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“CONFRONTING” FOREIGN INTELLIGENCE: *CRAWFORD* ROADBLOCKS TO DOMESTIC TERRORISM TRIALS

John Scott*

I. INTRODUCTION

In the first decade of this century, a central preoccupation of American foreign policy has been the rise of international terrorism.¹ This phenomenon provokes questions about the interrelation of international and domestic criminal law, constitutional interpretation, intelligence gathering, and military strategy. Now, after the challenges of the last eight years, the rhetoric (if not yet the reality) of American policy on terrorism seems to be changing.² The attempt to transfer prosecution from military tribunals to Article III courts is exemplary of this overall shift. But there are deeper legal issues at play beyond the political repercussions of this shift.³ A recent line of cases from the Supreme Court has the potential to make the process of trying suspected terrorists more complicated than it need be.⁴ *Crawford v. Washington* and its progeny have articulated a new standard for Confrontation Clause analysis and in so doing have raised significant questions about the future admissibility of certain evidence in criminal trials.⁵

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¹ See David M. Edelstein & Ronald R. Krebs, *Think Again: Barack Obama and the War on Terror*, FOREIGN POL’Y, Jan. 19, 2009, http://www.foreignpolicy.com/articles/2009/01/18/think_again_barack_obama_and_the_war_on_terror.

² Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1. *But see* Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 30, 2010, at A1.

³ Scott Shane, *Site for Terror Trial Isn’t Its Only Obstacle*, N.Y. TIMES, Jan. 31, 2010, at A18.

⁴ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004).

⁵ Joshua L. Dratel, *The Impact of Crawford v. Washington on Terrorism Prosecutions*, CHAMPION, Sept. 2004, at 19; Savage, *supra* note 2.

The goal of this Comment⁶ is to analyze the new confrontation rule from *Crawford* to determine what types of challenges its more rigorous testimonial evidence standard poses for prosecutors in future terrorism cases. Subpart II.A will provide background on the relevant cases, discussing the Court's holding in *Crawford* as well as its subsequent clarification in *Davis v. Washington*. Subpart II.B will describe the two primary federal regulations governing specific rules applicable to the use of foreign intelligence at trial. Part III will argue that the new Confrontation Clause standard potentially conflicts with these federal regulations and analyze the costs this conflict could impose on the government. Lastly, Part IV will attempt to weigh the merits of potential solutions and assess the likelihood of their adoption.

II. BACKGROUND

A. CRAWFORD: CHANGING THE RULES

The Confrontation Clause of the Sixth Amendment states “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”⁷ The common law developed a general antipathy towards the introduction of hearsay evidence and it is thought the Confrontation Clause embodies the same general principle.⁸ The common law also disfavors reliance upon ex parte testimony presented through affidavits.⁹ Defendants have the right to compel witnesses against

⁶ The goal of this Comment is not to promote the introduction of unreliable hearsay evidence against foreign defendants at trial. Rather, both the new *Crawford* rule and the new FISA warrant standard are problematic and should be reassessed because they impose significant costs on prosecution and these costs may discourage the Government from bringing charges in criminal courts against suspected terrorists. The assumption is that prosecutions of foreign terrorists are going to continue in one forum or another (be it military, criminal, or “other”). This Comment starts from the presumption that Article III courts are preferable, and for this reason the legal community should be cognizant of instances where (perhaps unintended) intersections of rules potentially throw up road blocks to the introduction of otherwise reliable evidence.

⁷ U.S. CONST. amend. VI.

⁸ See *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (stating that the Confrontation Clause and hearsay rules stem from the same roots but are not the same thing); *California v. Green*, 399 U.S. 149, 155 (1970); see also Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 501 (2006).

⁹ The holdings in both *Crawford* and *Davis* rely heavily upon examples of sixteenth- and seventeenth century prosecutions by ex parte affidavit as justification for the “testimonial hearsay” rule. See *Davis*, 547 U.S. at 826; *Crawford*, 541 U.S. at 43–46, 50–51. In particular, they focus on the case of Sir Walter Raleigh, who was convicted of treason on the basis of untested, ex parte affidavits. *Davis*, 547 U.S. at 828; *Crawford*, 541 U.S. at 44. This is the proper context within which to examine the Framers’ intentions with regards to confrontation. Daniel B. Shanes, *Confronting Testimonial Hearsay: Understanding the New*

them to appear and then to cross-examine those witnesses to test for weaknesses in their testimony.¹⁰

On its face, the Confrontation Clause seems to require a blanket prohibition of any statement made by a declarant not testifying at trial.¹¹ Such a shallow reading, however, would abrogate centuries of common law precedent recognizing a variety of valid hearsay exceptions.¹² Treating the words in the Confrontation Clause as a literal command would be far too extreme and out of line with the intentions of the Framers.¹³ Therefore, the challenge for the courts is to balance the constitutionally enshrined preference for face-to-face testimony in criminal trials and the right to cross-examine hostile witnesses with the workaday realities of a functioning criminal justice system.¹⁴

In 1980, the Supreme Court set out a test for evidence challenged under the Confrontation Clause that attempted to strike just such a balance.¹⁵ The Court determined in *Ohio v. Roberts* that the Sixth Amendment guaranteed a substantive right to challenge the reliability of evidence at trial.¹⁶ The defendant in this case was charged with forgery.¹⁷ At a preliminary hearing, the defense attorney called the daughter of the victim and attempted in vain to get her to admit to authorizing the defendant’s use of the checks and credit cards in question.¹⁸ At trial, the defendant took the stand and testified that the daughter had in fact authorized him to use those checks and cards.¹⁹ Between the deposition and the trial, the daughter had run away from home and her whereabouts were unknown.²⁰ Consequently, the prosecutor sought to introduce her testimony from the preliminary hearing to rebut the respondent’s statements.²¹ This

Confrontation Clause, 40 LOY. U. CHI. L.J. 879, 880–81 (2009); see *Crawford*, 541 U.S. at 54; cf. *White v. Illinois*, 502 U.S. 346, 352 (1994).

¹⁰ See U.S. CONST. amend. VI.

¹¹ *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); see also *Mattox v. United States*, 156 U.S. 237, 243 (1895).

¹² See *Dutton*, 400 U.S. at 80 (“It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced.”).

¹³ *Roberts*, 448 U.S. at 63.

¹⁴ *Id.* at 66.

¹⁵ *Id.* at 56.

¹⁶ 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, 399 n.26 (2005); see also *Roberts*, 448 U.S. at 65.

¹⁷ *Roberts*, 448 U.S. at 58.

¹⁸ *Id.*

¹⁹ *Id.* at 59.

²⁰ *Id.* at 59–60.

²¹ *Id.* at 59.

evidence was admitted, the transcript was read to the jury, and the defendant was convicted.²² The conviction, however, was overturned on appeal.²³

The United States Supreme Court granted certiorari and reversed the decision of the Ohio Supreme Court.²⁴ The Court held that the testimony at the preliminary hearing was admissible under the Confrontation Clause because it bore “sufficient ‘indicia of reliability’ and afforded the ‘trier-of-fact a satisfactory basis for evaluating the truth of the prior statement.’”²⁵ In prior cases the Court had recognized that certain hearsay exceptions “rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’”²⁶ These holdings supported the principle that even if certain evidence is not tested through cross-examination at trial, it is nevertheless constitutionally “safe” because it has either been tested prior to trial, or the surrounding circumstances indicate that the trier-of-fact can trust the evidence.²⁷ These exceptions are “firmly rooted” as they have been examined and tested by the courts over time, and ensure as “strict an adherence to the truth as would the obligation of an oath.”²⁸

²² *Id.*

²³ *Id.* at 60; *see also* State v. Roberts, 378 N.E.2d 492, 496 (Ohio 1978) (holding that the testimony at issue did not fall within a recognized hearsay exception and thus violated the defendant’s confrontation right). The Ohio Supreme Court held that here the hearsay exception for prior testimony of an unavailable witness was not properly invoked because the purpose of the prior hearing was not sufficiently related to the subsequent trial. *Id.*

²⁴ *Roberts*, 448 U.S. at 56.

²⁵ *Id.* at 73 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972)).

²⁶ *Roberts*, 448 U.S. at 66 (citing *Mattox v. United States*, 156 U.S. 237, 244 (1895)). In footnote 8 of the opinion, the Court specifically identifies certain types of hearsay exceptions that have been so classified. *Id.* at 66 n.8. *See Mancusi*, 408 U.S. at 215–16 (cross examined prior-trial testimony); *Pointer v. Texas*, 380 U.S. 400, 407 (1965) (same); *Mattox*, 156 U.S. at 244 (dying declaration). Justice Blackmun, writing for the Court in *Roberts*, also states “the business and public records exceptions would seem to be among the safest of the hearsay exceptions.” *Roberts*, 448 U.S. at 66 n.8 (quoting J. Broocks Greer, III, Comment, *Hearsay, the Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651, 668 (1970)).

²⁷ *Roberts*, 448 U.S. at 73 (holding that statements of an unavailable witness were admissible because the testimony had been tested by cross examination at a prior hearing); *see also* *Dutton v. Evans*, 400 U.S. 74, 88–89 (1970); *California v. Green*, 399 U.S. 149, 165 (1970) (Harlan, J., concurring).

²⁸ Or cross-examination at trial. *Lilly v. Virginia*, 527 U.S. 116, 126 (1999) (quoting *Roberts*, 448 U.S. at 66).

1. *The Crawford Revolution*

Until 2004, the holding in *Roberts* was recognized as the proper approach to the problem of reconciling hearsay exceptions with the Confrontation Clause.²⁹ Courts evaluated the “reliability” of disputed evidence and gave significant weight to exceptions cataloged in the Federal Rules of Evidence.³⁰ In 2004, however, the Court announced a radical departure from this established process.³¹ It abandoned the case-by-case analysis of *Roberts*, for (at least on the surface) a more dogmatic analysis of the “testimonial/non-testimonial” character of the evidence.³² According to the majority in *Crawford v. Washington*, the *Roberts* Court had its Sixth Amendment analysis wrong: the Confrontation Clause is a procedural guarantee, not a substantive one.³³ And as a procedural right, it does not bow to competing policy interests or notions of judicial efficiency.

In August 1999, Michael Crawford was arrested for murder.³⁴ Crawford was accused of stabbing Kenneth Lee in Lee’s apartment after Lee allegedly attempted to rape Crawford’s wife.³⁵ Crawford claimed at trial that he had gone to the victim’s apartment to confront him about this, and while he was there a fight broke out.³⁶ Crawford claimed that during this fight he stabbed Lee in self-defense.³⁷

This version of events conflicted with a statement made by Crawford’s wife to the police on the night of the incident.³⁸ Crawford’s wife did not testify at trial, but the prosecution introduced the tape recording under the

²⁹ See *id.* at 124–25; *Idaho v. Wright*, 497 U.S. 805, 814 (1990); *Bourjaily v. United States*, 483 U.S. 171, 182 (1987); *United States v. Inadi*, 475 U.S. 387, 392 (1986).

³⁰ See *Lilly*, 527 U.S. at 124–25; *Wright*, 497 U.S. at 814; *Bourjaily*, 483 U.S. at 182; *Inadi*, 475 U.S. at 392.

³¹ Ellen Liang Yee, *Confronting the “Ongoing Emergency”: A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729, 731 (2008) (“In 2004, after nearly twenty-four years of this well-entrenched reliability approach, the Supreme Court substantially altered the course of the Confrontation Clause analysis with its *pathbreaking* decision in *Crawford v. Washington*.”) (emphasis added); Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL’Y 553, 554 (2007) (“*Crawford v. Washington* changed the landscape dramatically.”); Jennifer B. Sokoler, *Between Substance and Procedure: A Role for States’ Interests in the Scope of the Confrontation Clause*, 110 COLUM. L. REV. 161, 170 (2010) (“In *Crawford v. Washington*, the Supreme Court upended close to a quarter century’s worth of jurisprudence . . .”); see also *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

³² *Crawford*, 541 U.S. at 61; see McEvoy, *supra* note 16, at 398.

³³ *Crawford*, 541 U.S. at 61.

