INTRODUCTION

Evidence derived from classified national-security information has long been a part of court proceedings in the United States. Despite the longstanding nature of its use, it can pose constitutional issues. The Sixth Amendment to the Constitution requires that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” The Supreme Court’s post-
Crawford v. Washington interpretation of the Confrontation Clause, including its most recent clarification in Ohio v. Clark, presents a theoretical obstacle to introducing such evidence in criminal trials. Before Crawford, prosecutors were required to show only “indicia of reliability” to support the introduction of evidence over a
Confrontation Clause challenge. Crawford and its progeny require the district court to examine whether the out-of-court declarant intended his or her statement to be used in a later prosecution, a far stricter standard. Clark extends Confrontation Clause protection to statements made by out-of-court declarants to non-law enforcement persons, such as members of the intelligence community. The expansion in Clark suggests it is time to reevaluate the constitutionality of the introduction of some classified evidence during a criminal trial.

Although Clark may, in certain scenarios, present a bar to the government’s introduction of statements collected by U.S. intelligence agencies, it is unlikely to pose a significant hurdle. The Confrontation Clause, under current jurisprudence, only classifies as prohibited “testimonial” statements those that are made with the primary purpose of creating evidence for a later criminal trial. Despite the theoretical possibility that Clark could bar the introduction of intelligence-agency-collected evidence, it is unlikely to do so in practice. Because many statements collected by our intelligence agencies—such as those intercepted electronically from phone calls, emails, or text messages, or those gathered from foreign agents—were not intended by the declarant to be used in a trial, or were collected without the declarant’s knowledge, Clark’s holding is unlikely to be a burden on the use of classified information derived from foreign intelligence.

This Note proceeds in three Parts. Part I discusses the use of classified information during criminal trials, and the Classified Information Procedure Act’s (CIPA) mechanics and constitutionality. Part II elaborates on the Court’s exposition of the Confrontation Clause, including its latest pronouncements in Clark. Part III examines how the post-Clark Confrontation Clause doctrine might affect the use of foreign-intelligence information in criminal prosecutions, focusing specifically on the use of signals and human intelligence. It argues that,

6. See Crawford, 541 U.S. at 68 (2004) (“Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.”).
7. Clark, 125 S. Ct. at 2181–82.
9. Other authors have examined issues related to the Confrontation Clause and classified evidence, but those studies were conducted before the Court’s decision in Clark. See, e.g., Brian McEvoy, Note, Classified Evidence and the Confrontation Clause: Correcting a Misapplication of the Classified Information Procedures Act, 23 B.U. Int’l L.J. 395, 395 (2005); John Scott, Comment, “Confronting” Foreign Intelligence: Crawford Roadblocks to Domestic Terrorism Trials, 101 J. CRIM. L. & CRIMINOLOGY 1039, 1039 (2011). Because of the decision’s doctrinal significance, it is necessary to reevaluate the use of classified information after Clark. The
with one small exception, foreign-intelligence information should be admissible over a Confrontation Clause objection because speakers either did not or could not have intended that their statements be used for later prosecution.

I. USING CLASSIFIED EVIDENCE IN A TRIAL

The nondisclosure of certain sensitive information by the government during a criminal trial has long been a part of the judicial process in the United States. In *Rovario v. United States*, the Court addressed the government’s right to withhold the identity of an informant from the defendant. The Court called for a balance between the public’s interest in keeping the informant’s identity a secret with the defendant’s right to fully defend herself. A lower court assessing this balance was required to look at “the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer’s testimony, and other relevant factors.” If the informer provides information “crucial to the defense,” then the government must either allow the defense to cross-examine the informant or dismiss the charges.

The *Rovario* line of cases gave rise to “greymail”—“the dilemma facing the Government when a defendant claims that he must use inclusion of classified evidence in criminal trials has also been questioned on due process grounds. See Note, supra note 1, at 1982.


