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DETERMINING CLASSIFIED EVIDENCE'S "PRIMARY PURPOSE": THE CONFRONTATION CLAUSE AND CLASSIFIED INFORMATION AFTER *OHIO V. CLARK*

J. PETER LETTENEY†

INTRODUCTION

Evidence derived from classified national-security information has long been a part of court proceedings in the United States.[1] 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 . . . ."[2] The Supreme Court's post-*Crawford v. Washington*[3] interpretation of the Confrontation Clause, including its most recent clarification in *Ohio v. Clark*,[4] 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

† Duke University School of Law, J.D. 2016; University of Pennsylvania, M.S.Ed 2009; University of Delaware, B.A. 2008. I would like to thank Professor Christopher Schroeder for his help and advice during the preparation of this Note. Also, thank you to the members of the *Duke Law Journal* for their hard work.

1. *See, e.g.*, S. REP. NO. 110-442, pt. 1, at 2 (2008) (stating that the Supreme Court first addressed the use of the state secrets privilege—which allows the Federal Government to prevent the disclosure of information which would be harmful to the United States—in *United States v. Reynolds*, 345 U.S. 1 (1953)); Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1962 (2005) ("[T]he United States has long used [classified] evidence in criminal prosecutions, military courts-martial and various immigration proceedings.").

2. U.S. CONST. amend. VI.

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

4. Ohio v. Clark, 135 S. Ct. 2173 (2015).

Confrontation Clause challenge.[5] *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.[6] *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.[7] 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.[8] 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.[9] It argues that,

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5. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

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.

8. *See* Michigan v. Bryant, 562 U.S. 344, 358 (2011) (describing the "primary purpose" test).

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*,[10] the Court addressed the government's right to withhold the identity of an informant from the defendant.[11] 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.[12] 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."[13] 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.[14]

The *Rovario* line of cases[15] gave rise to "greymail"—"the dilemma facing the Government when a defendant claims that he must use

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inclusion of classified evidence in criminal trials has also been questioned on due process grounds. *See* Note, *supra* note 1, at 1982.

10. Rovario v. United States, 353 U.S. 53 (1957).

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.*

14. Wolff v. McDonnell, 418 U.S. 539, 600 (1974).

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.

23. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 202 (1980) (codified as amended at 18 U.S.C. app. 3 §§ 1–16 (2012)).

24. S. REP. NO. 110-442, pt. 1, at 9 (2008).

during trial.[25] Upon motion, the government can ask the court for an *in camera* hearing to determine whether classified information must be disclosed to the defendant.[26] The court is allowed to "consider any matters which relate to classified information or which may promote a fair and expeditious trial,"[27] and may issue a protective order disallowing the disclosure of classified information,[28] or allow the government to redact specific items of classified information from the discovery materials provided to the defendant.[29] 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.[30]

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.[31] Failure by the defendant to provide such notice may preclude disclosure of the information or examination of the witness.[32] 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."[33] The court may, however, order other appropriate action instead of dismissing the action.[34]

CIPA specifically protects the examination of a witness who might reveal classified information during examination by the defendant.[35] Section 8(c) allows the government to object to any line of questioning

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25. 18 U.S.C. app. 3 § 2 (2012).

26. *Id.* § 6(a).

27. *Id.* § 2.

28. *Id.* § 3.

29. *Id.* § 4.

30. *Id.* § 6(c)(1). The court must find that the subsitution "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."[36] After such an objection, the court is required to determine if the response by the witness will disclose classified information.[37]

CIPA has withstood constitutional challenge.[38] In *United States v. Wilson*,[39] 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.[40] 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.[41] 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.[42] The Second Circuit found this situation to be exactly what Congress intended CIPA to cover.[43] 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.[44]

United States v. Jolliff[45] involved a challenge to the notice provision based on the defendant's Fifth Amendment privilege against self-incrimination.[46] 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

36. *Id.*

37. *Id.*

38. *See* United States v. Poindexter, 725 F. Supp. 13, 32 (D.D.C. 1989) ("[E]very court that has passed on the constitutionality of CIPA has upheld it.").

39. United States v. Wilson, 750 F.2d 7 (2d Cir. 1984).

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.