³⁴ *Id.* at 38.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 39.

statement-against-interest hearsay exception.³⁹ After being convicted, Crawford challenged the admission of the tape. The Washington Supreme Court upheld his conviction, concluding that: “although [Crawford’s wife’s] statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness.”⁴⁰

The Supreme Court granted certiorari and reversed the Washington Supreme Court. While the *Roberts* Court held that the Confrontation Clause provides a substantive right to reliable evidence, Justice Scalia stated that the Clause is primarily concerned with ensuring direct, face-to-face confrontation at trial.⁴¹

In reaching this conclusion, Justice Scalia took a long view of history and drew on sources dating as far back as the Roman Empire.⁴² In particular, he focused his attention on one specific incident: the trial, and subsequent execution, of Sir Walter Raleigh in 1603 for treason.⁴³ In that trial, the Crown relied primarily on the accusations of Lord Cobham, Raleigh’s supposed co-conspirator.⁴⁴ Cobham made a statement accusing Raleigh of treason to the Privy Council prior to trial as well as in a separate letter.⁴⁵ While Cobham did not testify at trial, both of these records were read to the jury.⁴⁶ Raleigh argued that these statements were coerced, but his entreaties to bring Cobham before the jury for cross-examination were ignored.⁴⁷

The fallout of the Raleigh “show trial” influenced both British and American jurisprudence by solidifying the importance of confrontation and cross-examination.⁴⁸ The *Crawford* opinion highlights how attempts by the Government to introduce untested *ex parte* evidence were met with resistance in both England and the Colonies.⁴⁹ Moreover, the primacy of

³⁹ See WASH. R. EVID. 804(b)(3) (2003). She admitted in the statement that she led Crawford to Lee’s apartment and thus facilitated the assault. *Crawford*, 541 U.S. at 40. Crawford’s wife did not testify at trial because her testimony was subject to the spousal privilege under the Washington Rules of Evidence. See WASH. REV. CODE § 5.60.060(1) (1994).

⁴⁰ *Crawford*, 541 U.S. at 41 (citing *State v. Crawford*, 54 P.3d 656, 663 (Wash. 2002)).

⁴¹ *Id.* at 57.

⁴² *Id.* at 43.

⁴³ *Id.* at 44.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 50.

⁴⁹ See, e.g., *King v. Paine*, 87 Eng. Rep. 584 (K.B. 1696) (holding that in a misdemeanor libel case, the statement of a dead witness could not be introduced because the defendant did not have a chance to cross examine); *Lord Fenwick’s Case*, (1696) 13 How. St. Tr. 537,

face-to-face confrontation was recognized even after the drafting of the Constitution.⁵⁰ Justice Scalia cited opinions from the early years of the American republic in which the requirement of face-to-face confrontation and cross-examination continued to be “uncompromising.”⁵¹

The *Crawford* Court specifically rejected the *Roberts* reliability test. In its place, the Court stated that any testimonial evidence not testified to at trial will be excluded, unless the witness is unavailable and the defendant had previously cross-examined the testimony.⁵² According to Justice Scalia, under the *Roberts* regime, courts had lost sight of this important principle of trial procedure.⁵³ The central holding of *Crawford* is that admission into evidence of a tape-recorded witness statement to police officers violates the Constitution’s uncompromising mandate.⁵⁴ According to Justice Scalia, the Confrontation Clause excludes all testimonial hearsay evidence.⁵⁵ In this new regime, there is no room for an inquiry into reliability. The Court went so far as to ridicule such a standard, remarking that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”⁵⁶

What *Crawford* lacks, however, is a specific definition of what “testimonial evidence” really means. The Court defended its incomplete description by arguing that the opinion need only focus on the core or “nucleus” of the Clause.⁵⁷ As the statements at issue in *Crawford* fit well within this core, the Court needed to opine no further.⁵⁸ Yet even the extent of this core is not clearly defined. At times the Court’s logic implies that the subjective intent of the declarant is primary in determining the scope of

591–92 (H.C.) (“[N]o deposition of a person can be read, though beyond sea, unless in cases where the party is to be read against was privy to the examination, and might have cross examined him . . .”). In the early eighteenth century, the Virginia Council protested untested ex parte evidence after governors privately issued several commissions to examine witnesses against particular men ex parte. *Crawford*, 541 U.S. at 47.

⁵⁰ *Crawford*, 541 U.S. at 49.

⁵¹ *Id.* (citing *State v. Webb*, 2 N.C. (1 Hayw.) 103 (1794) and *State v. Campbell*, 30 S.C.L. (1 Rich.) 124 (S.C. Ct. App. 1844)).

⁵² *Id.* at 53–54.

⁵³ *Id.* at 60 (“Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.”).

⁵⁴ *Id.*

⁵⁵ *Id.* at 61 (“[The Court imposes] an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine . . .”).

⁵⁶ *Id.* at 62.

⁵⁷ *Id.* at 51–52.

⁵⁸ *Id.*

“testimony.”⁵⁹ Bearing testimony against a person requires that the “bearer” intend to expose the person to some liability.⁶⁰ At other times the Court articulated that the test is whether the “objective” witness would reasonably understand that the testimony would later be available at trial.⁶¹ Given the ambiguity of the holding, it took only two years for the Court to again take up this issue and attempt to clarify the expanse of “testimony.”

2. *Davis and Hammon: The Purpose of the Inquiry.*

In 2006, the Court took the opportunity to further elaborate on its initial definition of testimony announced in *Crawford*. The Court in *Davis v. Washington* contrasted the factual settings of two cases to articulate a more exact definition of “testimonial” evidence.⁶² Both fact patterns deal with police response to reports of domestic violence. In the first situation the primary purpose of the inquiry eliciting the testimony was to properly respond to an “ongoing emergency.”⁶³ In the second, the primary purpose was to collect evidence for trial.⁶⁴

The facts in *Davis* are as follows: a victim of domestic violence placed a call to a 911 operator.⁶⁵ She told the operator that her boyfriend was in the process of assaulting her.⁶⁶ In the course of the conversation, the operator determined that the boyfriend’s name was Adrian Davis.⁶⁷ Later in the call, the victim reported that Davis had run out of the house.⁶⁸ The operator remained on the phone and collected more information on the boyfriend and the basis of the domestic dispute.⁶⁹

Davis was charged with assault, but his ex-girlfriend did not appear to testify at trial.⁷⁰ The prosecution attempted to introduce the transcript of the

⁵⁹ *Id.* at 51 (“Testimony, in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”) (internal quotations omitted).

⁶⁰ *Id.*

⁶¹ *Id.* at 52 (“[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”) (internal quotations omitted).

⁶² 547 U.S. 813 (2006). The two cases which were consolidated for this matter were: *State v. Davis*, 111 P.3d 844 (Wash. 2005) and *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).

⁶³ *Davis*, 547 U.S. at 817–18, 828.

⁶⁴ *Id.* at 819–20.

⁶⁵ *Id.* at 817.

⁶⁶ *Id.* at 817–18.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 818.

⁷⁰ *Id.* at 819.

911 conversation, however.⁷¹ The trial court admitted the transcript, determining that the statements were non-testimonial.⁷²

The facts of the second case, *Hammon v. Indiana*, closely mirror those of *Davis*: the police responded to reports of domestic abuse at the home of Amy and Hershel Hammon.⁷³ When the police arrived at the house, Mrs. Hammon appeared frightened and there was evidence of a struggle.⁷⁴ Initially, however, she stated that “nothing was the matter.”⁷⁵ Mr. Hammon likewise denied assaulting her. Eventually, after separating Mr. Hammon from Mrs. Hammon, she admitted to one officer that her husband had thrown her to the ground and hit her.⁷⁶ She then filled out a battery affidavit.⁷⁷

The state charged Mr. Hammon with domestic battery. Mrs. Hammon was subpoenaed, but did not appear.⁷⁸ The prosecutor called the officer who took the statement to testify to its substance. The trial court determined that, under hearsay exceptions for present sense impression and excited utterance, the evidence was admissible.⁷⁹

The Supreme Court determined that these two statements were distinguishable under the Confrontation Clause and held that:

Statements are non-testimonial when made in the course of police interrogation *under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁸⁰

The Court gave three reasons why statements made during the 911 call in *Davis* are different from statements made to the police in *Hammon* or *Crawford*.⁸¹ First, while the *Davis* statements were made as the events were taking place, the *Hammon* and *Crawford* statements were made after the events in question.⁸² Second, the purpose of the 911 operator’s questions was to resolve the ongoing emergency, while the purpose of the

⁷¹ *Id.*

⁷² *Id.* at 819.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 819–20.

⁷⁷ *Id.* at 820.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 822 (emphasis added).

⁸¹ *Id.* at 827.

⁸² *Id.*

police officers' interrogation in both *Hammon* and *Crawford* was to investigate a past crime.⁸³ Finally, the respective formalities of the statements were different. The declarant in *Crawford* made her statement in a police station, responding calmly to direct police questions; the declarant in *Davis* was "frantic" and speaking from the scene of the alleged crime.⁸⁴ The Supreme Court concluded that the portions of the 911 transcript occurring prior to Davis fleeing the house were non-testimonial and admissible.⁸⁵ The affidavit and statements at issue in *Hammon* were testimonial and therefore inadmissible.⁸⁶

Much more recently, the Court has provided additional clarification of the "primary purpose" inquiry articulated in *Davis*.⁸⁷ In *Michigan v. Bryant*, the Court addressed the admissibility of a dying declaration by a shooting victim identifying the perpetrator.⁸⁸ The Court held that a shooting suspect at large constituted an ongoing emergency and that statements elicited in an attempt to respond to that emergency were admissible under *Crawford*.⁸⁹

B. TOOLS FOR TERRORISM PROSECUTIONS

Several years before the Court began to reevaluate the Confrontation Clause, Congress reevaluated and rearticulated the standards for gathering foreign intelligence. As we will see below, these changes implicate one another.

1. "Primary Purpose" in FISA

In October 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA).⁹⁰ Under FISA, the government is permitted to conduct surveillance and searches in pursuit of foreign intelligence material without showing the normal probable cause to believe a crime had been

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 828–29.

⁸⁶ *Id.* at 828–30. While the Court held that the 911 conversation was non-testimonial, it noted that this only applies to the part of the conversation that took place while the declarant was being attacked. The later part, after Davis left the house, was not addressed, but it was hinted that it could be considered testimonial. *Id.* at 828–29.

⁸⁷ *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

⁸⁸ *Id.* In analyzing the objective circumstances of the statements, the Court applied the underlying logic of the traditional hearsay rules. *Id.* at 1155.

⁸⁹ The Court's analysis focused on the objective circumstances of the questioning, including the formality of the interaction and the actions of the officers. *Id.* at 1160–61; *see also id.* at 1171 (Scalia, J., dissenting).

⁹⁰ Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. §§ 1801–85 (2006)).

committed.⁹¹ FISA was designed to fill the legal gaps left by Title III of the Omnibus Crime Control and Safe Streets Act of 1968.⁹² Both the Court and Congress had recognized the Executive Branch’s need to collect certain information in order to satisfy its constitutional duties.⁹³ Additionally, in certain contexts this power could be exercised without invoking the Warrant Clause of the Fourth Amendment.⁹⁴ Nevertheless, during the 1960s and 1970s, past abuses of executive power, specifically with regards to wiretapping and information gathering, prompted a reevaluation of permissible government surveillance activities.⁹⁵ FISA therefore set out the standards for collecting foreign intelligence both with and without a warrant.⁹⁶

FISA covers both electronic surveillance and physical searches.⁹⁷ Foreign intelligence information is that information which is:

- (1) Information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against (A) actual or potential attack or

⁹¹ RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 77 (2008), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf>.

⁹² See Cedric Logan, *The FISA Wall and Federal Investigations*, 4 N.Y.U. J.L. & LIBERTY 209, 219 (2009); Stephanie Cooper Blum, *What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 274 (2008). FISA warrant procedures provide an alternative to Title III when federal agents are conducting electronic surveillance to gather foreign intelligence. Logan, *supra*. Unlike Title III, which requires that agents identify the crime that has been or will be committed as well as the specific target of the surveillance, FISA requires that the target of surveillance be a foreign power and that the substance of the surveillance relate to the United State’s ability to protect against foreign aggression. *Id.* at 219–20.

⁹³ Omnibus Crime Control and Safe Streets Act Title III, 18 U.S.C. §§ 2510–22 (1968); *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 310 (1972).

⁹⁴ *Keith*, 407 U.S. at 303.

⁹⁵ The “Church Committee” (named after Chairman Sen. Frank Church) was established to “conduct an investigation and study of governmental operations with respect to intelligence activities and the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government.” CHURCH COMM. REPORTS, BOOK II INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at v (1976) (citing S. Res. 21, 94th Cong. § 1 (1975)). The report highlighted decades of abusive targeting of different social groups by law enforcement acting under the auspices of “intelligence gathering.” See *id.* at 8–10. The Church Committee and the Watergate scandal indicated that without regulation and oversight, this power had significant potential to be abused. See *id.* at 10.

