at* http://www.dni.gov/files/documents/ICD/icd_208.pdf (requiring members of the Intelligence Community to write for "maximum utility" 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.").

154. *See* DIRECTIVE NUMBER 203, *supra* note 139, at 3 ("[F]actors 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.").

communication may 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 the past and present, but seeks also to produce intelligence products that are predictive in nature.[155] Although intelligence cannot "provide predictions of what will happen with absolute certainty," it may "provide assessments of likely scenarios or developments."[156] Indeed, the IC has been praised or maligned due to its success or failure to predict world events.[157] 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.[158]

C. WHAT CANNOT BE GLEANED FROM PUBLICLY-AVAILABLE INFORMATION

While the limited information that is publicly 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 when a factual conclusion is made in the intelligence process. Although the definition of intelligence cited 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 IC. 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 all form of intelligence 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

155. U.S. DEP'T OF THE ARMY, INTELLIGENCE: FM 2-0, *supra* note 132, at 1-4.

156. OFFICE OF THE DIR. OF NAT'L INTEL., U.S. NATIONAL INTELLIGENCE: AN OVERVIEW, *supra* note 128, at 40.

157. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY 271, *available at* http://www.9-11commission.gov/report/911Report.pdf.

158. *See* Hack, *supra* note 23, at 50 ("[A] legal system isn't exactly . . . a kind of inquiry; it is better described as a set of rules and machinery for resolving disputes and making it possible for people to live together in some kind of order . . . legal inquiry operates under a kind of time constraint not relevant to physics, history, etc., for, with good reason, the law seeks, in the words of Justice Blackmun, 'quick, final, and binding . . . judgments.'").

known when an interagency body, such as the National Intelligence Council, confirms the analysis?[159]

Second, and closely related to the issue of at what point in the intelligence cycle information becomes "known," is the question of what standard of proof is employed in determining that a fact is true. While various judicial standards of proof have been set forth in case law and statutes, publicly available information does not reveal the standards for determining what is known in intelligence. Indeed, the IC may have incentives for not revealing its method for accepting or rejecting information, such as to limit others from influencing 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 when information can be considered in forming an intelligence analysis—the intelligence cycle equivalent of "admission into the record")[160] may vary depending on the purpose for which the intelligence is 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, it can also aid homeland security providers and first responders."[161] When intelligence is being used for deliberative purposes that are not exigent in nature—such as the military procurement 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 or even possible. 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 taking defensive measures. Thus, the context in which intelligence is used could affect all three of the epistemological criteria above. Specifically, it could affect the degree of exigency which may dictate the amount of information that is considered, the method by which information will be communicated, and the number of actors who will engage in dialogical debate to reach veritistic conclusions.

159. *See* 50 U.S.C. § 403-3b (2006).

160. *See* A CONSUMER'S GUIDE, *supra* note 126, at 12.

161. *Id.* at 7. Furthermore, the 2009 National Intelligence Strategy lists four "goals and objectives" of the intelligence community, six "mission objectives," and seven "Enterprise Objectives." OFFICE OF THE DIR. OF NAT'L INTEL., U.S. NATIONAL INTELLIGENCE: AN OVERVIEW, *supra* note 128, at 5.

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 purposeful, or unintentional and instead due to cognitive flaws or by design, its effect may reduce the veritistic effectiveness of a process. For example, an actor's bias may lead one to falsely assume that the desideratum of completeness has been achieved or cause 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 because it supports the position of the party offering it into evidence.[162] In contrast, the roles of the various actors in the intelligence process are less clear. Human sources may be motivated by numerous personal biases. For example, an intelligence analyst may have subtle incentives to reach a certain conclusion so that his or her office continues to receive funding. At the very least, intelligence collectors will be constrained to collect only the information that they feel falls within U.S. national interests.[163]

The problem of bias is recognized in the IC and has been addressed in regulation and statutory law.[164] Broadly speaking, there are three methods of accounting for bias. The first method is individual self-policing based on regulatory exhortations to members of the IC that the actors remain impartial. For example, 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 analytic methods and tradecraft throughout elements of the intelligence community."[165] 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 informed by available information that are not distorted or altered with the intent of supporting or

162. *See* Robert Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT'L L. & COM. REG. 319, 346–48 (2011) (discussing the biases involved in the adversarial system and its effect on a prosecutors ability to act neutrally).