11. *Id.* at 62. The Court noted that if the informant was known to the defendant, or had died prior to trial, the privilege would have ended because its purpose was to “shield[] the identity of an informer from those who would have cause to resent his conduct.” *Id.* at 60 n.8.

12. *Id.* at 62.

13. *Id.*


15. The Court has announced varying standards of materiality required to overcome the government’s privilege. See United States v. Valenzuela-Bernal, 458 U.S. 858, 870 (1982) (stating *Rovario*’s holding as requiring that a court conclude the “informer’s testimony would be highly relevant” (emphasis added)); *Wolff*, 418 U.S. at 600 (requiring the information be “crucial to the defense” (emphasis added)); *Branzburg v. Hayes*, 408 U.S. 665, 698 (1972) (recognizing that an informer’s “identity cannot be concealed from the defendant when it is critical to his case” (emphasis added)); *Gravel v. United States*, 408 U.S. 606, 646 (1972) (Douglas, J., dissenting) (“The prosecution often dislikes to make public the identity of the informer on whose information its case rests. But his identity must be disclosed where his testimony is material to the trial.” (emphasis added)); *Rovario*, 353 U.S. at 60–61 (“Where the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” (emphasis added)).
classified information in defending himself.”\(^{16}\) The government is forced to choose between continuing to prosecute, “thereby compromising the classified material, or safeguarding the material but dropping the prosecution.”\(^{17}\) Generally, the defendant would attempt greymail through a “vague, non-specific[] threat.”\(^{18}\) The government’s reluctance to reveal classified information led many to worry that defendants would imperil valid prosecutions even in situations where the prosecutor could conduct the case within the bounds of due process.\(^{19}\) Then-Vice President Dick Cheney’s chief of staff Scooter Libby, who was prosecuted for leaking classified information, and Oliver North, a National Security Council staffer who was prosecuted for his involvement with the Iran-Contra scandal, were accused of using greymail to prevent the government from following through with their cases.\(^{20}\)

In an attempt to limit the greymail problem\(^{21}\) and “strik[e] a balance” between the government’s interest in keeping classified information secret, and a defendant’s right to confront the evidence against herself,\(^{22}\) Congress passed CIPA in 1980, which set out procedures for the use of classified evidence in criminal prosecutions.\(^{23}\) In doing so, it aimed “to provide Federal courts with clear statutory guidance on handling secret evidence in criminal cases.”\(^{24}\) CIPA enables a district court judge to determine whether the government must give the defendant classified information that it seeks to use

\(^{16}\) See Graymail Legislation: Hearings before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence, 96th Cong. 1 (1979) (statement of Rep. Murphy).

\(^{17}\) Id.

\(^{18}\) United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983).

\(^{19}\) Id. at 1197.

\(^{20}\) See Request for ‘Greymail’ May Doom Libby Prosecution, INSIDE BAY AREA (Feb. 25, 2006), http://www.insidebayarea.com/dailyreview/localnews/ci_3546439 [https://perma.cc/GR4A-C54D] (describing defendant I. Lewis “Scooter” Libby’s request for the disclosure of 277 highly classified documents as greymail); Philip A. Lacovara, Graymail, Secrets and the North Trial: Law on Classified Data Makes Vast Difficulty for All Parties, L.A. TIMES (Jan. 5, 1989) (suggesting that Oliver North’s attempt to introduce 30,000 classified documents during his defense was greymail). It should be noted that both of these cases of greymail occurred after the passage of CIPA.

\(^{21}\) See S. REP. No. 96-823, at 2 (1980) (stating that CIPA was introduced to “minimize the problem of so-called graymail . . . by requiring a ruling on the admissibility of . . . classified information before trial”).

\(^{22}\) Arjun Chadran, Note, The Classified Information Procedures Act in the Age of Terrorism: Remodeling CIPA in an Offense-Specific Manner, 64 DUKE. L.J. 1411, 1412 (2015); see, e.g., McEvoy, supra note 9, at 395.