⁹⁶ 50 U.S.C. § 1802 (2006) (authorizing electronic surveillance without a court order); § 1804 (defining the application process for court orders).

⁹⁷ *Id.* § 1802 (authorizing electronic surveillance); § 1822 (authorizing physical searches). Physical searches were not covered until 1994. See Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807, 108 Stat. 3423 (1994) (codified as amended in scattered sections of 10, 18, 50 U.S.C.).

other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) 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 the security of the United States; or (B) the conduct of the foreign affairs of the United States.⁹⁸

In order to conduct surveillance the Attorney General may⁹⁹ apply to the Foreign Intelligence Surveillance Court (FISC) for a warrant.¹⁰⁰ The court will grant an application if it finds there is probable cause to believe that the target is an agent of a foreign power and that a foreign power (or agent of a foreign power) controls the location at which the surveillance is to be conducted.¹⁰¹ The requirements for granting a FISA warrant are similar to but less rigorous than the standards under Title III.¹⁰² Whereas under Title III an applicant must show probable cause to believe that the surveillance will turn up evidence of a crime, under FISA the Government must only demonstrate probable cause that the subject of the surveillance is a foreign power or agent.¹⁰³

In addition to information about the subject of the surveillance, the Government is required to show how they will comply with minimization procedures in order to prevent the gathering, retention, or dissemination of

⁹⁸ 50 U.S.C. § 1801(e).

⁹⁹ The Attorney General is also authorized under FISA to conduct warrantless surveillance so long as it is directed at foreign powers. Section 102 of the Act provides that “[t]he President, through the Attorney General, may authorize electronic surveillance without a court order under this [subchapter] to acquire foreign intelligence information for periods of up to one year” Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 102, 92 Stat. 1783, 1786 (codified at 50 U.S.C. § 1802(a)(1) (2006)). The Attorney General must certify, however, (1) that the surveillance is solely directed at communication exclusively between or among foreign powers, and (2) that there is no “substantial likelihood” that the surveillance will intercept communications of United States citizens. 50 U.S.C. § 1802(a)(1)(A–B).

¹⁰⁰ An application must contain the following: (1) the identity of the target, (2) location where the surveillance is to be directed, (3) the type of communications sought to be acquired, and (4) the means by which the surveillance shall be conducted. 50 U.S.C. § 1804.

¹⁰¹ *Id.*

¹⁰² Blum, *supra* note 92, at 276.

¹⁰³ *Id.* Under the warrant provision of FISA, an agent of a foreign power can include a United States citizen, provided that the basis for determining the probable cause that the citizen is an agent of a foreign power is not based solely on activities protected by the First Amendment. 50 U.S.C. § 1804(a)(3)(A).

nonpublic information.¹⁰⁴ Determination of these minimization standards is left to the discretion of the Attorney General.¹⁰⁵

As originally articulated in the statute, the “purpose” of a FISA investigation had to be the collection of foreign intelligence.¹⁰⁶ If evidence of criminal wrongdoing was discovered, however, this could still be introduced at trial so long as the requirements of the FISA statute relating to the identity of the target and the minimization procedures were met.¹⁰⁷

Therefore, the scope of “purpose” was and still is significant. The exact meaning of the term, however, evolved from the 1980s through the early 2000s.¹⁰⁸ Prior to the passage of FISA, the Fourth Circuit had analyzed the issue of the use of foreign intelligence information in court and articulated a standard.¹⁰⁹ That court held in *United States v. Troung Dinh Hung* that the exclusionary rule does not apply where the primary purpose of an investigation is foreign intelligence gathering, and so information collected is admissible at a subsequent trial.¹¹⁰ The court dismissed the plaintiff’s argument that a sole purpose test should be adopted, as “almost all foreign intelligence investigations are in part criminal investigations.”¹¹¹ Adopting a sole purpose test would require the government to seek judicial warrants whenever it undertook foreign intelligence surveillance.¹¹² This

¹⁰⁴ Procedures must minimize use of “nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information” 50 U.S.C. §§ 1801(h)(1), 1806(a). The minimization procedures also must articulate how information can be shared between federal agents and agencies. *Id.* § 1806.

¹⁰⁵ *Id.* §§ 1801(h), 1802(a)(1)(C). Until 1995, the minimization standards were the “standard minimization procedures” generally utilized by the government when conducting electronic surveillance. *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 619 (FISA Ct. 2002). Pursuant to these standards, after the information has been collected and processed into an intelligible form, a reviewing official makes a determination as to whether the information is, or “might be,” foreign intelligence. Information would only be “minimized” or discarded if it “could not be” foreign intelligence. *Id.* at 618. If it satisfied this very general standard it was logged and stored so as to allow later recovery and further analysis. *Id.*

¹⁰⁶ 50 U.S.C. § 1804(a)(7)(B).

¹⁰⁷ *See generally id.* § 1806(a–e).

¹⁰⁸ Diane Carraway Piette & Jesselyn Radack, *Piercing the “Historical Mists”: The People and Events Behind the Passage of FISA and the Creation of the “Wall,”* 17 STAN. L. & POL’Y REV. 437, 452–53 (2006).

¹⁰⁹ *United States v. Troung Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).

¹¹⁰ *Id.* at 915; *see also Herring v. United States*, 129 S. Ct. 695, 699 (2009) (explaining the exclusionary rule).

¹¹¹ *Truong*, 629 F.2d at 915.

¹¹² *Id.* at 916.

fails to acknowledge the government's legitimate interest in conducting this type of surveillance.¹¹³

After FISA, other federal courts applied the holding in *Truong* to the new statute, and determined that the primary purpose of the investigation needed to be intelligence gathering.¹¹⁴ In denying a defendant's motion to suppress evidence collected through a FISA warrant, the District Court for the Eastern District of New York cited *Truong* and stated "surveillance under FISA is appropriate only if foreign intelligence surveillance is the Government's primary purpose."¹¹⁵ In addition to the Second and Fourth Circuits, other courts from around the country weighed in on this issue and determined that, pursuant to *Truong*, "purpose" as articulated in FISA should be interpreted to mean "primary purpose."¹¹⁶

While not addressed by the Supreme Court, this standard was adopted by the Justice Department (DOJ).¹¹⁷ Under its FISA mandate to "minimize" misuse of information, DOJ regulated contact between its Criminal Division and the FBI to ensure that the "primary purpose" of its FISA warrants was not compromised.¹¹⁸ The official line, articulated in the 1995 Protocols, was that when facts collected under FISA "reasonably indicate that a significant federal crime has been, is being, or will be committed," the Office of Intelligence Policy and Review (OIPR), in conjunction with the FBI, can notify the Criminal Division.¹¹⁹ Otherwise operations are kept separate. In practice, these protocols built a "wall" between the various departments as the specific requirements attached to

¹¹³ *Id.*

¹¹⁴ *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (holding that primary purpose applies to FISA); *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (same); see also *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988) (acknowledging the test but not deciding on its applicability).

¹¹⁵ *United States v. Megahey*, 553 F. Supp. 1180, 1189–90 (E.D.N.Y. 1982).

¹¹⁶ *Johnson*, 952 F.2d, at 572 (First Circuit holding that primary purpose applies to FISA); see also *Sarkissian*, 841 F.2d at 964 (Ninth Circuit acknowledging the primary purpose test).

¹¹⁷ Richard Scruggs, head of the Office of Intelligence Policy and Review (OIPR) in 1993, believed that the primary purpose standard was controlling on FISA. Piette & Radack, *supra* note 108, at 471–72. This position was first articulated in a memo by Assistant Attorney General Jamie Gorelick. Letter from Jamie S. Gorelick, Deputy Attorney General, to Mary Jo White, U.S. Attorney, S. Dist. of N.Y., et al. (1995), available at http://old.nationalreview.com/document/document_1995_gorelick_memo.pdf [hereinafter Gorelick Memo]. In July 1995, the procedures suggested by Scruggs and Gorelick came into effect. Memorandum from Janet Reno, Attorney General of the United States (July 19, 1995), available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html> [hereinafter 1995 Protocols].

¹¹⁸ 1995 Protocols, *supra* note 117, at (A)1–2.

¹¹⁹ *Id.* at A(1).

information transfer became so complex that sharing during the late 1990s simply was not done.¹²⁰

The guidelines adopted in 1995 assured that “FISA information could almost never be shared with criminal investigators.”¹²¹ Adopting the primary purpose standard encouraged thinking critically about the involvement of criminal investigators in FISA investigations, but erecting a wall was, in hindsight, an overreaction. The consequence of this overreaction became clear in September 2001.

Following the September 11 attacks, the government tried to determine what failures or oversights prevented the plot from being uncovered and the perpetrators stopped.¹²² Soon it became clear that restrictions on information sharing imposed within the DOJ had seriously hindered the ability of the government to track and respond to the threat.¹²³ In October 2001, Congress passed the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act).¹²⁴ This collection of legislation covered a wide array of areas: it increased the emergency surveillance period from twenty-four to seventy-two hours, expanded the use of electronic and physical searches, and extended surveillance periods from 90 to 120 days.¹²⁵

Arguably the most significant change brought about by the PATRIOT Act, however, was the addition of a single word to 50 U.S.C. § 1804. This statute governed applications for warrants from the FISC.¹²⁶ The PATRIOT Act added the word “significant” immediately before the word “purpose.”¹²⁷ In doing so, Congress effectively knocked out the foundation of the wall that had been built within the DOJ.¹²⁸ The courts could now

¹²⁰ Blum, *supra* note 92, at 281. This does not mean it was impossible. Some contact continued: information gathered under a FISA warrant could pass between the FBI and the Criminal Division if it was determined to relate to a “significant federal crime.” 1995 Protocols, *supra* note 117, at A(1). The Criminal Division could also provide “advice” in intelligence operations to better preserve the option of later criminal prosecution. *Id.* at A(6).

¹²¹ Blum, *supra* note 92, at 281 (quoting JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 81 (2006)).

¹²² See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

¹²³ *Id.*

¹²⁴ Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S.C.).

¹²⁵ Blum, *supra* note 92, at 280.

¹²⁶ 50 U.S.C. § 1804(a)(6)(B) (2006); Blum, *supra* note 92, at 281–82; see also William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1267 (2007).

¹²⁷ § 218, 115 Stat. at 291.

¹²⁸ *Id.*

issue FISA warrants in investigations where the primary purpose was not foreign intelligence gathering.¹²⁹ Requiring only that intelligence gathering be a “significant purpose” implies that agents can use FISA’s secret and more permissive procedures when their primary purpose was to gather evidence for criminal prosecution.¹³⁰

By early 2002, Attorney General John Ashcroft had revoked Reno’s 1995 procedures and instituted a new set of minimization procedures.¹³¹ According to Ashcroft, “[t]he USA Patriot Act allows FISA to be used for ‘a significant purpose,’ rather than the primary purpose, of obtaining foreign intelligence information.”¹³² Thus, it allows FISA to be used primarily for a law enforcement purpose, as long as a significant foreign intelligence purpose remains.¹³³ These 2002 Protocols stated that “[t]he Criminal Division and OIPR shall have access to all information developed in full field [Foreign Intelligence (FI)] and [Foreign Counterintelligence (FCI)] investigations.”¹³⁴ In general “[t]he FBI, the Criminal Division, and OIPR shall consult with one another concerning full field FI and FCI investigations” and “[t]he FBI, the Criminal Division, and OIPR shall meet regularly to conduct consultations.”¹³⁵ Criminal prosecution and foreign intelligence gathering were melded under the amended FISA, which allowed prosecutors to take advantage of the more deferential warrant standards when conducting investigations.¹³⁶

The FISA Review Court upheld Ashcroft’s protocols and the significant purpose standard later that year.¹³⁷ That court held that the significant purpose test satisfies the requirements of the Fourth Amendment.¹³⁸ In its decision, the court specifically stated that under this new standard, the primary purpose of the relevant investigation could be criminal prosecution.¹³⁹

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Memorandum from John Ashcroft, Attorney General of the United States (Mar. 6, 2002), available at <http://www.fas.org/irp/agency/doj/fisa/ag030602.html> [hereinafter 2002 Protocols].

¹³² *Id.*

¹³³ *Id.* (citing 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2000)).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Blum, *supra* note 92, at 282–83.

¹³⁷ *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

¹³⁸ *Id.* at 737.

¹³⁹ *Id.* at 735 (holding the intelligence interest must only be “measurable”).

While other federal courts are split,¹⁴⁰ if the significant purpose test is ultimately upheld by the Supreme Court,¹⁴¹ there will be profound consequences for criminal prosecutions utilizing FISA evidence. Most pressing for terrorism prosecution is that while the significant purpose test makes it easier for the government to collect information, it may simultaneously make it more difficult to later introduce this evidence at trial.

