

# HEARSAY AND CONFRONTATION ISSUES POST-CRAWFORD: THE CHANGING COURSE OF TERRORISM TRIALS

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*In 2004, the Supreme Court overhauled the established interpretation of the Confrontation Clause of the Sixth Amendment when it decided Crawford v. Washington. This Note attempts to augment the existing literature by elucidating the Crawford standard in the context of terrorism prosecutions in Article III courts. It details the shifts between Ohio v. Roberts and Crawford, analyzes subsequent federal case law, and tests the new framework on hypothetical terrorism fact patterns. This Note anticipates that for some types of evidence, such as ex parte affidavits and written summaries of testimony, the Crawford test will create significant hurdles for prosecutors in terrorism cases. A viable solution to this problem is for the government to make greater use of witness depositions abroad pursuant to Federal Rule of Criminal Procedure 15(c)(3).*

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## INTRODUCTION

In October 2013, after his capture in Libya and a lengthy military interrogation onboard a Navy vessel, Abu Anas Libi was transferred to New York to face criminal charges in the Southern District of New York.<sup>1</sup> The United States Government's decision to prosecute Anas Libi in a civilian court reignited a controversial debate over the appropriate forum for trying suspected terrorists—Article III courts or military commissions.<sup>2</sup> The Obama administration has demonstrated a firm commitment to civilian courts.<sup>3</sup> Attorney General Eric Holder has also emphatically argued for Article III courts and using the criminal justice system as a weapon in national security.<sup>4</sup> Strikingly, in the first two years of Barack Obama's presidency, the number of indictments handed down by the Department of Justice for terrorism-related crimes nearly doubled as compared to the amount filed during the entire Bush administration.<sup>5</sup> Given this shift and the heavy concentration of terrorism prosecutions in civilian courts,<sup>6</sup> the procedural

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<sup>1</sup> Benjamin Weiser et al., *Qaeda Suspect is Brought to New York for a Hearing*, N.Y. TIMES, Oct. 15, 2013, at A19.

<sup>2</sup> See Evan Perez & Susan Candioti, *Alleged Al Qaeda Operative Al Libi Taken to New York Week After Capture in Libya*, CNN (Oct. 15, 2013, 7:13 AM), <http://www.cnn.com/2013/10/14/justice/al-libi/> (quoting Republican Congressman Peter King as saying “[i]t shows the inherent flaws in the U.S. policy decision to try (terror suspects) in the U.S. because once you arrive on U.S. soil, that ends the interrogation of these high value detainees”); Guy Taylor, *Sen. Graham Wants Al-Libi Sent Quickly to Guantanamo for Interrogation*, WASH. TIMES (Oct. 8, 2013), <http://www.washingtontimes.com/news/2013/oct/8/sen-graham-wants-al-libi-sent-quickly-to-guantanamo/?page=all#pagebreak> (noting that Senator Lindsey Graham and two other Republican Senators advocated the use of military tribunals because intelligence officers can more effectively interrogate detainees at Guantanamo).

<sup>3</sup> The administration has specifically stated that suspects detained within the United States should be tried in Article III civilian courts. John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at Harvard Law School: Strengthening Our Security By Adhering To Our Values and Laws (Sept. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>. The administration has adopted a more flexible case-by-case approach for deciding in which forum to try suspects captured abroad. *Id.* However, the White House has underscored the fact that suspects captured overseas “have been successfully prosecuted in our federal courts on many occasions.” *Id.*

<sup>4</sup> See Letter from Eric H. Holder, Att’y Gen., U.S. Dep’t of Justice, to Mitch McConnell, Minority Leader, United States Senate (Feb. 3, 2010), <http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf> (“The criminal justice system has proven to be one of the most effective weapons available to our government for both incapacitating terrorists and collecting intelligence from them.”).

<sup>5</sup> CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011, at 2 (2011), available at <http://www.lawandsecurity.org/Portals/0/Documents/TTTC%20Ten%20Year%20Issue.pdf>.