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during trial. Upon motion, the government can ask the court for an in camera hearing to determine whether classified information must be disclosed to the defendant. The court is allowed to “consider any matters which relate to classified information or which may promote a fair and expeditious trial,” and may issue a protective order disallowing the disclosure of classified information, or allow the government to redact specific items of classified information from the discovery materials provided to the defendant. If the court requires the government to disclose classified information, the prosecution can move to provide a statement admitting relevant facts that the classified information would prove in lieu of revealing the classified material itself.

So the government can properly evaluate classified information before its disclosure in open court, CIPA section 5(a) requires that a defendant provide notice to the government of her intent to disclose classified information. Failure by the defendant to provide such notice may preclude disclosure of the information or examination of the witness. If the government objects to disclosure allowed by the court, the court must dismiss the indictment or information, unless “the interests of justice would not be served by dismissal.” The court may, however, order other appropriate action instead of dismissing the action.

CIPA specifically protects the examination of a witness who might reveal classified information during examination by the defendant. Section 8(c) allows the government to object to any line of questioning

26. Id. § 6(a).
27. Id. § 2.
28. Id. § 3.
29. Id. § 4.
30. Id. § 6(c)(1). The court must find that the substitution “will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.” Id.
31. Id. § 5(a); see also United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983) (describing the intent of § 5(a) to provide both the government and the court prior notice of any classified information to be introduced by the defense).
32. 18 U.S.C. app. 3 § 5(b).
33. Id. § 6(e)(2). This determination is made by the district court.
34. Id. Alternatives to dismissal include ruling that the classified information is immaterial, allowing a substitution of a summary of the classified information, or allowing the government to admit the facts that the defendant wants to prove by the use of classified information. Id.
35. See id. § 8(c).
that “may require the witness to disclose classified information not previously found to be admissible.” After such an objection, the court is required to determine if the response by the witness will disclose classified information.

CIPA has withstood constitutional challenge. In United States v. Wilson, the Second Circuit upheld CIPA’s notice provision as applied to a defendant who was barred from testifying about the classified details of his work. The defendant wanted to testify in the district court that the activities for which he was being prosecuted were part of his work for U.S. intelligence. The district court, relying on CIPA, would allow testimony regarding Wilson’s employment by intelligence agencies and involvement in covert operations, but it would not allow that testimony to include details of any operations. The Second Circuit found this situation to be exactly what Congress intended CIPA to cover. Similarly, the Eleventh Circuit upheld the use of CIPA’s notice provision in a prosecution for fraud on the Armed Forces against a defendant who wished to reveal details of classified military intelligence operations.

United States v. Jolliff involved a challenge to the notice provision based on the defendant’s Fifth Amendment privilege against self-incrimination. The defendant asserted that the notice provision required him to reveal classified information to individuals who were not cleared to know such information—namely, the judge and defense counsel—in violation of 18 U.S.C. § 798, which criminalizes such

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36. Id.
37. Id.
40. Id. at 9.
41. Id. at 8–9.
42. Id. at 9.
43. Id.
44. See United States v. Collins, 720 F.2d 1195, 1200 (11th Cir. 1983). The Collins court was primarily concerned with the vagueness of defendant's CIPA notice. Id. at 1198–99. The court considered the defendant's failure to provide details regarding what classified information was going to be disclosed as improper. Id. at 1199. The court stated that allowing a vague § 5(a) notice by a defendant would “merely require the defendant to reduce ‘greymail’ to writing,” because the government would not be able to evaluate the potential damage to national security without detail. Id. at 1200.
46. Id. at 231.
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disclosure. The court found that because the judge did not require a security clearance to view the classified information, and because the government had offered to provide the defendant’s attorney a sufficient security clearance, there was no Fifth Amendment violation.