2. CIPA and “Classified” Evidence

In addition to providing alternative means for gathering foreign intelligence information, the federal government has created alternative means for introducing that evidence at trial.¹⁴² The challenge is that the same government interests that motivate a separate standard for gathering information under FISA also compel the government to keep collected information secret. The struggle over how and when to allow defendants access to classified information is not a new problem, and Congress has already provided the government an alternative to producing classified evidence at trial.¹⁴³

Historically, prosecutors were often put in a difficult position when a court determined that classified information needed to be disclosed. Generally, they had only two options: either disclose the information or dismiss the case.¹⁴⁴ This led to a practice called “graymail” where

¹⁴⁰ *United States v. Stewart*, 590 F.3d 92, 128 (2d Cir. 2009) (acknowledging the significant purpose test accepted by the FISA Review Court, but declining to consider the constitutionality in the immediate case); *United States v. Hammoud*, 381 F.3d 316, 333 n.6 (4th Cir. 2004) (acknowledging the new standard but applying the pre-PATRIOT Act standard); *United States v. Warsame*, 547 F. Supp. 2d 982, 996–97 (D. Minn. 2008) (expressing concern with the constitutionality of the significant purpose test); *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1041 (D. Or. 2007) (declining to adopt FISA Review Court’s logic). *But cf.* *United States v. Ning Wen*, 477 F.3d 896, 897 (7th Cir. 2006) (holding that “significant purpose” does not offend the Fourth Amendment); *United States v. Abu-Jihaad*, 531 F. Supp. 2d 299, 308 n.9 (D. Conn. 2008) (adopting the significant purpose test); *In re Directives Pursuant to Section 105B of FISA*, 551 F.3d 1004, 1011 (FISA Ct. Rev. 2008) (reiterating the court’s previous holding in favor of significant purpose).

¹⁴¹ Upholding the significant purpose test would be consistent with the Court’s recent decisions adopting ever-larger exceptions to the Fourth Amendment. *See Herring v. United States*, 555 U.S. 135 (2009) (holding that the Fourth Amendment exclusionary rule did not apply to police recordkeeping mistakes); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“[Exclusion] has always been our last resort, not our first impulse.”); *Arizona v. Evans*, 514 U.S. 1, 11–12 (1995) (articulating the good faith exception to the Fourth Amendment exclusionary rule).

¹⁴² *See infra* note 152.

¹⁴³ *See* 18 U.S.C. app. 3, § 6 (2006).

¹⁴⁴ *McEvoy, supra* note 16, at 405.

defendants would request classified information, on the hope that the court would grant their request and the prosecution would decide to drop the case.¹⁴⁵

In 1980, Congress passed the Classified Information Procedures Act (CIPA).¹⁴⁶ In essence, CIPA increased the relevance threshold that defendants must meet in order to introduce classified information.¹⁴⁷ Unlike regular evidence, which must simply be relevant, CIPA requires classified information to be highly relevant or material.¹⁴⁸

Either party may initiate CIPA proceedings before trial.¹⁴⁹ If the defense wants to introduce classified information, the prosecutor may challenge this by filing a motion with the judge.¹⁵⁰ The motion itself remains confidential, and the judge must decide if the information is discoverable.¹⁵¹ If she does, however, the prosecution must produce either the evidence requested or an adequate substitute.¹⁵² Pursuant to CIPA, prosecutors may provide defendants affidavits summarizing classified information in lieu of those defendants subpoenaing actual testimony.¹⁵³ The adequacy of substitute information is dependent upon the facts of the case.¹⁵⁴

The Fourth Circuit debated the precise nature of an adequate substitute in *United States v. Moussaoui*.¹⁵⁵ Zacarias Moussaoui was arrested in 2001 for immigration violations, but six additional charges were later added

¹⁴⁵ *Id.*

¹⁴⁶ Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. 3 (2006)).

¹⁴⁷ McEvoy, *supra* note 16, at 400–01; *see also* 18 U.S.C. app. 3 § 6.

¹⁴⁸ McEvoy, *supra* note 16, at 400–01. Defendants must also alert the prosecution as to any classified information they intend to introduce at trial. *Id.*

¹⁴⁹ *Id.* at 406.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 406–07 (stating that the defendant is not entitled to view the motion).

¹⁵² 18 U.S.C. § 6(c) provides:

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or (B) the substitution for such classified information of a summary of the specific classified information.

¹⁵³ *Id.*

¹⁵⁴ *See* *United States v. Fernandez*, 913 F.2d 148, 157–58 (4th Cir. 1990) (affirming the trial court’s rejection of proposed substitutions that failed to inform the jury of facts deemed essential to the defendant’s argument). A defendant has more than a basic right to present evidence material to his defense; substituted information must go beyond the bare facts of the case and allow the jury to understand the relevant context in which those facts are situated. *Id.* at 158.

¹⁵⁵ 382 F.3d 453 (4th Cir. 2004), *aff’d on reh’g* 365 F.3d 292 (4th Cir. 2004).

relating to his purported involvement in the September 11 attacks.¹⁵⁶ At trial, Moussaoui sought to introduce the testimony of individuals being held at Guantanamo Bay.¹⁵⁷ The trial court determined that substituted evidence must not “materially disadvantage the defendant.”¹⁵⁸ The trial court denied Moussaoui’s request for classified documents, but allowed him to depose inmates of Guantanamo Bay.¹⁵⁹

The Fourth Circuit held that classified exculpatory evidence could be introduced through the CIPA summary substitution procedure but that inculpatory evidence could not.¹⁶⁰ The prosecutor challenged this on the basis of completeness.¹⁶¹ He argued that drawing a stark line between inculpatory and exculpatory statements in such an affidavit would strip it of its usefulness; lacking context, the information summarized therein would lack probative value for the jury.¹⁶² The Fourth Circuit allowed the inclusion of inculpatory information, provided the Government did not use this “as a means of seeking the admission of inculpatory statements that neither explain nor clarify the statements designated by Moussaoui.”¹⁶³

While *Moussaoui* addressed a number of important issues, many still remain. The case did not address the question of how CIPA could be used when the prosecution sought to introduce evidence in its case-in-chief.¹⁶⁴ Additionally, the witnesses in the *Moussaoui* case were already in United States custody.¹⁶⁵ The costs to the Executive would be higher if a defendant had to be given access to individual Government witnesses who were not in custody or not in the United States.¹⁶⁶ Both issues would be relevant should FISA material be challenged on a *Crawford* basis.

Future trials of terrorism suspects will inevitably involve classified information and the desire to protect such information has been a central preoccupation of the government in resisting civil trials.¹⁶⁷

¹⁵⁶ *Moussaoui*, 382 F.3d at 457.

¹⁵⁷ *Id.* at 458.

¹⁵⁸ *Id.* at 477.

¹⁵⁹ *Id.* at 476.

¹⁶⁰ *Id.* at 482.

¹⁶¹ *Id.* at 481. The Federal Rules of Evidence state: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” FED. R. EVID. 106.

¹⁶² *Moussaoui*, 382 F.3d at 481.

¹⁶³ *Id.* at 482.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 465.

¹⁶⁶ *See* Friedman, *supra* note 31, at 574.

¹⁶⁷ *See* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV.

III. “CONFRONTING” FOREIGN INTELLIGENCE

Davis and *Crawford* provided a rough outline of the Court’s current reasoning with respect to the Confrontation Clause. The standard for determining what evidence is excluded by the Clause raises potential problems, however, for prosecutors—specifically in the area of foreign intelligence.

A. FISA, CIPA, AND APPLYING THE NEW CONFRONTATION CLAUSE

Both FISA and *Davis* couch their respective analyses in the context of intent of the government agent in collecting information.¹⁶⁸ When that intention is criminal prosecution, however, the exclusionary consequences of *Davis* implicate the admissibility of evidence collected pursuant to FISA and presented under CIPA.

The first question is whether foreign intelligence information can be considered “testimonial.” To answer this, one must have a clear definition of “testimony.” As was noted above, the Court has been vague in its description of the standard, particularly given the attack it leveled against *Roberts*. The Court tells us, however, that a statement made to police during an interrogation is clearly testimonial because the objective declarant would understand that this statement would be used at trial.¹⁶⁹ According to the Court, such accusations are precisely the type of evidence the Framers feared based upon a historical record of executive misuse of such statements.¹⁷⁰ The evidence in *Crawford* is of a type that falls within the core or “nucleus” of the Clause.¹⁷¹ The objective circumstances of the interrogation made it apparent to the declarant that her statements could be used at trial.¹⁷² But while government interrogations may be the “easy case” under this new standard, they are clearly not the only situation in which “testimonial” evidence may be generated.

1407, 1413–14 (quoting Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 at § 1(f) (Nov. 16, 2001)) (“[I]t is not practicable to apply . . . the principles of law and [the] rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”); see also Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT’L L.J. 135, 150 (2008) (stating that the entire trial process under the Bush Administration was tainted by politics).

¹⁶⁸ See *supra* Part II.

¹⁶⁹ *Crawford v. Washington*, 541 U.S. 36, 52–53 (2004).

¹⁷⁰ *Id.* at 47–50.

¹⁷¹ *Id.* at 51–52.

¹⁷² The declarant in this case was under arrest at the time she gave her statement, and had been given a *Miranda* warning. *Id.* at 38. She was under actual (rather than constructive) notice, therefore, that her statements could be used later at trial.

When required to elaborate beyond this core class of statements, the Court shifted the focus of its analysis from one that exclusively addressed the intent of the declarant¹⁷³ to one that considered more objective factors.¹⁷⁴ Specifically, the Court looked at the purpose of the government questioning.¹⁷⁵ Unlike *Crawford*, where the interrogation was removed both geographically and temporally from the events at issue, the statements at issue in *Davis* were made in the context of “ongoing emergencies.”¹⁷⁶ The Court was forced to recognize that the police gather information from the public for more reasons than simply prosecuting criminals.¹⁷⁷ Under ongoing emergency circumstances, statements elicited by the police would not be testimonial because they were not made to “establish or prove some past fact, but to describe current circumstances requiring police assistance.”¹⁷⁸ Therefore, depending upon the surrounding circumstances, the intentions of both the individuals making the statements and the officers collecting them may change. Depending upon the extent of that change, the Confrontation Clause implications of the statements may fluctuate as well. Both are therefore relevant.

In explaining its position, the *Davis* Court highlighted three factors which distinguish statements made to a 911 operator during an ongoing emergency with those made to police officers conducting an interview: (1) the time period in which the statement was made,¹⁷⁹ (2) the purpose of the questioning,¹⁸⁰ and (3) the formality of the statement.¹⁸¹ Interestingly, wedged in between the two objective factors evidencing the physical context in which the statement was made, the Court introduced to the analysis the subjective intent of the officer. Depending upon the purpose of the officers, the statements or information they elicit may or may not

¹⁷³ *Id.* at 51 (defining testimony as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact”) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

¹⁷⁴ *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“[Statements] are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 822, 827.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 827 (internal quotations omitted).

¹⁷⁹ Specifically: was the statement contemporaneous to the events it describes? *Id.*

¹⁸⁰ The Court asks rhetorically whether objectively the situation was an ongoing emergency and whether the purpose motivating the officers to elicit the statement was resolution of that emergency. *Id.*

¹⁸¹ *Id.* The statement at issue in *Crawford* was made “calmly,” “at the station house,” and was taped. *Id.* The statement in *Davis* was frantic, on the phone, and in “an environment that was not tranquil.” *Id.*

qualify as “testimony.”¹⁸² And in describing an officer’s intent, sufficient to implicate the “testimonial evidence” standard, the Court specifically refers to “primary purpose.”¹⁸³

Therefore, under *Crawford* and its progeny, the intent of both the government and the declarant are relevant to the testimonial analysis.¹⁸⁴ Granted, intent is not the only factor, and the way in which all the relevant factors interact has not been conclusively shown. In the “simple cases” of direct police interrogation, the officer’s intention makes the consequences of the statement obvious to the declarant: officer intention is clear and a reasonable adult will know that the statements they make might be used against a defendant at trial. Alternatively, in certain “non-core” situations, officer intent may nevertheless be determinative.