163. *See* JOINT PUBLICATION 2-0, *supra* note 125, at I-11 ("[C]areful consideration must be given to having multiple collection sources performing redundant collection, as collection requirements will usually exceed collection systems/missions available.").

164. 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 HEUER, *supra* note 36, at iv–xxv.

165. 50 U.S.C. § 403-1(h)(1)(A) (2006).

advocating a particular policy, political viewpoint, or audience."[166] 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."[167]

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, a second method for challenging bias in intelligence reporting is that IRTPA requires that the DNI ensure that "analysis is based on all sources available."[168] 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. However, in practice 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. For example, an imagery analyst reviewing the capacity of an adversary's military may need to reach out to a HUMINT analyst in order to incorporate information on the subject from a human source. Such collaboration could produce a discussion between the two analysts and may potentially help to challenge faulty assumptions and biases.

Beyond self-policing and dialectic debate, 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 IC conduct alternative analysis (commonly referred to as 'red team analysis') of the information

166. *See* DIRECTIVE NUMBER 203, *supra* note 139, at 2.

167. JOINT PUBLICATION 2-0, *supra* note 125, at II-3. Additionally, § 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." Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 § 1017 (codified at 50 U.S.C. § 403-1(h)(1)(C) (2006)). 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 of analytic tradecraft or politicization, biased reporting, or lack of objectivity in intelligence analysis." *See id.* § 1020.

168. *Id.* § 403-1(h)(1)(B).

and conclusions in intelligence products."[169] By challenging the premises and conclusions of a given intelligence assessment and offering alternative conclusions, such alternative analysis may be a polemic method of bias correction, which is similar to the adversarial method used in the common law judicial system.

However, whereas the biases of the litigating parties in a judicial trial are relatively clear, the IRTPA does not make evident what is to comprise the alternative paradigm of the "red team" analysts.[170] According to former CIA veteran Richard Heuer, such alternative analysis could take at least one of three forms. One form involves 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. The analysts then work backwards from their "faulty" conclusions, in order to determine where their analyses went "wrong." [171] In a second form a "red team" adopts the devil's advocate form of analysis, in which analysts will strenuously advocate a hypothesis rejected in the primary assessment.[172] Finally, alternative analysis could be conducted through role-playing, wherein red team analysts assume the point of view of the adversary.[173]

The example of the adversary's military capacities study demonstrates how each method of challenging biases might be employed. Let us assume that the information collected indicates that the naval ships of the adversary are in a declining state of repair. From this information 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 that the adversary military has ceased to expend funds on ship maintenance because it plans to procure newer, more advanced ships. The first assessment implies that the adversary is struggling to defend its national interests, whereas the second assessment inferences that the adversary will shortly acquire 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

169. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified at 50 U.S.C. § 403-1(h)(1)(C) (2006)). *See also* U.S. DEP'T OF THE ARMY, INTELLIGENCE: FM 2-0, *supra* note 132, at 1-27.

170. U.S. DEP'T OF THE ARMY, INTELLIGENCE: FM 2-0, *supra* note 132, at 1-27.

171. HEUER, *supra* note 36, at 71.

172. *Id.* at 72.

173. *Id.* at 71–72.