Another challenge to CIPA involved former National Security Advisor John Poindexter, who was prosecuted for his involvement in the Iran-Contra scandal. Poindexter, like those mentioned previously, challenged CIPA’s notice provision as a violation of his Fifth Amendment rights. He also challenged it for violating his rights to counsel, due process, and to confront the witnesses against him. None of these challenges succeeded. The court dismissed Poindexter’s Confrontation Clause challenge, which was based on CIPA’s requirement that Poindexter notify the prosecution of his intention to elicit classified information from prosecution witnesses on cross-examination. In rejecting this challenge, the court stated that the Confrontation Clause provided Poindexter “an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”

A more contemporary case, decided after Crawford but before Clark, also addressed the Sixth Amendment issues raised by using classified evidence. In In re Terrorist Bombings of U.S. Embassies in

49. Id.
52. See id. at 31 (“According to defendant, [CIPA] violates his Fifth Amendment right to remain silent; his . . . rights to testify in his own defense; his Sixth Amendment right to the effective assistance of counsel; his right to cross examine witnesses against him; and his right to due process of law.”).
53. See id. at 33–35 (rejecting the basis for Poindexter’s constitutional complaints).
54. Id. at 34.
55. Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).
East Africa, the Second Circuit held that the defendant’s Sixth Amendment right to present a defense was not violated even though the defendant himself was not allowed to review the classified information presented by the government. In doing so, the court did not address any of the then-recent Confrontation Clause cases. Instead, the court relied on Chambers v. Mississippi, a case from 1973, for the proposition that “a criminal defendant’s right to cross-examine the witnesses in his case ‘is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’”

CIPA’s passage provided courts an avenue for addressing the issues caused by grey mail, and created a process for introducing classified information in criminal proceedings. Classified information can only be introduced at trial if it complies with Constitutional requirements, including the Confrontation Clause. As will be discussed below, the Confrontation Clause’s interpretation changed significantly in the wake of the Court’s decision in Crawford, requiring a reevaluation of exactly what limits remain on the introduction of classified evidence.

II. THE CHANGING CONFRONTATION CLAUSE DOCTRINE

The Sixth Amendment’s Confrontation Clause doctrine has seen a radical shift in the last dozen years. The Confrontation Clause requires that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Generally,

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57. Although the defendant challenged the government’s introduction of evidence on the basis of the Confrontation Clause, because the government had sought to introduce documents, not testimony, the court reframed the Confrontation Clause challenge as a Sixth Amendment challenge for deprivation “of his right to present a defense.” Id. at 123 n.27.

58. Id. at 127. The court also upheld a district court requirement that all persons wanting access to classified information were required to hold a security clearance, including defense counsel. Id. at 122. This requirement was constitutional “as long as the application . . . does not deprive the defense of evidence that would be ‘useful to counter the government’s case or to bolster a defense.’” Id. (quoting United States v. Aref, 533 F.3d 72, 80 (2d Cir. 2008)).


60. In re Terrorist Bombings, 552 F.3d at 127 (quoting Chambers, 410 U.S. at 295).

61. See United States v. Abu Ali, 528 F.3d 210, 255 (4th Cir. 2008) (“[T]he government . . . may either declassify the document, seek approval of an effective substitute, or forego its use altogether. . . . [H]id[ing] the evidence from the defendant, but giv[ing] it to the jury . . . . plainly violates the Confrontation Clause.”).

62. U.S. CONST. amend. VI.
hearsay evidence—an out-of-court statement offered for the truth of the matter asserted—is not admissible. Hearsay statements can be admitted, under the Federal Rules of Evidence, if they exhibit circumstantial guarantees of trustworthiness. Before Crawford, courts were required to look for similar “indicia of reliability” when deciding whether an out-of-court statement was allowed over a Confrontation Clause objection. As long as the declarant was unavailable and the statement was trustworthy, there was no Confrontation Clause bar to the introduction of hearsay testimony.