<sup>6</sup> The Department of Justice has indicted 998 defendants in terrorism prosecutions—in civilian courts—since the September 11th attacks. CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2010, at 4

protections attendant to Article III courts are becoming increasingly important. This Note focuses on two of these procedural protections—the ban on hearsay imposed by the Federal Rules of Evidence,<sup>7</sup> and the Confrontation Clause.<sup>8</sup>

The hearsay rule and the requirements of the Confrontation Clause help to ensure that the evidence used to convict a defendant is reliable, trustworthy, and, importantly, subject to adversarial testing.<sup>9</sup> In 2004, the Supreme Court overhauled the established interpretation of the Confrontation Clause when it decided *Crawford v. Washington*.<sup>10</sup> Relatively little has been written on *Crawford* as it applies to terrorism prosecutions in Article III courts.<sup>11</sup> This Note attempts to add to the existing literature by elucidating the *Crawford* standard, analyzing subsequent federal case law, and testing the new framework on hypothetical terrorism fact patterns. I argue that the Court's new interpretation of the Confrontation Clause, as outlined in

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(2010) [hereinafter TERRORIST REPORT CARD 2010], available at [http://www.lawandsecurity.org/Portals/0/documents/01\\_TTRC2010Final1.pdf](http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf). Of those, 688 indictments have been resolved, meaning they ended in a guilty plea or a conviction, acquittal, or dismissal at trial. Of these indictments, 598 defendants “were convicted on some charge either at trial or by plea.” *Id.* The government’s conviction rate is 86.9%. *Id.*

<sup>7</sup> FED. R. EVID. 802.

<sup>8</sup> U.S. CONST. amend. VI.

<sup>9</sup> See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“[T]he Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

<sup>10</sup> See *id.* at 62–65, 68 (explaining how the *Ohio v. Roberts* test is incompatible with the Framers’ conception of the Sixth Amendment and announcing a new test for confrontation based on a distinction between testimonial and nontestimonial hearsay); see also Won Shin, *Crawford v. Washington: Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity To Cross-Examine*, 40 HARV. C.R.-C.L. L. REV. 223, 223 (2005) (noting that *Crawford* was “a sea change in the Court’s interpretation of the Confrontation Clause” that will “profoundly affect prosecutors, defense attorneys, and courts”).

<sup>11</sup> However, there are some exceptions. See, e.g., Norman Abrams, *Confrontation and Hearsay Issues in Federal Court Terrorism Prosecutions of Gitmo Detainees: Moussaoui and Paracha as Harbingers?*, 75 BROOK. L. REV. 1067, 1093 (2010) (arguing that statements by detainees in interrogations are not reliable and, therefore are most likely to “founder” not on confrontation grounds “but rather on old-fashioned reliability concerns”); Norman Abrams, *Terrorism Prosecutions in U.S. Federal Court: Exceptions to Constitutional Evidence Rules and the Development of a Cabined Exception for Coerced Confessions*, 4 HARV. NAT’L SEC. J. 58, 76–78 (2012) [hereinafter Abrams, *Terrorism Prosecutions in U.S. Federal Court*] (proposing an “exception” to confrontation where a court finds a statement made in an interrogation about future terrorism acts or plans is otherwise trustworthy and reliable); John Scott, Comment, “Confronting” Foreign Intelligence: *Crawford* Roadblocks to Domestic Terrorism Trials, 101 J. CRIM. L. & CRIMINOLOGY 1039, 1058–65 (2011) (arguing that the new interpretation of the Confrontation Clause in *Crawford* may conflict with the Foreign Intelligence Surveillance Act (FISA) search warrant procedures and the evidentiary protocols outlined by the Classified Information Procedures Act (CIPA)).

*Crawford*, creates significant evidentiary problems for the prosecution of terrorism trials in Article III courts, which may be remedied by increased use of witness depositions abroad pursuant to Federal Rule of Criminal Procedure 15(c)(3).<sup>12</sup>

Part I of this Note examines the Supreme Court's evolving interpretation of the Confrontation Clause and focuses on the marked change from *Ohio v. Roberts* to *Crawford v. Washington*. Part II applies the post-*Crawford* framework to terrorism prosecutions by examining the facts of an existing case, as well as using hypothetical fact situations. This Part anticipates that for some types of evidence, such as *ex parte* affidavits and written summaries of testimony, the *Crawford* test for determining confrontation issues will create significant hurdles for prosecutors in terrorism cases. Part III of this Note proposes solutions to this challenge and ultimately advocates for greater use of witness depositions abroad pursuant to Federal Rule of Criminal Procedure 15(c)(3).<sup>13</sup> Rule 15(c)(3) authorizes pre-trial depositions taken abroad and outside the presence of the defendant.<sup>14</sup> It allows both the prosecution and the defense to preserve witness testimony that has been subject to cross-examination in order to satisfy the strictures of *Crawford*.<sup>15</sup> This mechanism is the best way to accommodate the government's goal of obtaining convictions, while still protecting a defendant's right to a fair trial.