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 in its ability to defend internal land borders. If such an assessment is correct, then the information on the fleet's readiness is not evidence of the adversary's ability to defend its national interest, but instead, it is 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 should be employed.[174] In other words, it is unknown whether every intelligence product, or only a fraction thereof, is subject to alternative analysis. Finally, it is unknown whether analysis advocating competing alternative analysis employs the type of effective argumentation dictated by the third epistemological criterion above. Thus, while it is clear that the IRTPA requires a kind of polemic debate as a method of correcting bias,[175] public record nonetheless provides us with no method of assessing the effectiveness of this corrective device.

V. INTERACTION BETWEEN THE JUDICIAL PROCESS AND THE INTELLIGENCE CYCLE

From referencing the above descriptions, some differentiating characteristics of judicial trials and the intelligence cycle may be summarized. First, judicial processes are 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

174. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified at 50 U.S.C. § 403-1(h)(1)(C) (2006)).

175. *Id.*

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 primarily written and visual communications that consequently sacrifice 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. It appears that an empirical evaluation of the two systems is not possible. First, one might attempt an empirical analysis to examine how the two systems interact by comparing their relative veritistic efficacy to determine whether one system is inherently superior at discovering factual "truth" than the other. However, to determine which system is more suited to produce a correct judgment, one would need to "know" the fact in question with veritistic certainty, independent of the two systems being studied. Assuming this were possible, one would additionally 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.

It may also be empirically impossible 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 (for example, the inclusion or exclusion of intelligence information at trial) affects the epistemological properties of a social process.[176] Goldman hypothesizes in examining a different aspect of judicial proceedings (namely, attorney performance), that such an experiment would require two trials, and in both trials the same judge and jury must hear the same evidence, elicited by the same attorneys from the same witnesses, with the only difference being the examined variable.[177] Furthermore, one would have to ensure that the jury rendering the judgment in the second trial was not influenced by

176. *See* GOLDMAN, *supra* note 16, at 298.

177. *Id*. at 299.

information learned or withheld in the first trial.[178] Of course, imposing such restrictions makes such an experiment impossible.[179] Therefore, there is no obvious way of empirically assessing whether the inclusion or exclusion of intelligence reports in judicial proceedings leads to better veritistic results.

Thus, it is problematic to fully examine how and whether intelligence should be used in judicial proceedings, and one must rely on theoretical assessments based on the characteristics of the two systems as outlined above. Thus, this section examines the issue of the inclusion of intelligence information from a theoretical perspective, utilizing the three epistemological criteria outlined above.

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 employs all relevant information. This principle is embraced by the Federal Rules of Evidence ("FRE") 402, which state that all "[r]elevant evidence is admissible,"[180] due to such being a "presupposition involved in the very conception of a rational system of evidence."[181] 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, 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 when a given piece of information is relevant to a material issue, but is unreliable. 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 relevant yet problematic information. First, one may consider the information, with the hope that a dialogical argument based on

178. *Id.*
179. *Id.*
180. FED. R. EVID. 402.
181. *Id.* at 402 advisory committee's note.

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 the judicial system and the intelligence cycle utilize the first option, it appears that only the judicial system employs the second option. With regards to judicial proceedings, several evidentiary rules exclude relevant information due to a lack of reliability. For example, FRE 602 excludes testimony from a witness that does not have personal knowledge of the matter in question.[182] Also, FRE 701 generally precludes "expert" testimony from lay witnesses.[183] In contrast, it appears that intelligence collectors are encouraged to "report all information collected. The collector should not filter information since all information is of interest to an [intelligence] analyst."[184] This is not to say, however, that relevant information of questionable reliability is valued equally as credible information. Collectors may include in their reports an assessment of the reliability of the information collected.[185]

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 both time and topical scope, judges must narrow the evidence to be considered so that a jury is able to reach a factual conclusion. A judge's gatekeeping duty is outlined in FRE 403, which requires that judges exclude relevant information that is found to be prejudicial, confusing, or a waste of time. In contrast, the continuous nature of the intelligence cycle may permit more time for analysts to fully consider relevant yet problematic information.[186] Furthermore, whereas "evidence" in the judicial system tends to be collected for the purposes of making a specific veritistic judgment about a past event (such as the defendant's guilt or innocence), the goal of intelligence is to warn of potential threats and opportunities, which may

182. FED. R. EVID. 602 ("[T]he 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.").

183. FED. R. EVID. 701 advisory committee's note.

184. DEP'T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FM 2-22.3, at 10-2 (Sept. 2006), *available at* http://www.fas.org/irp/doddir/army/fm2-22-3.pdf [hereinafter COLLECTOR OPERATIONS].