Crawford signaled a major change in Confrontation Clause jurisprudence. Speaking for the Court, Justice Scalia—seeking to bring the “application of the Confrontation Clause back to its original meaning”—found that any time “testimonial” evidence is presented, the Sixth Amendment requires that the defendant have an opportunity to cross-examine either at trial, or before trial if the declarant is both unavailable and the defendant had a prior opportunity to cross-examine. He explained:

An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Crawford generally left the definition of “testimonial statements” for later cases, but did enumerate a few types of covered statements: those taken by police in an interrogation, statements before a grand jury, and those made in court by a witness.

63. FED. R. EVID. 801-02.
64. See id. 803-07 (such as when the declarant has a particularly strong motive to tell the truth or the circumstances of the statement would make falsehoods easy to discover).
66. See id. (“When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’”).
69. Id. at 51.
70. Id. at 68.
Later cases expanded the definition of “testimonial statements.” *Davis v. Washington*\(^{71}\) established that statements are testimonial where the primary purpose of the statement is to establish or prove past events for criminal prosecution.\(^{72}\) In that case, statements made to police during an emergency were not considered testimonial because “the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency.”\(^{73}\) *Michigan v. Bryant*\(^{74}\) requires that courts “objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.”\(^{75}\) In doing so, a court must evaluate the conduct of both the declarant and the interrogator\(^{76}\) to determine whether the primary purpose of a statement was to “creat[e] an out-of-court substitute for trial testimony.”\(^{77}\) The Court has identified, however, that statements made during an emergency to “seek or render aid”\(^{78}\) are not testimonial.\(^{79}\)

This primary-purpose test was underscored in both *Melendez-Diaz v. Massachusetts*\(^{80}\) and *Bullcoming v. New Mexico*,\(^{81}\) which dealt with the introduction of laboratory reports as evidence during trial. In *Melendez-Diaz*, the Court held that a forensic laboratory report which was “created specifically to serve as evidence in a criminal proceeding”\(^{82}\) constituted testimonial evidence, requiring that the defendant be able to cross-examine the laboratory analysts either at or before trial.\(^{83}\) The prosecution was not allowed to introduce the report without also producing a witness who could testify to the truth of the information in it.\(^{84}\) The case left open the question of whether someone who was familiar with the testing procedures could testify as to the

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72. *Id.* at 822.
73. *Id.*
75. *Id.* at 359.
76. *Id.* at 367.
77. *Id.* at 358.
79. See *Bryant*, 562 U.S. at 377–78 (finding that the declarant’s statements to police about the location and identity of an active shooter were not testimonial); *Davis v. Washington*, 547 U.S. 813, 828 (2006) (categorizing statements on a 9-1-1 call “to enable police assistance” as nontestimonial).
82. *Id.* at 651 (citing *Melendez-Diaz*, 557 U.S. 305).
truth of a lab report based on knowledge and experience. Bullcoming clarified the Melendez-Diaz requirement by asserting that if laboratory results are introduced, the prosecution must also allow confrontation of “the analyst who made the certification” unless the analyst is unavailable and there was an opportunity to cross-examine at an earlier point.85

Clark raised the question of whether the introduction of witness statements made to non-law enforcement personnel could violate a defendant’s Confrontation Clause right, and answered in the affirmative.86 Clark involved statements made by a three-year-old to his preschool teachers regarding the child’s potential abuser.87 The Court held that the statements were not made for the primary purpose of creating evidence for trial, and were therefore not testimonial.88 In doing so, the Court distinguished statements made to police from those made to others. Although statements made to non-law enforcement personnel are “significantly less likely to be testimonial than statements given to law enforcement officers,” their introduction could still violate a defendant’s Sixth Amendment right if the declarant’s primary purpose was to create evidence for criminal prosecution.89

III. INTRODUCING CLASSIFIED EVIDENCE AFTER OHIO V. CLARK

Because Clark extends Confrontation Clause protection to statements made to non-law enforcement persons, such as members of the intelligence community, the introduction of certain types of classified evidence must be reevaluated. This Part looks at whether the introduction of classified information obtained by intelligence agencies may run afoul of the Crawford/Clark requirements. It first surveys various intelligence-information collection scenarios and how the method of collection may impact the use of evidence at trial. It then examines the primary-purpose requirement of Crawford. The Part argues that it is unlikely, under most scenarios, that introducing intelligence-derived evidence will violate the Confrontation Clause because it would be rare for a declarant—in intelligence-collection circumstances—to have made statements with the “primary purpose” of creating evidence for prosecution.