While the Court in *Davis* clearly endorsed an objective, intent-of-the-investigation inquiry to determine the “primary purpose” of the government agent’s behavior, some federal and state courts have disregarded this and focused only on the more objective factors: context and formality.¹⁸⁵ Specifically, several circuits have also looked at the issue of how wiretap evidence fits into the new scheme.¹⁸⁶ One decision, a year after *Crawford*, indicated that certain statements captured via wiretap do not constitute testimonial evidence.¹⁸⁷ The Third Circuit in *United States v. Hendricks* held that statements recorded on a wiretap between co-conspirators were not “testimony” because they failed the “formality” test discussed in *Crawford*.¹⁸⁸ While this holding came before the decision in *Davis*, later

¹⁸² *Id.* at 822; *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011) (“In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.”).

¹⁸³ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

¹⁸⁴ See *Crawford v. Washington*, 541 U.S. 36, 51 (2004); Pilar G. Kraman, *Divining the U.S. Supreme Court’s Intent: Applying Crawford and Davis to Multipurpose Interrogations by Non-Law Enforcement Personnel*, 23 CRIM. JUST. 30, 33 (2009) (“In *Crawford*, the Supreme Court focused on the objective view of the declarant; and in *Davis* the Court created the so-called primary purpose test that focused on the interrogator.”); see also *Davis*, 547 U.S. at 822.

¹⁸⁵ See generally *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) (“The proper inquiry . . . is whether the declarant intends to bear testimony against the accused.”).

¹⁸⁶ See, e.g., *United States v. Emmanuel*, 565 F.3d 1324, 1333 (11th Cir. 2009) (holding that written approval of a wiretap authorization was admissible under *Crawford*); *United States v. Faulkner*, 439 F.3d 1221, 1226 (10th Cir. 2006) (holding that a wiretapped discussion between co-conspirators was not excluded under *Crawford*); *United States v. Hendricks*, 395 F.3d 173, 183–84 (3d Cir. 2005) (holding that co-conspirator statements from a wiretap were admissible under *Roberts* and *Crawford*).

¹⁸⁷ *Hendricks*, 395 F.3d at 183–84.

¹⁸⁸ See *id.* at 181. A witness “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

courts also focused on the “formality” element when evaluating the admissibility of recorded statements between co-conspirators.¹⁸⁹

There is reason, however, to believe that the formality element is not the whole story.¹⁹⁰ Like in *Crawford*, the holding in *Davis* focused on interrogations. The Court indicated, however, that the scope of the new test might incorporate statements generated in other circumstances as well:

Our holding refers to interrogations because . . . the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.¹⁹¹

Specifically responding to the attempt by Justice Thomas in his concurring opinion to classify testimonial evidence based upon formality, the Court questioned whether such a test is “workable.”¹⁹²

The Court in *Melendez-Diaz v. Massachusetts* drew on this dicta and held that formal interrogation (or any government questioning whatsoever) is not required under the Confrontation Clause to produce testimony. In *Melendez-Diaz*, the Court analyzed a challenge to a chemical analysis report and affidavit completed by a lab technician in a narcotics case.¹⁹³ When arresting the defendant, police discovered several small plastic bags containing a fine white power.¹⁹⁴ The powder was submitted to the

not.” *Crawford*, 541 U.S. at 51. The Title III recordings here at issue are much more similar to the latter than the former.

¹⁸⁹ *United States v. Valle-Martinez*, 336 F. App’x 720, 724 (9th Cir. 2009) (“[A] question posed by the other speaker was not ‘testimonial.’”); *United States v. Fleming*, F. App’x 150, 154 (3d Cir. 2008) (determining that video tapes of defendant meeting with confidential informant did not qualify as testimonial because they were not “solemn declarations”); *United States v. Davis*, 270 F. App’x 236, 248 n.9 (4th Cir. 2008) (noting that statements by a confidential informant on a wiretap, not introduced for truth of the matter asserted, were non-testimonial); *see also* *United States v. Emmanuel* 565 F.3d 1324, 1333 (11th Cir. 2009) (holding that a *Crawford* challenge to wiretap authorization was not preserved for trial).

¹⁹⁰ *Friedman*, *supra* note 31, at 567 (“A statement is not rendered non-testimonial by the absence of formalities A rule that only formal statements will be characterized as testimonial is . . . theoretically backwards.”).

¹⁹¹ *Davis v. Washington*, 547 U.S. 813, 822–23 n.1 (2006). In addition, the majority opinion casts doubt on the position that “formality” and “solemn” declaration are interchangeable. *Id.* at 830–31 n.5.

¹⁹² *Id.* at 830–31 n.5. (“The dissent, in attempting to formulate an exhaustive classification of its own, has not provided anything that deserves the description ‘workable’—unless one thinks that the distinction between ‘formal’ and ‘informal’ statements . . . qualifies.”).

¹⁹³ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

¹⁹⁴ *Id.* at 2530.

Massachusetts state crime laboratory for analysis.¹⁹⁵ The tests determined the substance was cocaine.¹⁹⁶ The technician who performed the tests did not testify at trial, but did provide a “certificate of analysis” describing the weight of the bags, the tests performed and the results.¹⁹⁷ The defendant was found guilty.¹⁹⁸ The Supreme Court, however, reversed the verdict, holding that such reports are inadmissible.¹⁹⁹

The certificate at issue in that case was prepared specifically for use at the petitioner’s trial. This type of government-prepared evidence is analogous to the statement of Lord Cobham introduced against Sir. Walter Raleigh.²⁰⁰ For the same reasons the Court highlights in *Crawford*, the certificate is inadmissible under the Confrontation Clause.²⁰¹ This case, however, did not fully resolve the distinction between the subjective intent of the declarant and the objective intent of the interrogation.

The utility of focusing too much on objective factors indicating declarant intent breaks down, however, if the declarant cannot be reasonably expected to understand how those factors impact the consequences of their statements. For example, this problem is obvious in the context of child witnesses.²⁰² The Supreme Court of Oregon held in *State v. Mack* that the statements made by a three-year-old witness about alleged sexual abuse fell within the core class of testimonial hearsay excluded under *Crawford*.²⁰³ In determining that the statements were testimonial, however, the court did not evaluate them based upon declarant intent.²⁰⁴ A declarant-centric test would result in admission of evidence that “would offend” *Crawford*’s rigid standards.²⁰⁵ In this case, rather, the testimony was deemed testimonial as the child’s statements were elicited by a caseworker *at the behest of police officers*.²⁰⁶ The officers’ intent, not the declarant’s, was determinative. Oregon is not alone; other states have

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2531.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2532.

²⁰⁰ *Id.* at 2535.

²⁰¹ *Id.*

²⁰² Kraman, *supra* note 184, at 32 (noting that various state courts do not look at declarant intent in the context of children and that this result makes sense if the primary purpose of the interrogation is to collect evidence for trial).

²⁰³ 101 P.3d 349, 352 (Or. 2004).

²⁰⁴ *Id.*

²⁰⁵ Kraman, *supra* note 184.

²⁰⁶ *Mack*, 101 P.3d at 353.

followed suit by utilizing an analysis that evaluates the subjective intent of the investigators, not only the subjective awareness of the declarant.²⁰⁷

Assuming that objective factors like formality are not determinative in judging “testimonial” evidence, the CIPA and the 2002 Protocols for FISA may raise significant confrontation problems.

A showing of primary purpose is the thread that connects the Fourth and Sixth Amendments in this case. In both Supreme Court Confrontation Clause cases after *Crawford*, the Court articulated the Clause’s overarching aim of excluding ex parte testimonial evidence generated by the government.²⁰⁸ The Court takes the position that the testimonial standard has a broad reach.²⁰⁹ By inquiring into the officers’ intention in eliciting statements in *Davis*, the Court opened the testimonial standard to encompass both freely given, and possibly surreptitiously recorded, statements.²¹⁰ The holdings in both *Davis* and *Crawford* only address actual police interrogation. Advances in technology since the trial of Walter Raleigh have made the government less dependent upon the interrogations of witnesses, but the danger of government abuse remains the same. There is no apparent reason why evidence collected through wiretaps or physical searches could not be deemed testimonial if it satisfies the *Crawford* and *Davis* criteria.²¹¹

Let us therefore turn to the statutes themselves. The Court in *Davis* indicated that the primary purpose of an interrogation was relevant in deciding whether a statement was testimonial.²¹² If that purpose is criminal prosecution, the statement may be found testimonial, and therefore barred.²¹³ FISA has become a powerful law enforcement tool, and one in which the government has shown great interest.²¹⁴ Under the more lax

²⁰⁷ See *People v. Stechly*, 870 N.E.2d 333, 357 (Ill. 2007); *People v. Cage*, 155 P.3d 205, 216 (Cal. 2007), *cert. denied*, 552 U.S. 1023 (2007); *People v. Vigil*, 127 P.3d 916, 924–26 (Colo. 2006).

²⁰⁸ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009); *Davis v. Washington*, 547 U.S. 813, 828 (2006).

²⁰⁹ *Melendez-Diaz*, 129 S. Ct. at 2532.

²¹⁰ See *Davis*, 547 U.S. at 822.

²¹¹ Justice Scalia specifically notes in *Davis* that statements made in the absence of interrogation can be testimonial and therefore excluded under the Confrontation Clause. *Id.* at 822–23 n.1.

²¹² *Davis*, 547 U.S. at 822 (holding that when the circumstances indicate that the primary purpose of government action is to establish or prove past events potentially relevant to future prosecution, the statements made are testimonial); see also *Stechly*, 870 N.E.2d at 359 (noting the *Davis* Court’s focus on the intent of the police-questioner).

²¹³ *Davis*, 547 U.S. at 822.

²¹⁴ Since 2002, the number of FISA applications has almost doubled. In 2002, the government applied for, and was granted, 1228 FISA warrants. In 2007 the government applied for 2371 and received 2370. This is a 93% increase. Electronic Privacy Information

standards for FISA warrants in the wake of September 11, the FBI may utilize FISA in instances where criminal prosecution is the primary purpose of the investigation, so long as foreign intelligence gathering is a significant purpose.²¹⁵ Given the DOJ's new protocols, involvement by prosecutors is encouraged during FISA investigations.²¹⁶

It should be noted that both the Supreme Court and the lower courts have said the testimonial standard does not reach statements made in the furtherance of a conspiracy.²¹⁷ This would seem to carve out a chunk of the information collected through FISA wiretaps. But it does not exempt wiretaps in general. If the Court is serious about tying the Confrontation Clause to its seventeenth-century common law roots, a blanket prohibition on all wiretap evidence seems unlikely. Even though the Court bases its definition on the common law understanding of testimony growing out of the Raleigh trial, logical consistency demands at least some attention be paid to the advances of technology in the last two hundred and fifty years. As Justice Brandeis pointed out in *Olmstead*, technology provides the government with means of gathering information more subtle than direct interrogation.²¹⁸ In Raleigh's day, collecting evidence was largely limited to face-to-face statements.²¹⁹ Now the government has far more subtle means of gathering information about its citizenry.

The Court itself has hinted at this more expansive reading. In *Crawford*, the majority took issue with Chief Justice Rehnquist's concurrence, which attempted to insulate existing hearsay exceptions such as the co-conspirator exception, from augmentation. Justice Scalia notes:

Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.²²⁰

Whether an accusatory statement is made to a police officer or to another person on a tapped phone line, the result is the same: the

Center, Foreign Intelligence Surveillance Act Court Orders 1879–2009, (Sept. 29, 2010), http://epic.org/privacy/wiretap/stats/fisa_stats.html.

²¹⁵ See 50 U.S.C. §§ 1804(a)(6)(B), 1823(a)(6)(B) (2006).

²¹⁶ 2002 Protocols, *supra* note 131.

²¹⁷ *Crawford v. Washington*, 541 U.S. 36, 56 (2004).

²¹⁸ *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

²¹⁹ Intelligence gathering was limited to eavesdropping, which at the time literally meant standing outside a home and listening. 5 OXFORD ENGLISH DICTIONARY 45 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining eavesdrop: “To stand within the ‘eavesdrop’ of a house in order to listen to secrets.”).

²²⁰ *Crawford*, 547 U.S. at 56 n.7; see also *id.* at 73 (Rehnquist, C.J., concurring).

government has collected information, useful for subsequent prosecution, to which it otherwise would not be privy. Given this, it seems apparent that the purpose of a wiretap is relevant to the issue of whether the statements gathered through its use are admissible under *Davis* and *Crawford*. Unfortunately, under this new testimonial standard, this evidence would be excluded regardless of its reliability.