185. *Id.* at 12-3, App. B.

186. *Id.* at 10-2.

necessitate the broad collection of information, the relevance or reliability of which is not immediately apparent.[187]

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, in deciding 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 this exclusion detracts from the desideratum of completeness. Alternatively, the inclusion of such information in the intelligence process may not necessarily result in reduced veritistic efficacy.

Furthermore, it should be noted that the search for "truth" is not the only goal of judicial proceedings; trials are also about additional societal aims such as promoting the rule of law, ensuring individual rights, and enhancing the legitimacy of the courts.[188] 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. Notably, 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.[189] Additionally, the Confrontation Clause of the Sixth Amendment is designed to avoid the civil law practice of ex parte examination[190] and to permit cross-examination.[191] However, achieving

187. 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." *See* THE 9/11 COMMISSION REPORT, *supra* note 157, 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." *Id.*

188. Redmayne, *supra* note 21, at 871.

189. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (noting that the Fifth Amendment privilege against 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'").

190. Crawford v. Washington, 541 U.S. 36, 50 (2004).

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 fact finders of the testimony the accused.[192] 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.[193]

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 IC inhibits—if not prohibits—the use of such individuals as witnesses in public trials.[194] 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 communicated through the confidential reports or intermediary witnesses is offered as evidence of guilt or innocence, then the intelligence falls squarely within the hearsay definition of "a statement . . . the declarant does not make while testifying at the current trial or hearing; and . . . a party offers in evidence to prove the truth of the matter asserted,"[195] and thus, it would be generally inadmissible.[196]

However, the issue is less clear when one speaks of situations where the application of certain constitutional rights is uncertain, such as in immigration cases or Guantanamo habeas corpus proceedings.[197] In the context of the Guantanamo habeas corpus proceedings, the standards for the admission of evidence are more permissive than those used in criminal proceedings, with hearsay being "always" admissible.[198] Indeed, the information at the heart of the *Latif* case may have constituted just this type of information.

191. *Id.* at 45–46, 53–54.

192. United States v. Dean, 221 F. App'x 849, 852 n.3 (11th Cir. 2007).

193. United States v. Greenleaf, 692 F.2d 182, 189 (1st Cir. 1982).

194. U.S. CONST. amend. VI.

195. FED. R. EVID. 801(c).

196. FED. R. EVID. 802.

197. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271–75 (1990) (holding that the Fourth Amendment does not apply to a non-U.S. citizen overseas); Shaughnessy v. United States, 345 U.S. 206, 212–14 (1953) (holding that Constitutional Due Process does not apply to alien who has not entered the United States).

198. Al-Bihani v. Obama, 590 F.3d 866, 880 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 1814 (2011).

If no constitutional bar otherwise prohibits the admission of intelligence information into trial, the question turns 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,[199] which in turn could undermine public confidence in governmental action that relies on intelligence outside of the judicial realm. Indeed, intelligence information advises 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,[200] and the ability of U.S. persons to trade with individuals believed to be involved with acts of terrorism.[201] 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.

B. THE CLASSIFIED INFORMATION PROCEDURES ACT

Just as the Sixth Amendment right of confrontation facilitates achieving the constitutional goal of securing "the Blessings of Liberty,"[202] effective national security policy-making, supported by efficient and effective intelligence, facilitates the constitutional goal of "providing for the common defense."[203] To this end, other constitutional values not derived primarily from concerns about individual liberty may affect the question regarding whether to include intelligence in judicial proceedings. Indeed, it may be argued that "providing for the common defense" could require the exclusion of intelligence information. For example, one could attest that if confidential human sources are aware that the Sixth 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 the methods and means by which they are being surveilled and monitored.