85. Id. at 652.
87. Id. at 2178.
88. Id. at 2181–82.
89. Id.
A. Collection of Classified Evidence

The Crawford/Clark line of cases is concerned with statements that are intentionally given by witnesses with the primary purpose of creating evidence for criminal prosecution. Because the vast majority of intelligence-collected statements, especially those in the signals-intelligence realm, are not intentionally provided by the declarant to law enforcement or an intelligence agency, Crawford/Clark restrictions likely do not apply.

Intelligence information is used to provide our elected and military leaders with data that shape their decisions and actions in areas as diverse as foreign policy, counterterrorism, military maneuvering, and nuclear non-proliferation. The United States has a number of ways to collect intelligence, including human intelligence (HUMINT), signals intelligence (SIGINT), open-source intelligence, imagery and geospatial intelligence, and measurement and signature intelligence. “SIGINT is intelligence derived from electronic signals and systems . . . such as communications systems, radars, and weapons systems.” Although each type of intelligence has different uses, SIGINT provides the greatest share of information that makes it into the President’s Daily Brief (which signifies the importance of the information). HUMINT, as the name suggests, refers to “the collection of information from human sources.”

90. See supra Part II.
92. See id. at 2–3 (describing ways the United States collects intelligence).
95. FED. BUREAU OF INVESTIGATION, Intelligence Branch, https://www.fbi.gov/about/leadership-and-structure/intelligence-branch [https://perma.cc/TMQ8-FMW2]. For a short primer on all types of intelligence, see id.
B. Primary-Purpose Test

As a threshold matter, the introduction of SIGINT- and HUMINT-collected statements could pose a Confrontation Clause issue because the declarant is unlikely to be produced for cross-examination either before or during trial. This is the case because either the declarant does not know that her communications are being intercepted, or the declarant is working with U.S. intelligence officials to uncover information about our allies or adversaries. In either case, making the declarant available for trial, if even possible, would reveal the “sources and methods” by which the U.S. intelligence apparatus goes about its work.96 Under the Crawford/Clark doctrine though, the court looks beyond the availability of the declarant for cross-examination, and instead looks to the declarant’s purpose for making the statement.97 For this reason, it is unlikely that most intelligence gathered through SIGINT or HUMINT means would trigger a requirement that the government produce the declarant. There is, however, at least one scenario in the HUMINT context wherein the failure to do so would violate the defendant’s Sixth Amendment right—where a source in U.S. custody specifically attempts to incriminate another person by providing information to U.S. intelligence officers.

1. Signals Intelligence. The primary-purpose test requires that the declarant give a statement to another person with the intention or foresight of creating evidence for use in a prosecution in order to trigger the Confrontation Clause.98 This explanation of “testimonial statements” may insulate the use of a great deal of SIGINT from the Confrontation Clause requirement. Even though statements were procured by non-law enforcement personnel, which could trigger Confrontation Clause requirements under Clark,99 statements

96. See Robert M. Clark, The Protection of Intelligence Sources and Methods, THE INTELLIGENCER, Fall 2016, at 61, 61, http://www.afio.com/publications/CLARK%20Robert%20The%20Protection%20of%20Intelligence%20Sources%20and%20Methods%20FINAL%202016Oct15.pdf [https://perma.cc/4PKZ-JXGT] (distinguishing between the product of intelligence and the sources and methods used to obtain that intelligence, and stating that “[t]he highest level of protection is placed on information that might allow someone to determine the identity of the source” of intelligence information).
97. See supra Part II.
procured by SIGINT methods are not generally made with the intention or foresight of producing evidence for trial.