45. United States v. Jolliff, 548 F. Supp. 229 (D. Md. 1981).

46. *Id.* at 231.

disclosure.[47] The court found that because the judge did not require a security clearance to view the classified information,[48] and because the government had offered to provide the defendant's attorney a sufficient security clearance, there was no Fifth Amendment violation.[49]

Another challenge to CIPA involved former National Security Advisor John Poindexter, who was prosecuted for his involvement in the Iran-Contra scandal.[50] Poindexter, like those mentioned previously, challenged CIPA's notice provision as a violation of his Fifth Amendment rights.[51] He also challenged it for violating his rights to counsel, due process, and to confront the witnesses against him.[52] None of these challenges succeeded.[53] 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.[54] 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."[55]

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*

47. 18 U.S.C. § 798 (2012); *Jolliff*, 548 F. Supp. at 231.

48. *Jolliff*, 548 F. Supp. at 231 ("Section 4 of the Security Procedures Established Pursuant to Public Law 96–456, 94 Stat. 2025, by the Chief Justice of the United States provides that no security clearances are required for judges.").

49. *Id.*

50. *See* United States v. Poindexter, 725 F. Supp. 13, 33–35 (D.D.C. 1989). For information regarding the Iran-Contra scandal itself, see generally HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); *The Iran-Contra Affair 20 Years On*, NAT'L SECURITY ARCHIVE (Nov. 24, 2006), http://nsarchive.gwu.edu/NSAEBB/NSAEBB210 [https://perma.cc/3S7Z-Z6F2] (providing declassified documents relating to the scandal).

51. *Poindexter*, 725 F. Supp. at 33–35.

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,[56] the Second Circuit held that the defendant's Sixth Amendment right to present a defense[57] was not violated even though the defendant himself was not allowed to review the classified information presented by the government.[58] In doing so, the court did not address any of the then-recent Confrontation Clause cases. Instead, the court relied on *Chambers v. Mississippi*,[59] 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.'"[60]

CIPA's passage provided courts an avenue for addressing the issues caused by greymail, 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.[61] 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."[62] Generally,

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56. *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93 (2d Cir. 2008) (per curiam).

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)).

59. Chambers v. Mississippi, 410 U.S. 284 (1973).

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.[63] Hearsay statements can be admitted, under the Federal Rules of Evidence, if they exhibit circumstantial guarantees of trustworthiness.[64] 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.[65] As long as the declarant was unavailable and the statement was trustworthy, there was no Confrontation Clause bar to the introduction of hearsay testimony.[66]

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"[67]—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.[68] 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.[69]

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.[70]

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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).

65. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (allowing admission of statements falling within strong hearsay exceptions for trustworthiness).

66. *See id.* ("[W]hen 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.'").

67. Ohio v. Clark, 135 S. Ct. 2173, 2184 (2015) (Scalia, J., concurring in judgment) (explaining the Court's opinion in *Crawford*, which he authored).

68. Crawford v. Washington, 541 U.S. 36, 68 (2004).

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

71. Davis v. Washington, 547 U.S. 813 (2006).

72. *Id.* at 822.

73. *Id.*

74. Michigan v. Bryant, 562 U.S. 344 (2011).

75. *Id.* at 359.

76. *Id.* at 367.

77. *Id.* at 358.

78. Anne R. Traum, *Confrontation After* Ohio v. Clark, NEV. LAW., Oct. 2015 at 17, 19.

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).

80. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

81. Bullcoming v. New Mexico, 564 U.S. 647 (2011).

82. *Id.* at 651 (citing *Melendez-Diaz*, 557 U.S. 305).

83. *Melendez-Diaz*, 557 U.S. at 311.

84. *Bullcoming*, 564 U.S. 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.

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85. *Id.* at 652.
86. Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015).
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.[90] 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.[91] 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.[92] "SIGINT is intelligence derived from electronic signals and systems . . . such as communications systems, radars, and weapons systems."[93] 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).[94] HUMINT, as the name suggests, refers to "the collection of information from human sources."[95]

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90. *See supra* Part II.