199. *See* Al Mutairi v. United States, 644 F. Supp. 2d 78, 84 (D.D.C. 2009) (evaluating whether government intelligence is reliable or unreliable in certain circumstances).

200. *See Terrorist Screening Center: FAQs*, FBI, http://www.fbi.gov/about-us/nsb/tsc/tsc_faqs (last visited Jan. 25, 2013) (noting that the Terrorist Screening Center utilizes intelligence from other agencies in making its determinations on who to include on "no fly" lists, including "domestic terrorists").

201. *See* Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism, Exec. Order 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

202. U.S. CONST. pmbl.

203. *Id.*

In light of these concerns, various evidentiary procedures 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 ("CIPA"),[204] which establishes processes by which classified information is handled in civilian criminal discovery, and the Military Commission Rule of Evidence 505, which is similar to the procedure for courts martial and makes allowances for ex parte hearings.[205] Both of these rules generally follow the same procedure. First, they make provisions for courts to issue protective orders in order to prevent the disclosure of classified information produced by federal prosecutors during discovery.[206] 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.[207] 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."[208] If the proffered summary or substitute is found to be deficient in this regard, the judge may either dismiss specific counts of the indictment or information, find against the U.S. on any issue that relates to the excluded classified information, or strike all or part of the testimony of a witness.[209] In addition, 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 must be made. First, 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

204. 18 U.S.C. app. 3 §§ 1–16 (2006).

205. *See* MIL. COMM'N R. EVID. 505(f)(2)(B), *available at* http://www.mc.mil/Portals/0/2010_Manual_for_Military_Commissions.pdf.

206. 18 U.S.C. app. 3 § 3.

207. *Id.* § 4.

208. *Id.* § 6(c)(1)(B).

209. *Id.* § 6(e)(2).

information derived from intelligence collection is introduced into the social process of judicial fact-finding. For example, the introduction at trial of highly technical intelligence information—particularly information derived from the SIGINT and MASINT disciplines—might require excessive testimony to establish the necessary foundational understanding by the layperson jury and non-expert judge as to how data is collected and how such data is translated into comprehensible information.

Second, it is imperative to note that CIPA is most effective at protecting classified information when such information is offered for exculpatory purposes, rather than to inculpate. To understand why, consider a hypothetical case in which prosecutors intending to prosecute a defendant for possessing and distributing narcotics possess photographs of the property of the defendant, which were taken by an airplane.[210] 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 IC. In this scenario, under Section 6 of CIPA,[211] the prosecution could prepare a summary that omitted the classified purpose that resulted in the incidental photography, which would merely leave the photographs collected. If the photographs inculpate the defendant (for example, 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 through discovery into the potentially classified topic of how the photographs were collected.[212] However, if the information is exculpatory (for example, it depicts plants that are rhododendrons rather than poppies), then it is likely that the defense will not wish to challenge the accuracy of the statement and 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 likely asymmetrical in their impact on the desideratum of completeness, since they introduce more exculpatory information than incriminating information.

210. These facts derive from *Florida v. Riley*, 488 U.S. 445 (1989). However, in *Riley*, the photographs were collected by civilian law enforcement and not the IC. Thus, classified information was not at issue in *Riley*.

211. 18 U.S.C. app. 3 § 6(c)(1).

212. *See id.* § 6(c)(1)(B) (permitting the United States to move for a court order providing for a substitution of the classified information when the court "finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information").