SIGINT methods are designed to collect information without the target being aware of the collection. The fact that the declarant is unaware that his or her statement—for example, one made in an intercepted phone call or email—is being recorded or monitored strongly suggests that there can be no legitimate argument that the statement was made with the “primary purpose” of creating information for a later criminal prosecution.

The lower courts have found this line of argument applicable to the use of Title III wiretaps and statements recorded by undercover officers or confidential informants (CI). In Brown v. Epps, the Fifth Circuit relied on dicta from Davis stating that “statements made unwittingly to a government informant were ‘clearly nontestimonial,’” to uphold the introduction of statements recorded by a confidential informant at a criminal trial. In Brown, police used a wire-wearing CI to record statements made by the defendant over the phone before a controlled drug buy. Similarly, in United States v. Udeozor, the Fourth Circuit held that police-recorded telephone calls were not testimonial because “no reasonable person in [the declarant’s] position would have expected his statements to be used later at trial. [The declarant] certainly did not expect that his statements would be used prosecutorially; in fact, he expected just the

100. The unknowing nature of the transmission of intelligence information to the U.S. government may have changed after the revelation of a number of intelligence programs by National Security Agency contractor Edward Snowden. See, e.g., Shane Harris, CIA’s Ex-No. 2 Says ISIS ‘Learned from Snowden,’ DAILY BEAST (May 6, 2015, 4:24 PM), http://www.thedailybeast.com/articles/2015/05/06/cia-s-ex-no-2-says-isis-learned-from-snowden.html (U.S. intelligence officials have long argued that Snowden’s disclosures provided valuable insights to terrorist groups and nation-state adversaries, including China and Russia, about how the U.S. monitors communications around the world.”); Jason Leopold, Official Reports on the Damage Caused by Edward Snowden’s Leaks Are Totally Redacted, VICE NEWS (Feb. 25, 2015, 12:30 PM), https://news.vice.com/article/official-reports-on-the-damage-caused-by-edward-snowdens-leaks-are-totally-redacted (As the Director of National Intelligence has stated, terrorists and other adversaries of this country are going to school on US intelligence sources methods and trade craft, and the insights that they are gaining are making our job much, much harder . . . .

102. Id. at 287 (quoting Davis v. Washington, 547 U.S. 813, 825 (2006)).
103. Id. at 288.
104. Id. at 283–84.
opposite.” 106 In Udeozor, unlike in Brown, the prosecution introduced a victim’s telephone conversation with a third-party declarant. 107 All circuit courts that have addressed the issue have found that statements recorded without the declarant’s knowledge of the recording were not testimonial. 108 Clark’s assertion that statements made to non-law enforcement personnel could be testimonial has not been read to change this calculus.

The wiretap and CI cases suggest that the police’s intention with regard to recording statements is immaterial to establish a violation of the Confrontation Clause’s primary-purpose test. In both cases, law enforcement intended to create evidence for later prosecution. In Udeozor, the court stated that the intentions of police are only relevant if a reasonable person in the declarant’s position would have expected the statements to be used in a later prosecution. 109 Because emails and telephone calls intercepted by intelligence agencies could not be intended or expected by a reasonable declarant to be used in a later criminal prosecution, it is unlikely that such evidence would run afoul of the Crawford/Clark Confrontation Clause requirements. The fact that intelligence agencies are intercepting communications is intended to be secret, much like a wiretap in the domestic-surveillance context. 110 If the declarant—for example, a terrorist based outside of the United States—does not know that her communications are being intercepted, it is unlikely that she intends her statements to be used in a later prosecution. It would be implausible for such a speaker to have the “primary purpose” of creating evidence for prosecution if she is unaware the statements are being recorded. Therefore, after Clark,
even though these statements are made outside a courtroom to non-law enforcement personnel, their use would not violate a defendant’s Confrontation Clause right.