Like evidence generated through FISA warrants, evidence introduced through CIPA procedures may be barred under the Confrontation Clause. In *Melendez-Diaz*, the Court held that lab reports were barred under *Crawford*.²²¹ In the foreign intelligence context, the most analogous document to the lab reports excluded in *Melendez-Diaz* is the substitute evidence provided by the government under CIPA. In that context, the Court extended the bounds of excluded testimonial evidence past mere perception witnesses.²²² By crossing this barrier, the Court nullified many of the policy arguments that might support an exception for CIPA. The voluntariness of a CIPA substitution, the relative contemporaneous nature of its recording, and the fact that it does not (itself) make a direct criminal accusation, are all irrelevant to the determination of its admissibility.²²³ Moreover, under the historic examples of governmental abuses drawn by the Court in its prior holdings, the affidavits at issue in *Melendez-Diaz* were significantly more innocuous than substitute evidence under CIPA,²²⁴ and arguably more damning than wiretap information gleaned from FISA warrants.

B. THE COSTS OF CONFRONTATION

The federal government has significant powers to prosecute international terrorism, and in the past decade it has had cause for exercising those powers.²²⁵ Should *Crawford*'s testimonial exclusion apply

²²¹ See *infra* section III.B.1.

²²² *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2534 (2009) (holding that it does not matter if the statement is not “conventional” or of a type typically considered by the Court in the context of Confrontation).

²²³ See *id.*

²²⁴ *Crawford*, 541 U.S. at 52 (stating *ex parte* examination of the sort used at Raleigh’s trial have “long been thought a paradigmatic confrontation violation.”).

²²⁵ Under federal law, individuals can be prosecuted for terrorist acts committed both on United States soil as well as abroad. Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventative Detention Debate*, 50 S. TEX. L. REV. 669, 677–78 (2009) (citing 18 U.S.C. § 2332b(a), (c) (2006)). The federal government can charge an individual for murder of a U.S. national committed on U.S. soil upon issuance of a certificate by the Attorney General. 18 U.S.C. § 2332(d) (2006). This presents the problem of trying cases where the scene of the crime and witnesses might be located thousands of miles away from the courthouse.

to evidence either collected under FISA's warrants or introduced through CIPA, however, the result would complicate the already challenging task facing federal prosecutors.²²⁶ Excluding evidence gathered under FISA's new permissive standard would mitigate some of the risks associated with allowing criminal investigation under the aegis of intelligence gathering.²²⁷ In the context of domestic prosecutions, the benefits of such exclusion might outweigh the cost. On the other hand, the exclusion of evidence collected under FISA warrants in terrorism trials would be more problematic. Additionally, finding CIPA's substitution procedures unconstitutional would disrupt a necessary, if imperfect, legislative balancing act. In context of both statutes, the complexity and importance of the competing interests demands a legislative solution that weighs the demands of the parties. Unfortunately, the Supreme Court addressed the question of when *Crawford* takes governmental interests into consideration in its new standard last spring. The answer was a resounding "never."

I. Melendez-Diaz: Costs Begin to Come into Focus

The Court in both *Davis* and *Crawford* implies that its new rule is less complex and open to interpretation than the prior reasonableness standard. By imposing a "wooden" standard,²²⁸ the Court has attempted to clamp down on inappropriate judicial judgment calls.²²⁹ Yet even with this standard, the analysis the lower courts must undertake is no less opaque. And the resultant uncertainty imposes costs on both defendants and prosecutors.²³⁰ Unlike *Roberts*, where the parties shared the burden of uncertainties, here challenges posed by the practical applications of *Crawford* seem directed exclusively at prosecutors.²³¹

Since the *Crawford* decision came down in 2004, legal scholars have attempted to draw attention to the potential costs this new standard would

²²⁶ See S. REP. NO. 96-823, at 2 (1980).

²²⁷ It certainly would not fix all the problems, however.

²²⁸ *Melendez-Diaz*, 129 S. Ct. at 2544 (Kennedy, J., dissenting).

²²⁹ *Crawford*, 541 U.S. at 61 ("[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'").

²³⁰ *Melendez-Diaz*, 129 S. Ct. at 2545. Writing after the *Davis* opinion came down, Richard Friedman predicts the possibility that as a consequence of the Court's primary purpose language, the new standard may only impose costs on the prosecution. Friedman, *supra* note 31, at 574-75 (noting that there are situations where a court may deem evidence testimonial, but the expense of providing a live witness is exorbitant and the accused seems to have no plausible expectation that confrontation would do him any good) (citing Metzger, *supra* note 8)).

²³¹ *Melendez-Diaz*, 129 S. Ct. at 2545.

impose.²³² The first practical question to be taken up by the Court was decided in June 2009.²³³ The Court in *Melendez-Diaz v. Massachusetts* was asked to determine whether the costs to the government could be considered under its new standard.²³⁴ The Court responded “no” and emphasized that the burden of its new standard lay squarely at the prosecutor’s feet.²³⁵ “[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses to court.”²³⁶

The majority in *Melendez-Diaz* commented on how the question of lab reports/affidavits called for a “straightforward” application of the testimonial standard from *Crawford*.²³⁷ While the declarant in *Crawford* was determined to have been objectively aware that her words could be used later at trial, the statements contained in the report and affidavit at issue in *Melendez-Diaz* were made with the actual intent that they be introduced at trial.²³⁸

The prosecution put forward four arguments attempting to distinguish the declarant in this case from other types of perception witnesses.²³⁹ They argued that the technician is not an “accusatory” witness or one who directly accuses the defendant of wrongdoing.²⁴⁰ They argued that the technician is not “conventional” in that they did not observe the facts salient to the crime.²⁴¹ They asserted that because the statements were not elicited through interrogation they fall outside of the *Crawford/Davis* rule.²⁴² And finally, they pointed out that the witness is not recounting historic facts

²³² Some of the cost issues which have thus far been raised include those related to child testimony and testimony in domestic abuse cases. See Kimberly Y. Chin, “*Minute and Separate*”: Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After *Crawford* and *Davis*, 30 B.C. THIRD WORLD L.J. 67, 71 (2010); G. Michael Fenner, *Today’s Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 CREIGHTON L. REV. 35, 80–81 (2009). Battered women and abused children are frequently the only witnesses to the crimes perpetrated on them, but are often unable or unwilling to testify. See Craig M. Bradley, *Melendez-Diaz and the Right to Confrontation*, 85 CHI.-KENT L. REV. 315, 327 (2009). In such instances, a rigid confrontation rule would bar charges from being brought. *Id.*

²³³ *Melendez-Diaz*, 129 S. Ct. at 2527.

²³⁴ *Id.* at 2540.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 2532–33.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 2533.

²⁴¹ *Id.* at 2535.

²⁴² *Id.*

“prone to distortion” but rather reporting scientific fact, the “result of neutral, scientific testing.”²⁴³

The Court, however, held that none of these factors are relevant to its Confrontation Clause analysis. It may be true, the majority noted, “that there are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.”²⁴⁴

2. *Costs Specific to Terrorism Trials*²⁴⁵

Given its responsibilities enumerated in the U.S. Constitution, the Executive has certain recognized interests in collecting foreign intelligence.²⁴⁶ The Executive also has the responsibility to prosecute suspected criminals.²⁴⁷ These interests can coincide, and when they do, the competing interests of fair trial and information control need to be reconciled. In the context of international terrorism prosecutions, one particular problem is the government’s limited ability to compel appearance of potentially relevant witnesses.²⁴⁸ The general solution to this problem has been the hearsay exceptions articulated in the Federal Rules of

²⁴³ *Id.* at 2536 (internal quotations omitted). The State also pointed out that the documents are akin to business records admissible at common law. *Id.* at 2538.

²⁴⁴ *Id.* at 2536.

²⁴⁵ For a discussion of some of the costs specific to terrorism trials, see Chesney, *supra* note 225, at 705 (noting that while there are few examples of terrorism trials being derailed due to adverse evidentiary rulings, what is unclear is the extent to which individuals are not being criminally prosecuted because of procedural evidentiary hurdles); see generally S. REP. NO. 96-823 (1980).

²⁴⁶ See U.S. CONST. art. II, § 2, cl. 1; *United States v. Moussaoui*, 382 F.3d 453, 476 n.26 (4th Cir. 2004) (“The Government is charged not only with the task of bringing wrongdoers to justice, but also with the grave responsibility of protecting the lives of the citizenry.”).

²⁴⁷ See U.S. CONST. art. II, § 3, cl. 4 (“[The President] shall take Care that the Laws be faithfully executed . . .”); see also *United States v. Sitka*, 666 F. Supp. 19, 22 (D. Conn. 1987) (“This duty to execute the laws is a broad power not specifically limited to powers enumerated in the text of the Constitution.”).

²⁴⁸ In the United States, defendants have the right to secure the attendance of witnesses on the issuance of a subpoena by the courts. *United States v. Cooper*, 4 U.S. 341 (1800) (Opinion of Chase, J.). Under federal law, a court can issue a subpoena on an individual living outside of the United States. 28 U.S.C. § 1783(a) (2006), see also *Blackmer v. United States*, 284 U.S. 421 (1932) (upholding a statute under which a U.S. national living abroad was held in contempt for failing to comply with a subpoena issued by a federal court). That being said, the Court in *Blackmer* stated that its holding was based upon its *in personum* jurisdiction over the defendant. *Id.* at 438. While federal courts now analyze the issue through the lens of “minimum contacts,” the consequence remains the same: non-citizen witnesses living abroad are not necessarily subject to federal process. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Evidence.²⁴⁹ In the context of foreign intelligence, specifically, Congress has created a flexible regulatory scheme designed to address the competing interests through evidentiary substitution.²⁵⁰

Since the government amended the FISA standards in 2001, evidence gathered pursuant to these warrants has played an increasingly significant role at trial.²⁵¹ Terrorism trials tend to involve a great deal of electronic surveillance.²⁵² In one case from 2003, *United States v. Al-Arian*, the evidence at trial included 21,000 hours of telephone recordings collected under FISA.²⁵³ The evidence in another case from 2004, *United States v. Hassoun*, included 275 transcripts of recorded conversations and over 300 summaries of those intercepts, whittled down from 10,000 to 12,000 pages of materials.²⁵⁴ In a third case, *United States v. Sattar*, the Government made extensive disclosures prior to trial including 85,000 audio recordings, written summaries of 5,300 voice calls, and 10,000 pages of e-mails.²⁵⁵

The ability to collect and store vast quantities of information has not made the process of analyzing that information any less costly. This is a challenge not just for the federal government during terrorism trials but for civil discovery procedures in general.²⁵⁶ Mandating that individuals testify as to the contents of thousands of hours of recorded phone conversations—when the contents of those conversations bear adequate indicia of reliability on their own—would be a waste of the court’s time.

Moreover, the challenges of having individuals testify to such voluminous information assumes that the Government even has access to the declarants who are recorded on the relevant tapes. Should the courts determine that the significant purpose standard for FISA warrants triggers the “testimonial” exclusion at trial, terrorism trials in Article III courts will require the production of all the individuals making statement on these tapes. This is a difficult prospect. FISA warrants cover conversations

²⁴⁹ ZABEL & BENJAMIN, *supra* note 91, at 107 (arguing that the Federal Rules of Evidence have largely been up to the task in the context of terrorism trials).

²⁵⁰ *Id.* at 85.

²⁵¹ *See infra* note 253.

²⁵² *Id.*

²⁵³ 267 F. Supp. 2d 1258, 1260 (M.D. Fla. 2003). The defendant in this case was prosecuted for allegedly providing material support to Palestinian Islamic Jihad, a militia organization in Palestine. *Id.*

²⁵⁴ ZABEL & BENJAMIN, *supra* note 91, at 78 (citing Protective Order, *United States v. Hassoun*, No. 04-cr-60001 (S.D. Fla. Jan. 8, 2004) (Dkt. No. 34)).

²⁵⁵ No. 02 CR. 395 JGK, 2003 WL 22137012, at *2 (S.D.N.Y. Sept. 15, 2003).

²⁵⁶ ZABEL & BENJAMIN, *supra* note 91; *see also* Robert W. Trenchard, *Two Roads Diverge in Managing E-Discovery Costs*, N.Y. L.J., Nov. 16, 2009, at S6.

between individuals in the United States and elsewhere.²⁵⁷ Locating and transporting such individuals to domestic courts may prove impossible.²⁵⁸

In addition to the admissibility of FISA evidence generally, an overlapping issue is the procedure for admitting classified information. Congress passed CIPA in order to balance the interests of prosecution and defense specifically in the context of classified evidence.²⁵⁹ The issues raised in *Moussaoui* have yet to reach the Supreme Court, but on its face, the Fourth Circuit's decision raises significant *Crawford* questions. While ostensibly situating its holding under the new testimonial standard, the Fourth Circuit in *Moussaoui* fell back on a balancing standard reminiscent of *Roberts*.²⁶⁰ Despite the fact that the evidence was being used to contextualize other exculpatory evidence, the court allowed introduction of inculpatory evidence against the defendant by means of government affidavit.²⁶¹ Under all three Supreme Court decisions describing the testimonial rule, such an affidavit would be inadmissible. Plus, any mention of "reliability" at all would seem to place it squarely in the *Crawford* crosshairs.