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<sup>12</sup> FED. R. CRIM. P. 15(c)(3).

<sup>13</sup> Rule 15(c)(3) was added to the Federal Rules in 2012. FED. R. CRIM. P. 15 advisory committee's note—2012 amendment. Prior to its adoption, Barry M. Sabin argued for its inclusion as a means of obtaining testimony from valuable witnesses who may be "unable or unwilling" to travel to the United States. Barry M. Sabin et al., *Proposed Changes to Federal Rule of Criminal Procedure 15: Limitations, Technological Advances, and National Security Cases*, in CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001—SEPTEMBER 11, 2009, at 34, 38 (2009), available at [http://www.lawandsecurity.org/Portals/0/documents/02\\_TTRCFinalJan142.pdf](http://www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan142.pdf). Sabin's article focuses heavily on *Maryland v. Craig* and whether virtual depositions violate a defendant's qualified right to face-to-face confrontation. *See id.* at 35–38, 41. *See generally* *Maryland v. Craig*, 497 U.S. 836, 849–50 (1990) (holding that face-to-face confrontation with witnesses is not "an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers"). By comparison, this Note focuses on why the government should use Rule 15(c)(3)—namely because *Crawford* is going to block a good deal of evidence from coming into court. The dominant purpose of this Note is to anticipate problems after *Crawford* and not to analyze the problems with virtual depositions with respect to face-to-face confrontation.

<sup>14</sup> FED. R. CRIM. P. 15(c)(3).

<sup>15</sup> *But see* FED. R. CRIM. P. 15 advisory committee's note—2012 amendment (making clear that this rule "does not determine whether the resulting deposition will be admissible . . . [Q]uestions of admissibility . . . are left to the courts to resolve on a case by case basis").

## I

THE EVOLVING INTERPRETATION OF THE  
CONFRONTATION CLAUSE

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in that statement.<sup>16</sup> Hearsay is inadmissible unless otherwise allowed by federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court.<sup>17</sup> Even when an out-of-court statement satisfies a hearsay exception, there is an additional obstacle for the government in criminal trials: the Confrontation Clause of the Sixth Amendment of the United States Constitution.<sup>18</sup> The Confrontation Clause provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”<sup>19</sup> This Part traces the Supreme Court’s evolving interpretation of the clause and explains the major changes in the doctrine over the last thirty-five years.

A. *From Ohio v. Roberts to Crawford v. Washington*

In 1980, the Supreme Court held in *Ohio v. Roberts* that an out-of-court statement is admissible only if “it bears adequate ‘*indicia of reliability*.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”<sup>20</sup> In essence, under *Ohio v. Roberts*, hearsay evidence passed constitutional muster if the hearsay declarant was found to be unavailable and the evidence was

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<sup>16</sup> FED. R. EVID. 801.

<sup>17</sup> FED. R. EVID. 802. The Federal Rules contain a number of exceptions to the prohibition on hearsay. *See, e.g.*, FED. R. EVID. 801(d)(2)(A) (admitting out-of-court statements made by party opponents); FED. R. EVID. 801(d)(2)(E) (admitting out-of-court statements made by co-conspirators during the course of the conspiracy and in furtherance of the conspiracy); FED. R. EVID. 803(8) (admitting certain public records); FED. R. EVID. 807 (admitting, under certain circumstances, out-of-court statements that do not fall into one of the other exceptions (“the residual exception”).

<sup>18</sup> U.S. CONST. amend. VI. The ban on hearsay and the Confrontation Clause work hand in hand to ensure that out-of-court statements that are admitted are reliable. However, there are some key differences between the provisions. The ban on hearsay applies to all out-of-court statements admitted for the truth of the matter asserted, whether offered by the government or the defendant. *See* FED. R. EVID. 802 (providing a categorical ban on hearsay unless allowed by federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court). The ban applies to testimonial and nontestimonial statements. *See id.* (same). The Confrontation Clause only applies to out-of-court statements offered by the government against the defendant and exclusively bars testimonial statements. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

<sup>19</sup> U.S. CONST. amend. VI.