C. EFFECTIVE COMMUNICATION

As noted above, the criterion of effective communication requires that for a fact to become testimony, a witness must perceive the fact, accurately remember the fact at the time of testimony, intend to communicate the fact, and adequately articulate the fact.[213] The review of the intelligence cycle and judicial proceedings suggests several ways in which information derived from the intelligence cycle may be 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 as contract and will) is admitted at trial.[214] For example, it is probable that a knowledgeable individual would have to testify about the authorship of a written intelligence report,[215] about whether the intelligence report satisfies the "best evidence" rule,[216] or if admitted under the business records hearsay exception, whether the report was made by a person with personal knowledge in the course of a "regularly conducted business activity."[217] Furthermore, the introduction at trial of highly technical intelligence information may necessitate the use of expert testimony, in order for the information to be verbally summarized to the jury, in layman's terms.[218]

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 effectively communicate that information to the trier of fact. This additional step increases the opportunity for testimonial failure to occur, with the consequence of a reduction in veritistic efficacy.[219] 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

213. Friedman, *supra* note 26, at 685.

214. 2 KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 221, 56 (Kenneth S. Brown ed., 6th ed. 2006) ("[T]he 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.") [hereinafter MCCORMICK ON EVIDENCE].

215. *See id.* at 58.

216. *See id.*

217. FED. R. EVID. 803(6). *See also* Ahmed v. Obama, 613 F. Supp. 2d 51, 54 (D.D.C. 2009) (holding intelligence reports are given a presumption of authenticity under the "business records" rule).

218. *See* MCCORMICK ON EVIDENCE, *supra* note 214, at 58.

219. *See* Andy Worthington, *Judge Gladys Kessler Releases Yemeni Detainee, Slams "Mosaic" of Guantanamo Intelligence and Unreliable Witnesses*, HUFF. POST, May 14, 2009, http://www.huffingtonpost.com/andy-worthington/judge-condemns-mosaic-of_b_203382.html?.

police interview report into evidence, it is likely that one of the interviewing police officers would have testified, thereby increasing the risk of the office failing one of the steps of effective communication while authenticating the report.[220] However, it is much less likely that an author of an intelligence report will "authenticate" the report because of the need to protect intelligence sources and methods.[221] If so, any foundational testimony that comes from someone other than the source or author creates a greater risk of ineffective communication due to flaws in the witness's perception of the report or failure of articulation about the details of the report.

In addition, a lack of understanding of either the role a given piece of information plays within the 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 IC that 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.[222] For the IC, such cautionary statements may not necessarily speak to the reliability of the information contained within the report.[223] 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 fact finder as being dispositive on the issue of guilt or innocence.

However, if such cautionary statements lead a judge to reject intelligence reports or to view them with skepticism beyond that generally

220. *See generally* State v. Halsey, 748 A.2d 634 (N.J. Super. Ct. App. Div. 2000).

221. *See* Khan v. Obama, 655 F.3d 20, 30–31 (D.D.C. 2011) (expressing concern for the reliability of heavily redacted reports in habeas corpus hearings).

222. Al Mutairi v. United States, 644 F. Supp. 2d 78, 84 (D.D.C. 2009).

223. 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, e.g.*, U.S. DEP'T OF THE ARMY, INTELLIGENCE: FM 2-0, *supra* note 132 (stating that intelligence may be predictive in nature).

applied to other evidence in the record, then a failure of communication has occurred. The cautionary statement may have been intended to communicate that a veritistic determination had not been made with regards to the report, that the reliability of the report had not been determined, but instead the statement may be interpreted to mean that a veritistic presumption of unreliability had been applied.

Such a failure of communication may have occurred in *Al Mutairi*, in which 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.[224] Although Judge Kollar-Kotelly does not explicitly define the term, it appears that she adopts Judge Gladys Kessler's definition that the presumption of authenticity was equivalent to the "business records" hearsay exception in the Guantanamo habeas case of *Ahmed v. Obama*.[225] 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 collective meaning are made."[226] 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 because the judge perceived a greater level of unreliability than the statement intended to convey.