The challenge that classified information poses for trial practice is as great as the interests at stake are significant.²⁶² Since its passage in 1980,

²⁵⁷ 50 U.S.C. § 1802(a)(1) (2006).

²⁵⁸ There are a number of strategies which have been utilized by courts attempting to mitigate the challenges associated with in person testimony. Zabel and Benjamin provide a comprehensive description of many of the steps taken by courts to accommodate these unique challenges. ZABEL & BENJAMIN, *supra* note 91, at 109; *see* United States v. Ressim 593 F.3d 1095, 1102 (9th Cir. 2010) (describing pre-*Crawford* trial verdict against petitioner after court had allowed the deposition of a witness living outside the United States to be introduced as evidence at trial); United States v. Yates, 438 F.3d 1307, 1312–18 (11th Cir. 2006) (allowing video conferencing of witness unable to participate at trial). In *Yates*, the court noted Justice Scalia's objection to this type of evidence on confrontation grounds. *Id.* at 1314–15.

²⁵⁹ Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified in 18 U.S.C. app 3 (2006)); S. REP. NO. 96-823, at 3 (1980) ("The purpose of this bill is to help ensure that the intelligence agencies are subject to the rule of law and to help strengthen the enforcement of laws designed to protect both national security and civil liberties. Too often the duty of the government to protect legitimate national security secrets and to prosecute lawbreakers have been in conflict. Insofar as possible, [this bill] resolves that conflict.").

²⁶⁰ United States v. Moussaoui, 382 F.3d 453, 468 (4th Cir. 2004) ("Moussaoui . . . has a Sixth Amendment right to [detainees'] testimony . . . [but] this right must be balanced against the Government's legitimate interest in preventing disruption [Redacted] of the enemy combatant witnesses.").

²⁶¹ *Id.* at 482.

²⁶² Chesney, *supra* note 225, at 708 ("[W]hile it may be possible [to present declarants at trial] in many instances . . . presumably it will not be possible in some non-trivial number of cases.").

courts have upheld the constitutionality of CIPA procedures.²⁶³ Starting in the 1980s, it has been heavily relied upon in terrorism cases.²⁶⁴ It has found success precisely because it is a flexible standard, capable of adapting to the ever-changing prosecutorial environment.²⁶⁵ The Supreme Court, however, has been explicit in its rejection of any flexibility or balancing of interests in the context of Confrontation.²⁶⁶ This contradicts the express intention of Congress in fashioning this statute.²⁶⁷ Moreover, CIPA, while not perfect, does function to ensure that both sides are able to put on an effective case.²⁶⁸ To remove this scheme would prompt the return of tactics such as “graymail,” which serve only to obstruct the trial process.²⁶⁹

Safeguards are needed to protect defendants’ rights at trial, and confrontation is a critical tool for testing the validity and reliability of evidence.²⁷⁰ But the Federal Rules of Evidence have existed for thirty-five years,²⁷¹ and have been shown to provide adequate safeguards against the introduction of unreliable testimony.²⁷² The Court should return to the *Roberts* reliability standard, not because it provides less protection to the interests of the defendant, but rather because it is more consistent with the aims of the Confrontation Clause itself.

Alternatively, should the Court stand pat, terrorism suspects will not be able to avoid prosecution by “gaming the system” by invoking their constitutional rights. Rather, the government will shift the forum of

²⁶³ *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G, 2007 WL 628059, at *2 (N.D. Tex. Feb. 27, 2007); *United States v. Bin Laden*, No. S(7) 98 CR. 1023 LBS., 2001 WL 66393, at *9 (S.D.N.Y. Jan. 25, 2001).

²⁶⁴ *ZABEL & BENJAMIN*, *supra* note 91, at 85 (citing *e.g.*, *United States v. Warsame*, No. 04-cr-00029, 2007 WL 74828, at *3 (D. Minn. Mar. 8, 2007); *United States v. Salah*, 462 F. Supp. 2d 915, 925 (N.D. Ill. 2006); *United States v. Rezaq*, 134 F.3d 1121, 1142–43 (D.C. Cir. 1998); *United States v. Yunis*, 867 F.2d 617, 619–20 (D.C. Cir. 1989)).

²⁶⁵ *See United States v. Rosen*, 520 F. Supp. 2d 786, 796 (E.D. Va. 2007) (“CIPA is neither exhaustive nor explicitly exclusive with respect to the presentation of classified testimony or documents at trial.”).

²⁶⁶ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009) (holding that despite the “burden[some]” “necessities of the trial and adversarial process” this new standard may entail, the Court cannot water down the rule it has articulated) (internal quotations omitted).

²⁶⁷ *ZABEL & BENJAMIN*, *supra* note 91, at 85 (“Congress’ express intent in enacting CIPA was that federal district judges . . . must be relied upon to fashion creative and fair solutions to these problems.”) (quoting S. REP. NO. 96-283 (1980)).

²⁶⁸ *Id.* at 87 (“Prior evaluations of CIPA have found that CIPA is effective not only in espionage prosecutions but in terrorism prosecutions as well.”) (internal quotations omitted).

²⁶⁹ *See McEvoy*, *supra* note 16, at 405.

²⁷⁰ *Metzger*, *supra* note 8, at 501 (noting that each aspect of the Confrontation Clause serves to advance the “search for reliability”).

²⁷¹ Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

²⁷² *See Ohio v. Roberts*, 448 U.S. 56 (1980).

prosecution—most likely to military tribunals.²⁷³ In essence, by requiring that evidence collected pursuant to FISA warrants always be introduced via live testimony, the Court is incentivizing the use of military tribunals over Article III courts. And these tribunals provide significantly fewer protections for detainees than they would enjoy under the return to a *Roberts* formulation.²⁷⁴ More generally, these tribunals weaken our commitment to the rule of law at home while decimating the legitimacy of our legal system abroad.

IV. CONCLUSION: OVERTURN *CRAWFORD*, REWRITE FISA, OR . . . BOTH?

The Obama Administration has indicated that it believes trying terrorism suspects in Article III courts, with all the rights and privileges that such trials entail, is a worthy goal.²⁷⁵ This is a laudable position. The demand for terrorism prosecutions will only become more frequent in the future.²⁷⁶ The attempts to limit the rights of individuals accused of

²⁷³ It is possible that the Confrontation Clause issue would not necessarily be resolved by restricting terrorism trials to military courts. Justice Scalia takes great pains to justify his holding in *Crawford* on the basis of common law principles and fundamental values of the judicial process. *Crawford v. Washington*, 541 U.S. 36, 43 (2004); Dratel, *supra* note 5, at 20. The opinion did not just rely on the meaning of confrontation in the abstract, but found the genesis of the right outside of the four corners of the Constitution. *Crawford*, 541 U.S. at 43; Dratel, *supra* note 5, at 20. Therefore, it could be argued that even defendants facing trial before military tribunals might be able to challenge testimonial evidence. If this were the case, the challenges of *Crawford* might be exacerbated by the Court's holding in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Conspiracy is not recognized as a crime under the law of war. *Id.* at 603–04. Should the Court not recognize a conspiracy, statements that might otherwise be barred under the Confrontation Clause, could now be introduced.

²⁷⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948–50 (2006)) (enacting Chapter 47A of Title 10 of the United States Code and amending § 2241 of Title 28). In recent months, we are actually seeing evidence of an even more disturbing third alternative: targeted killings. Karen DeYoung & Joby Warrick, *For Obama Administration, Fatal Blows Take Precedence*, WASH. POST, Feb. 14, 2010, at A1 (discussing how the difficulty of dealing with terrorism suspects captured alive has disincentivized their capture and trial for the U.S. government).

²⁷⁵ Jerry Markon, *Terror Trials in U.S. Are a Worry*, WASH. POST, Mar. 6, 2009, at A4 (“Obama’s nominee for Pentagon general counsel recently told a Senate committee that the president’s ‘predispositions’ are for civilian trials.”).

²⁷⁶ Despite being a party to the drafting Rome Statute, the United States has refused to ratify and join the International Criminal Court (ICC). While one might argue that crimes like international terrorism are best suited for an international forum like the ICC, the United States may be fully capable of exercising jurisdiction over terrorists committing purely international crimes without the ICC. Under the principle of universal jurisdiction, any state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern. These include piracy, slave trade, aircraft hijacking, genocide, war crimes, and perhaps terrorism. RESTATEMENT (THIRD) LAW OF FOREIGN RELATIONS § 404. This power is not completely unbounded, and as it has become more frequently utilized, there have been stronger and more frequent calls to curtail it. Dapo

terrorism in the last decade by subjecting them to ad hoc military tribunals has resulted in only five convictions.²⁷⁷ Conversely, of the 449 defendants charged with terrorism or national security crimes in civilian courts since September 11, 271 have settled with 230 ending in convictions.²⁷⁸ Nevertheless, despite the impotence of extrajudicial detention at Guantanamo Bay, a political backlash has stymied the Administration’s attempt to focus on prosecuting terrorists in domestic courts.²⁷⁹ Civilian courts have shown that they are capable of handling terrorism trials.²⁸⁰ There have been setbacks as well.²⁸¹ The challenges that *Crawford* poses could lend fuel to this particular fire.

In November 2009, Attorney General Eric Holder announced that Khalid Shaikh Mohammed and four alleged accomplices would be tried in federal court in Manhattan.²⁸² Despite an initial outpouring of support for this proposal, opposition soon began to build in the city against allowing this to go forward.²⁸³ This sentiment echoed the resistance to moving the suspects held at Guantanamo Bay to United States soil. While much of the criticism has centered on the costs and security concerns associated with both the trial²⁸⁴ and the transfer,²⁸⁵ critics have been willing to critique the premise that accused terrorists should be afforded the right to civilian trial.²⁸⁶

Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT’L L. 815, 847–48 (2010).

²⁷⁷ Clyde Haberman, *Verdict Replies to Terrorists and to Critics*, N.Y. TIMES, Jan. 28, 2011, at A23.

²⁷⁸ *Id.*

²⁷⁹ Shane, *supra* note 3.

²⁸⁰ Haberman, *supra* note 277.

²⁸¹ Peter Finn & Anne E. Kornblut, *Indefinite Detention Possible for Suspects at Guantanamo Bay*, WASH. POST, Dec. 22, 2010, at A3 (describing Administration plans for “indefinite detention” executive order).

²⁸² Savage, *supra* note 2. In April, the Obama Administration abandoned its plans to try Khalid Shaikh Mohammed in civilian court. Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

²⁸³ Shane, *supra* note 3.

²⁸⁴ Al Baker, *Security for Terrorism Trials Estimated at \$200 Million a Year*, N.Y. TIMES, Jan. 7, 2010 at A25 (describing the costs associated with trying 9/11 suspects in Manhattan).

²⁸⁵ Charlie Savage, *U.S. to Move Detainees to Illinois, Official Says*, N.Y. TIMES, Dec. 15, 2009 at A26.

²⁸⁶ Julie Kirtz, *With New York All but Ruled Out, Lawmakers Look for Cheap, Safe Spot for 9/11 Trials*, FOXNEWS.COM, Jan. 31, 2010, <http://www.foxnews.com/politics/2010/01/31/new-york-ruled-lawmakers-look-cheap-safe-spot-trials> (“I think we ought to have three criteria. Number one, where can we try them safely? Where can we try them quickly? And where can we try them inexpensively? I’m for whichever venue accomplishes those things.”) (quoting Sen. Evan Bayh) (internal quotation omitted); Charlie Savage,

As much as political opponents of the Obama Administration's initial plan may wish the opposite to be true, military tribunals are not the best forum for trying international terrorists.²⁸⁷ Before courts are ready to take on trials of alleged terrorists, however, the Supreme Court needs to provide a more definite explanation of "testimonial" evidence. Too many questions remain as to the "new" scope of the Confrontation Clause. Terrorism prosecutions present unique challenges to federal prosecutors. The Court's opinion in *Melendez-Diaz* expressed little concern for the very real logistical challenges the broad testimonial rule announced in that case would imply.²⁸⁸ Requiring that individuals testify in person to all steps of the chain of custody would require individual custodians to spend significant amounts of time in court and not doing the substantive work they are charged with.²⁸⁹ Local and state government agencies are already understaffed, and while it may be too early to see the true impact of *Melendez-Diaz*, the decision no doubt imposes real costs on prosecutors which will inevitably translate into fewer legitimate cases being brought to trial.²⁹⁰

These logistical challenges are multiplied many times in the context of foreign intelligence. Congress enacted CIPA because it understood that the disclosure of classified information involved real costs.²⁹¹ The inevitable impact of the imposition of these costs was the inclination to pursue fewer

Holder Defends Decision to Use U.S. Court for 9/11 Trial, N.Y. TIMES, Nov. 19, 2009, at A18 (describing political opposition to trying 9/11 suspects in civilian courts); Danny Hakim, *Patterson Calls Obama Wrong On 9/11 Trial*, N.Y. TIMES, Nov. 17, 2009 at A26 ("[H]aving those terrorists tried so close to the attack is going to be an encumbrance on all New Yorkers.") (quoting Gov. David A. Paterson).