91. For an excellent overview of intelligence collection and analysis, various uses of intelligence-derived information, and the U.S. intelligence community, see generally JEFFREY T. RICHELSON, THE U.S. INTELLIGENCE COMMUNITY (7th ed. 2016).

92. *See id.* at 2–3 (describing ways the United States collects intelligence).

93. NAT'L SEC. AGENCY, *Signals Intelligence* (May 3, 2016), https://www.nsa.gov/what-we-do/signals-intelligence [https://perma.cc/3RSZ-5T94].

94. *See* Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html?hpid=z1 [https://perma.cc/4URN-SEYA] (stating that the PRISM program, which collected internet SIGINT, accounted for nearly 1500 items in the Presidential Daily Brief in 2012); Lauren Harper, *National Security Agency Has Pushed to "Rethink and Reapply" Its Treatment of the Fourth Amendment Since Before 9/11*, UNREDACTED (June 10, 2013), https://nsarchive.wordpress.com/2013/06/10/national-security-agency-has-pushed-to-rethink-and-reapply-its-treatment-of-the-fourth-amendment-since-before-911 [https://perma.cc/9EGA-PM2N] ("[B]y January 2001, 60% of the Presidential Daily Briefings were based upon SIGINT, a percentage that has surely increased over the last decade.").

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.

98. Davis v. Washington, 547 U.S. 813, 822 (2006).

99. *See* Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015).

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.[100] 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*,[101] the Fifth Circuit relied on dicta from *Davis* stating that "statements made unwittingly to a government informant were 'clearly nontestimonial,'"[102] to uphold the introduction of statements recorded by a confidential informant at a criminal trial.[103] In *Brown*, police used a wire-wearing CI to record statements made by the defendant over the phone before a controlled drug buy.[104] Similarly, in *United States v. Udeozor*,[105] 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 relevation 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 [https://perma.cc/8ZLU-3KSU] ("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 [https://perma.cc/V2UN-KWRD] ("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 . . . .").

101. Brown v. Epps, 686 F.3d 281 (5th Cir. 2012).

102. *Id.* at 287 (quoting Davis v. Washington, 547 U.S. 813, 825 (2006)).

103. *Id.* at 288.

104. *Id.* at 283–84.

105. United States v. Udeozor, 515 F.3d 260 (4th Cir. 2008).

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*,

106. *Id.* at 269.

107. *Id.* at 266–67.

108. *Brown*, 686 F.3d at 287–88 ("[S]tatements unknowingly made to an undercover officer . . . are not testimonial . . . . Many other Circuits have come to the same conclusion, and none disagree." (citing United States v. Dale, 614 F.3d 942, 956 (8th Cir. 2010); United States v. Smalls, 605 F.3d 765, 778 (10th Cir. 2010); United States v. Johnson, 581 F.3d 320, 325 (6th Cir. 2009); United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008); *Udeozor*, 515 F.3d at 269–70; United States v. Underwood, 446 F.3d 1340, 1347–48 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182–84 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229–30 (2d Cir. 2004))).

109. *Udeozor*, 515 F.3d at 270.

110. Intelligence-agency leaders claimed that Edward Snowden's exposure of the National Security Agency's SIGINT collection programs did significant damage to U.S. national security precisely because after the leaks intelligence targets knew the methods NSA could use to intercept their communications. James Gordon Meek, Luis Martinez & Alexander Mallin, *Intel Heads: Edward Snowden Did 'Profound Damage' to U.S. Security*, ABC NEWS (Jan. 29, 2014), http://abcnews.go.com/Blotter/intel-heads-edward-snowden-profound-damage-us-security/story?id=22285388 [https://perma.cc/V774-YHHC].

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.[111] 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,[112] 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.[113]

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.[114] 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.[115] Though the anonymity of the declarant does not pose a Confrontation Clause problem by itself,[116] 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.*

114. Randy Burkett, *An Alternative Framework for Agent Recruitment: From MICE to RASCALS*, 57 STUD. INTELLIGENCE, Mar. 2013, at 7, 7 https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol.-57-no.-1-a/vol.-57-no.-1-a-pdfs/Burkett-MICE%20to%20RASCALS.pdf [https://perma.cc/QVM4-Z2UV].

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.[117] 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-

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.