D. EFFECTIVE ARGUMENTATION

Finally, it is necessary to mention how the inclusion of intelligence information may affect 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 is justified in their beliefs (be

224. *Al Mutairi*, 644 F. Supp. 2d at 84. Judge Kollar-Kotelly also declined to extend the presumption of accuracy to the reports. *Id.*

225. FED. R. EVID. 803(6); Ahmed v. Obama, 613 F. Supp. 2d 51, 54 (D.D.C. 2009).

226. *Al Mutairi*, 644 F. Supp. 2d at 84 (internal quotations omitted).

it a litigant presenting a case to the jury or a deliberating jury). Theoretically, such an effect will generally result from the inclusion or exclusion of intelligence information as much as any other piece of evidence. The question then becomes whether there is any impact on effective argumentation that results exclusively—or at least disproportionately—from the admission or exclusion of intelligence information in particular.

Conceivably, the most likely effect 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.[227] This could occur if either litigants or jurors excessively relied on the reputation of the IC in order to bolster their arguments. The mystique of certain intelligence agencies, or patriotic appeals to the role the IC plays in defending the national security, could be used to give undue weight to evidence produced through the intelligence cycle.

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 by an appropriate jury instruction. However, if the appeal to the IC's "authority" was to be made during jury deliberations, the only method by which it could be corrected would be either identification of the fallacy by other jurors or the presentation of a superior counterargument. As noted above, the opaqueness of the jury deliberation process precludes an understanding of whether such offsets are likely to occur during deliberations.

That being said, there is reason to believe that appeals to the IC's authority are either unlikely to be made or, if made, are unlikely to have much weight. Although polls have traditionally shown a high degree of public confidence in the military and law enforcement,[228] a 2005 Gallup poll suggested that a large percentage of respondents had low confidence in the IC, with the percentage of respondents claiming they were "not too confident" or "not at all confident" ranging between 41 percent and 68

227. *See* Douglas Glen Whitman & Mario J. Rizzo, *Paternalist Slopes*, 2 N.Y.U. J.L. & LIBERTY 411, 434 (2007) (explaining the "appeal to authority" fallacy of logic).

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

percent, depending on political affiliation.[229] Of course, this Gallup poll was a snapshot of public opinion, taken at the height of the wars in Iraq and Afghanistan, and thus, it might not necessarily reflect public confidence in the IC over the long term. Additionally, one cannot necessarily deduct from the poll whether a given juror will have confidence in the IC's information or "authority." At the same time, however, the poll does suggest that one cannot assume jurors are particularly susceptible to appeals to the IC's "authority." This suggestion is further supported by the fact that the 2005 poll indicated that only between 7 percent and 12 percent of respondents expressed being "very confident" in the IC,[230] whereas a poll taken seven months later indicated that 53 percent of respondents had "a great deal" or "quite a lot" of confidence in local police.[231] Thus, to the extent that public polls provide any insight into potential juror behavior, they suggest that an appeal to IC authority is no more likely than an appeal to more traditional authority–law enforcement personnel to provide undue support for a particular piece of evidence.

VI. 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,[232] the inherent secrecy that surrounds the IC, combined with the relatively minor percentage of a judge's case load that will invoke intelligence information,[233] 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."[234] Therefore, it is clear that 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.

229. Joseph Caroll, *Public Doubts "Smarts" of U.S. Intelligence Community*, GALLUP (Apr. 26, 2005), http://www.gallup.com/poll/16009/Public-Doubts-Smarts-US-Intelligence-Community.aspx.

230. *Id.*

231. Saad, *supra* note 228.

232. Latif v. Obama, 666 F.3d 746, 752 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012).

233. 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 as compared to only 78,469 criminal cases. *See* UNITED STATES COURTS, CASELOAD STATISTICS 2011, Tables C & D, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C00Mar11.pdf.

234. *Latif*, 666 F.3d at 772.