²⁸⁷ See Haberman, *supra* note 277 (noting that there have been 230 convictions of terrorism suspects in federal civilian courts since September 11, compared with just five in military commissions).

²⁸⁸ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2544–45 (2009) (Kennedy, J., dissenting) (arguing that the Court's new Confrontation Clause standard "threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway").

²⁸⁹ *Id.* at 2544 (arguing that, since many "people play a role in a routine test for the presence of illegal drugs[.]" it is difficult to determine which person "is the analyst to be confronted under [the majority's rule]").

²⁹⁰ *Id.*; see generally Craig M. Cooley, *The CSI Effect: Its Impact and Potential Concerns*, 41 NEW ENG. L. REV. 471, 474 (2007) ("[A] lack of qualified forensic scientists [has led] to understaffing and ultimately massive backlogs.").

²⁹¹ S. REP. NO. 96-823, at 3 (1980) ("The Government's understandable reluctance to compromise national security information invites defendants and their counsel to press for the release of sensitive classified information the threatened disclosure of which might force the government to drop the prosecution.") (quoting Attorney General Philip Heymann).

criminal convictions.²⁹² If the Court was to prohibit evidence collected through FISA warrants, and instead insist that individuals recorded under those warrants testify in person, similar costs would be imposed.

Therefore, in addition to providing a more definite definition of testimonial evidence, the Obama Administration and the Congress should abandon the significant purpose test articulated in both the PATRIOT Act and the 2002 Protocols. The Supreme Court has not weighed in on this issue, so perhaps its dismissal of the test will force the Executive’s hand. But regardless, adhering to the significant purpose analysis raises practical problems more immediate than the potential constitutional ones. Fostering a culture of information sharing within government is a positive goal, but the significant purpose test is not the right way to do this. A clear demarcation between domestic investigations and foreign intelligence investigations is essential to the success of both. There is a strong need for more comprehensive foreign intelligence tools, but given the risks involved, they cannot be conflated with existing law enforcement practices. Integrating the two puts the government’s ability to successfully prosecute offenders at risk. This will make the government less willing to use Article III courts, or more willing to flout their determinations if they dismiss claims for evidentiary problems.

A. RETHINK FISA’S PRIMARY PURPOSE STANDARD

The most obvious solution to this problem is to repeal the PATRIOT Act’s augmentation of the preexisting FISA warrant standard. If the Congress is serious about FISA being a foreign intelligence-gathering tool—rather than a criminal prosecution tool—there is no reason justifying this standard. FISA already removes the obligation that the government demonstrate probable cause to secure a warrant—the permissive significant purpose standard practically removes the need for any showing at all.²⁹³

²⁹² *Id.* at 2 (“The more sensitive the information compromised, the more difficult it becomes to enforce the laws that guard our national security.”) (quoting STAFF OF SENATE SELECT COMMITTEE ON INTELLIGENCE AND SUBCOMMITTEE ON SECRECY AND DISCLOSURE, 95th CONG., REPORT ON NATIONAL SECURITY SECRETS AND THE ADMINISTRATION OF JUSTICE (Comm. Print 1978)).

²⁹³ The federal district court in *Mayfield v. United States* held in 2007 that the new standard violated the Constitution as a Title III warrant was necessary whenever the primary purpose of an investigation is criminal prosecution. 504 F. Supp. 2d 1023, 1041 (D. Or. 2007). This decision was overturned by the Ninth Circuit on the basis of standing without reaching the merits of the claim. *Mayfield v. United States*, 588 F.3d 1252, 1258 (9th Cir. 2009).

B. RETHINK *CRAWFORD*

A second priority is to overturn *Crawford*. The Court, however, has made it clear that government interest is not a factor to consider in its new standard, and so policy arguments may fall on deaf ears.²⁹⁴ Nevertheless, in addition to the specific problems raised by this standard in the context of foreign intelligence evidence, there are deeper structural questions about the justification for the *Crawford* standard on its own. Specifically, it seems suspect that the testimonial standard has any basis in the actual Constitution.

In *Crawford*, while the Court parses the historic record for justification of the new standard, it refuses to define specifically what “testimonial” evidence really means in the context of actual practice.²⁹⁵ After thirty-two pages, the Court ends its opinion by acknowledging that it has not provided a definition of “testimonial” evidence: “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”²⁹⁶ Without such a definition, the utility of the testimonial test remained suspect.²⁹⁷ While courts have attempted several times to fill in this blank spot in the years since *Crawford*, uncertainty remains as to its true scope.²⁹⁸ The Court itself acknowledges that the Clause could cover a variety of circumstances: ex

²⁹⁴ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

²⁹⁵ This line of analysis may be questionable in and of itself given that questioning and interrogation by police officers—the subject of *Crawford* and *Davis*—was a topic that the common law had not dealt with in 1789. See Bradley, *supra* note 232, at 322.

²⁹⁶ *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The most recent decision has provided some clarification by incorporating the traditional hearsay analysis into the primary purpose determination. *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 (2011). Still, as there seems to be some conflict with the initial motivations of the Court when deciding *Crawford*, it appears plausible that further clarification is still warranted. See *id.* at 1174 (Scalia, J., dissenting) (“[The majority opinion] is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence . . .”).

²⁹⁷ While addressing very different subject matter, Justice Scalia’s enthusiasm for the testimonial standard in *Crawford* is reminiscent of his dissent in *Mistretta v. United States*, 488 U.S. 361, 413 (1989). Both tests reject any sort of ad hoc evaluation, and focus rather on the “character” of the power or right at issue. *Id.* at 427; *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004). Confrontation, much like delegation, is a practice that does not lend itself to bright-line rules. See *Mistretta*, 488 U.S. at 371–72. While it may be conceptually easier to impose a rigid ban on introducing ex parte testimonial evidence or delegating legislative powers to the courts, the practical demands of both the lawmaking and criminal justice systems demand a more nuanced and flexible guidebook.

²⁹⁸ See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“[Holding, w]ithout attempting to produce an exhaustive classification of all conceivable statements . . .”); see also *United States v. Arnold* 486 F.3d 177, 187 (6th Cir. 2007) (noting that *Crawford* did not provide a “comprehensive definition” of the term “testimonial”); *United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005) (“[T]he Supreme Court declined to rigidly define what is meant by the term ‘testimonial.’”).

parte sworn statements such as affidavits, prior testimony, unsworn statements to police officers, or even in-court statements.²⁹⁹ Without defining the outer bounds of testimony, application of this rule is no less fluid than a reliability standard and is subject to the same judicial uncertainty.

The problem stems from the Court’s shaky foundation supporting the primacy of testimonial evidence in the Sixth Amendment.³⁰⁰ As said above, the central challenge of Confrontation Clause analysis is resolving the tension between the facially restrictive wording of the Clause and the realities of a functional justice system. The Court in *Crawford* implies that too much evidence was getting in under the *Roberts* standard, and therefore sought to impose restrictions.³⁰¹ It seems to be able to avoid the potential pitfall of overextending the Clause by drawing a distinction between “evidence” and “testimony.” Barring “testimonial” evidence keeps a great deal of problematic ex parte statements out, while not simultaneously imposing an unworkable rule.

The question, however, is why the Court can focus on the “bearing of testimony” as the essence of what it means to be a witness.³⁰² The concept of “testimony” is the keystone that links “witness”—the word that appears in the text of the Confrontation Clause—and the ex parte formal statements and affidavits the Court is trying to exclude.³⁰³ The definition that the Court uses is drawn from the 1828 edition of *Webster’s New American Dictionary*.³⁰⁴ Having cited only one dictionary definition, however, the

²⁹⁹ *Crawford*, 541 U.S. at 50–52. The Court raises but then dismisses the last category, in-court statements, but does so on the basis of the historic precedent it has identified, not any intrinsic quality of “testimony” itself. *Id.* at 50. “[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham’s confession in court.” *Id.* at 50–51.

³⁰⁰ *Id.* at 69–70 (Rehnquist, C.J., dissenting). The classification of testimonial versus non-testimonial evidence is arbitrary, at least with regards to the common law. *Id.* The law of testimony non-exclusion was fully developed at the time of the framing. *Id.* at 72. Given that the law of exclusion was in the midst of developing, there is no reason to suspect that the Framers would ascribe to such a wooden and categorical rule. *Id.* at 73.

³⁰¹ *Id.* at 60 (holding that the *Roberts* test departs from historical principles because it admits statements consisting of ex parte testimony upon a mere reliability finding).

³⁰² This is the “logical hook” upon which the Court hangs its holding in *Crawford*. Justice Scalia asserts that the word “witness” in the Confrontation Clause should be defined as “one who bears testimony,” which in turn is used to justify the Court’s blanket exclusion of any “testimonial evidence.” *Id.* at 51. This judicial sleight-of-hand takes but five sentences and cites to no precedent. *Id.* at 51.

³⁰³ *Id.*

³⁰⁴ *Id.*

Court significantly inflates its lexicographic choice by asserting that the bearing of testimony is a more formalized activity than presenting other types of evidence.³⁰⁵ Resting such an important point of the analysis on one dictionary definition is suspect, particularly when no reason for using that particular dictionary over another is given.³⁰⁶ The logic of the opinion is dependent upon accepting that the definition of “witness” is the bearer of “testimony,” rather than a more general (but no less plausible) definition of “witness,” such as one who bears or presents “evidence.” Should this definition of witnesses be accepted (rather than the more formalized “bearer of testimony”), it would be a much more tenuous inferential leap to establish the type of bright-line rule announced in *Crawford*.

Yet the fact is, one can look elsewhere in legal dictionaries from the period and find alternative definitions of “witness.” For example, a legal dictionary from 1811 defines a witness as “[o]ne who gives evidence in a cause”³⁰⁷ and a second from 1848 likewise defines a witness as “one who gives evidence in a cause.”³⁰⁸ The “bearer of testimony” definition, while critical for sewing up the logic of the Court’s holding, seems to be only one of several equally plausible options.

This is not to say that *Ohio v. Roberts* was wholly unproblematic. The old reliability standard lacked a unifying theory to ground its application. It typically provided no more protections to defendants than the Federal Rules of Evidence envisioned.³⁰⁹ Under this standard, the Confrontation Clause had a limited effect.³¹⁰ While this is potentially a problem to address, the solution is not *Crawford*.

Imposing the rigid testimonial standard in *Crawford* to foreign intelligence might effectively bar certain terrorism trials in federal court. While in other contexts the costs this rigid rule creates might simply result in fewer cases being brought, terrorism trials present a unique situation. The Bush Administration’s experiment with military tribunals raises a possible alternative to the acquittal/dismissal decision the government might otherwise be faced with. It is not entirely clear how the *Crawford*

³⁰⁵ *Id.*

³⁰⁶ See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543–44 (2009) (Kennedy, J., dissenting) (“[T]he Court’s approach has become ‘disconnected from history and unnecessary to prevent abuse.’ The Court’s reliance on the word ‘testimonial’ is of little help, of course, for that word does not appear in the text of the Clause.”) (citation omitted).

³⁰⁷ 6 GILES JACOB & T. E. TOMLINS, *THE LAW DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE ENGLISH LAW* 450 (1811).

³⁰⁸ J.J.S. WHARTON, ESQ., *THE LAW LEXICON, OR DICTIONARY OF JURISPRUDENCE* 1070 (1848).

³⁰⁹ Bradley, *supra* note 232, at 318 (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

³¹⁰ Friedman, *supra* note 31, at 554.

rule would apply to such commissions, but the “flexible” evidentiary rules of these tribunals would no doubt make them an attractive option to an overzealous administration driven by political pressures to punish terrorists. Nevertheless, these commissions have proven at the very least a political liability and at most a denial of fundamental human rights. They are not a valid option, and to the extent that *Crawford* incentivizes their use, it should be overruled.