<sup>20</sup> 448 U.S. 56, 66 (1980) (emphasis added).

deemed reliable.<sup>21</sup> This test proved to be flimsy and quite permissive, favoring the liberal admission of hearsay evidence.<sup>22</sup>

In 2004, the Supreme Court jettisoned the “reliability” test and overruled *Ohio v. Roberts* in *Crawford v. Washington*.<sup>23</sup> In *Crawford*, the defendant admitted in a police interrogation that he had been in a physical fight with the alleged victim.<sup>24</sup> The prosecution charged Crawford with assault and attempted murder, and he claimed self-defense.<sup>25</sup> Crawford’s wife, Sylvia, was present for the fight, though she did not testify at trial.<sup>26</sup> The prosecution sought to introduce a recorded statement that Crawford’s wife made during a police interrogation in which she described the fight.<sup>27</sup> Holding that the evidence met the *Ohio v. Roberts* test of “reliability,” the state trial judge allowed the recording to be played for the jury.<sup>28</sup> The jury found Crawford guilty of assault.<sup>29</sup>

The Washington Court of Appeals reversed the conviction.<sup>30</sup> It applied a nine-factor test to determine whether Sylvia’s out-of-court statement was reliable, and found it did not bear the necessary guar-

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<sup>21</sup> See *id.* (describing the test for admissibility of out-of-court statements).

<sup>22</sup> See *Crawford*, 541 U.S. at 63–64 (noting that the “unpardonable vice” of the *Roberts* test was “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude”). The Court cited one study that found “appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases—more than one-third of the time,” *id.* at 64, despite the plurality opinion’s “speculation” in *Lilly v. Virginia*, 527 U.S. 116 (1999), “that it was ‘highly unlikely’ that accomplice confessions implicating the accused could survive *Roberts* . . . .” *Id.* at 63–64 (internal citation and quotation marks omitted).

<sup>23</sup> *Id.* at 62.

<sup>24</sup> *Id.* at 38.

<sup>25</sup> *Id.* at 40.

<sup>26</sup> *Id.* at 38, 40. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse’s consent. *Id.* at 40; WASH. REV. CODE § 5.60.060(1) (2013). The state marital privilege does not extend to out-of-court statements admissible under a hearsay exception. *State v. Burden*, 841 P.2d 758, 761 (Wash. 1992).

<sup>27</sup> *Crawford*, 541 U.S. at 40. The prosecution sought to introduce this evidence under Washington Rule of Evidence 804(b)(3), which pertains to statements made against penal interest. See WASH. R. EVID. 804(b)(3) (admitting those statements “that a reasonable person in the declarant’s position would not have made . . . unless the person believed it to be true” because they are “so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another”).

<sup>28</sup> See *Crawford*, 541 U.S. at 40 (noting that the trial court found that the evidence was trustworthy because “Sylvia was not shifting blame but rather corroborating her husband’s story that he acted in self-defense or ‘justified reprisal’; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a ‘neutral’ law enforcement officer”).

<sup>29</sup> *Id.* at 41.

<sup>30</sup> *Id.*

antees of trustworthiness.<sup>31</sup> The Washington Supreme Court reinstated the conviction, holding that Sylvia's statement was in fact reliable.<sup>32</sup> The United States Supreme Court then granted certiorari to determine whether the admission of Sylvia's out-of-court statement indeed violated the Confrontation Clause.<sup>33</sup>

Acknowledging that the text of the Confrontation Clause did not resolve the issue, Justice Scalia, writing for the Court, turned to the historical background of the clause for clarification.<sup>34</sup> Scalia noted: "The right to confront one's accusers is a concept that dates back to the Roman times."<sup>35</sup> Further, following the English common law tradition, "[m]any declarations of rights adopted around the time of the [American] Revolution guaranteed a right of confrontation."<sup>36</sup> The First Congress ultimately included the Confrontation Clause in the proposal that became the Sixth Amendment to the United States

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<sup>31</sup> *Id.*; see also *State v. Crawford*, 107 Wash. App. 1025, at \*4–6 (2001) (unpublished opinion) (noting that Washington courts use a nine-factor test to determine whether an out-of-court statement satisfies the Confrontation Clause), *rev'd*, 54 P.3d 656 (Wash. 2002), *rev'd and remanded*, 541 U.S. 36 (2004). One factor that weighed against admission of the statement was Sylvia's apparent motive to lie for her husband. *Id.* at \*4. Another relevant factor was her general character—"Sylvia gave the police two versions of her statement within four hours of each other." *Id.*

<sup>32</sup> *State v. Crawford*, 54 P.3d 656, 664 (Wash. 2002), *rev'd and remanded*, 541 U.S. 36 (2004).