2. Human Intelligence. The introduction of HUMINT-collected statements is more likely to violate a defendant’s Sixth Amendment right than SIGINT, but the likelihood remains low. HUMINT comes in many forms, including interviews with a friendly source, or interrogation of a hostile detainee. HUMINT may be the only way of getting access to certain information held by an intelligence target, and therefore can be of enormous value to the United States, both for its intelligence value, and for its prosecutorial value. Studies in 1994 found that HUMINT made a critical contribution to 204 of 376 specific intelligence issues.

HUMINT could pose Confrontation Clause challenges that are unlikely to be present with SIGINT. In contrast with SIGINT, HUMINT sources generally know that they are making statements to U.S. government personnel. Sources of HUMINT provide information to the U.S. for any number of reasons, including money, ideology, coercion, and ego. Courts, in determining whether a HUMINT source provided testimonial statements, would look not at their overall motivation, but their reason for giving that particular statement.

The strictures of CIPA could prevent the court from determining the declarant’s primary purpose for making a statement. Under CIPA, the government can withhold the declarant’s identity and merely provide a summary of the information obtained from the source. Though the anonymity of the declarant does not pose a Confrontation Clause problem by itself, when combined with the government’s ability to create a factual summary of the information in the statements, a defendant may plausibly raise a claim that the statements were intended by the declarant to be used in a criminal prosecution. A

111. RICHELSON, supra note 91, at 2.
112. Id. at 319.
113. Id.
115. See supra Part I.
116. See Brown v. Epps, 686 F.3d 281, 283 (5th Cir. 2012) (holding that an “unidentified [declarant’s] recorded statements were not testimonial, and therefore their admission did not violate the Confrontation Clause”).
reviewing court would have difficulty determining what the source’s “primary motivation” was because the court would not have access to information about the source, or the method that the government used to elicit the statement.

One could imagine a scenario wherein the perpetrator of a failed terrorist attack is arrested and brought to trial in a federal court. The intelligence community, in its effort to stop further attacks, detains and interrogates the defendant’s co-conspirator overseas. The detainee, angry with his associate’s failure, gives interrogators information he intends to be used to convict the failed terrorist. Such a situation would produce, under Crawford/Clark, a statement made to a U.S. intelligence official (who is not a law enforcement officer) with the primary purpose of providing evidence for trial. Before Clark was decided, it was unclear whether the statements would violate the Sixth Amendment. However, after Clark, these statements would be deemed testimonial even though they were not made to a law enforcement officer. If the government were able to conceal both the identity of the source and provide the court with a CIPA-sanctioned summary of the facts gleaned from the interrogation, there would be a surreptitious violation of the Confrontation Clause upon introduction of the evidence. Thus, although the introduction of SIGINT evidence is unlikely to ever violate the Sixth Amendment, it is possible, in a particular scenario, that HUMINT evidence would violate a defendant’s constitutional right.

In the vast majority of cases, declarant statements would be allowed without violating the Confrontation Clause. However, as discussed above, there are some situations wherein HUMINT-derived statements could present Confrontation Clause issues after the Court’s decision in Clark, because although the statements were made to non-law enforcement personnel, they were made with the intention of being used for later prosecution.118

CONCLUSION

Changes to the Sixth Amendment’s Confrontation Clause doctrine in the wake of the Court’s decision in Crawford have drastically changed the analysis when determining whether an out-of-

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117. This scenario is based loosely on facts from United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).

118. See Burkett, supra note 114, at 7 (explaining the motivations for becoming an intelligence source).
court hearsay statement can be introduced. Subsequent cases, including *Clark*, provide clarification for litigants. *Clark*’s acknowledgement that statements made to non-law enforcement personnel can be testimonial suggests that prosecutors seeking to use classified intelligence information should be aware of the challenges presented by the Confrontation Clause. Although Confrontation Clause issues could plausibly arise in some cases, nearly all prosecutions using evidence from SIGINT, and most using HUMINT, would avoid any Sixth Amendment problems.