Such a framework begins with an assumption, based on the desideratum of completeness and FRE 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 practical framework for evaluating whether intelligence information is to be included in judicial proceedings should examine the societal values and policy considerations at play. Because the intelligence cycle is shrouded in secrecy and is not "familiar, transparent, . . . or accessible," [235] 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 hinder public debate by obscuring larger policy questions. Those cases in which intelligence information appear most likely to be used, such as prosecution for terrorism offenses, espionage, or contraband smuggling, tend to be ripe with value-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 it should be articulated as the rationale for exclusion, in order to foster an honest, public debate.

If no societal value categorically bars the inclusion 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 in the intelligence report—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 it is unknown what kind of intelligence report was the main subject of the *Latif* opinion because the Court of Appeals' opinion is heavily redacted. 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

235. *Id.*

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 bar to the inclusion of intelligence information—that such information constitutes hearsay, which would offend the Sixth Amendment right of confrontation—does not apply.[236] However, other value-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 increasing veritistic efficacy, such as if the intelligence report were to be considered to be an unnecessary 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 by the court.

Turning to the evidentiary weight issue that is at 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.* The *Ahmed* court presumed that the report is what it purports to be,[237] yet does not presume that the information therein is accurate.[238] In contrast, Judge Tatel appears to view the presumption of regularity as being similar to the presumption of accuracy, which would permit a court to presume that the facts in the report are accurate.[239]

Assuming that the report at issue in *Latif* was similar to that in *Al Mutiari*, then it would be understood what role the report was designed to fulfill in the intelligence cycle. The report was data collected in the "ordinary course of business," from which a final veritistic determination had yet to be made.[240] Likewise, it is also likely that the intelligence was offered into evidence 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 to contribute to the

236. Al-Bihani v. Obama, 590 F.3d 866, 879 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011) (stating hearsay is always admissible in a habeas court).

237. *See* Ahmed v. Obama, 613 F. Supp. 2d 51, 54 (D.D.C. 2009). *See also* BENJAMIN WITTES, ROBERT M. CHESNEY & LARKIN REYNOLDS, THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (April 2012), *available at* http://www.brookings.edu/research/reports/2011/05/guantanamo-wittes.

238. *Latif*, 666 F.3d at 755.

239. WITTES, CHESNEY & REYNOLDS, *supra* note 237, at 61.

240. A CONSUMER'S GUIDE , *supra* note 126, at 17.

desideratum of completeness. Furthermore, absent some indicia that the reports were falsified, mistakenly labeled, or somehow other than what the purport to be, then the policy goal of judicial economy would argue for applying a presumption of authenticity, lest excessive time and effort be spent 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 produced by the National Intelligence Council.[241] On the one hand, the fact that a national intelligence estimate officially represents "the judgment of the intelligence community as a whole"[242] suggests that the report is the kind of "official Executive branch record[]" about which "the horizontal separation of powers justifies a presumption" of regularity or accuracy.[243] Alternatively, because a National Intelligence Estimate is just 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 exception, to say nothing of a presumption of reliability.[244] Under such circumstances, it is possible that a "raw intelligence" report—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 merits 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 does not need to derive from a lack of understanding about the process that produced the information. As the discussion above demonstrates, even the most rudimentary understanding

241. 50 U.S.C. § 403-3b(c)(1)(A) (2006).

242. *Id.* § 403-3b(i).

243. *Latif*, 666 F.3d at 751.

244. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 n.11 (1988) (noting four factors helpful in assessing the trustworthiness of opinions 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").

of the role that a given intelligence report plays within the intelligence process would provide some basis for a 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. Consequently, the incorporation of intelligence information into judicial proceedings will likely always create conceptual and procedural challenges, and often inclusion of intelligence information will be barred by constitutional principles. Nonetheless, to the extent that intelligence can contribute to the veritistic results of trials, its inclusion is desirable from an epistemological perspective.

The debate over 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.