<sup>33</sup> *Crawford*, 541 U.S. at 42.

<sup>34</sup> See *id.* at 42–43 ("One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between . . . . We must therefore turn to the historical background of the Clause to understand its meaning." (citations omitted)).

<sup>35</sup> *Id.* at 43. England's legal system generally differed on this point from continental civil law: "The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers." *Id.* Although the English primarily followed the common-law tradition, at times they adopted civil law practice. *Id.* For example, the "Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court." *Id.* at 44. In an especially notorious trial, Sir Walter Raleigh was convicted of treason and sentenced to death after out-of-court statements made in a letter and to the Privy Council by Raleigh's alleged accomplice were read to the jury. *Id.* Raleigh was not afforded the opportunity to confront his accomplice and cross-examine the accomplice's statements. *Id.* One of the trial judges in the Raleigh case later admonished the prosecution: "[T]he justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Id.* (internal quotation marks omitted). In the aftermath of that trial, England piloted statutory and judicial reform and created a right to confrontation of witnesses. *Id.* England's highest court ruled that a witness's pre-trial examination was not admissible, where the defendant had not been present for the examination and thus had "lost the benefit of a cross-examination." *Id.* at 45 (quoting *King v. Paine*, (1794) 87 Eng. Rep. 584 (K.B.) 585; 5 Mod. 163, 165). In 1848, Parliament amended the Marian statutes to require that a defendant must be afforded an opportunity for cross-examination in interrogations by justices of the peace in felony cases. *Id.* at 46–47.

<sup>36</sup> *Id.* at 48.

Constitution.<sup>37</sup> Early state court opinions make clear that prior testimony is only admissible under the Confrontation Clause if the defendant had a prior opportunity to cross-examine the witness.<sup>38</sup>

Justice Scalia summarized the history of the Sixth Amendment in two principles: “First, the principal evil at which the Confrontation Clause was directed was the . . . use of *ex parte* examinations as evidence against the accused. . . . [Second,] the Framers would not have allowed admission of testimonial statements . . . unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>39</sup>

Scalia, along with a majority of the justices in *Crawford*, concluded that the *Roberts* reliability test did not comport with these principles.<sup>40</sup> First, the Court held that the *Roberts* test was too broad: “It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause.”<sup>41</sup> Second, the Court ruled that the test was, simultaneously, too narrow: “It admits statements that *do* consist of *ex parte* testimony upon a mere [judicial] finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.”<sup>42</sup> The Court emphasized that the Confrontation Clause prescribes a particular mode of testing to determine whether hearsay evidence is reliable: cross-examination.<sup>43</sup>

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<sup>37</sup> *Id.* at 49. Initial drafts of the United States Constitution did not include the right to confrontation; however, objectors vehemently petitioned for this right and won. *See id.* at 48–49 (noting that a prominent Antifederalist condemned the use of written evidence in trials: “Nothing can be more essential than the cross examining [of] witnesses. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken *ex parte*, and but very seldom leads to the proper discovery of truth” (alterations in original) (citations omitted)).

<sup>38</sup> *Id.* at 49–50; *see also* *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972) (holding that the right to confrontation includes “the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness” (quoting *Barber v. Page*, 390 U.S. 719, 725 (1968)); *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (noting that it is important for the defendant to have an opportunity “not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor . . . whether he is worthy of belief”).

<sup>39</sup> *Crawford v. Washington*, 541 U.S. 36, 50, 53–54 (2004).

<sup>40</sup> *Id.* at 60.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 61 (“To be sure, the [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

In formulating the new standard under *Crawford*, Justice Scalia limited the right to confrontation to testimonial statements.<sup>44</sup> He clarified that, absent unavailability and a prior opportunity for cross-examination, there is a bar to admitting testimonial statements.<sup>45</sup>

### B. *Defining Testimonial: The Primary Purpose Test*

The Supreme Court declined to define “testimonial” in *Crawford v. Washington*.<sup>46</sup> A series of decisions following *Crawford* sought to provide clarification. In 2006, the Court attempted to delineate which types of police interrogations produce testimonial hearsay in *Davis v. Washington*.<sup>47</sup> The Court held that “[s]tatements are nontestimonial 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.”<sup>48</sup> By contrast, statements “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.”<sup>49</sup>

In *Davis*, Michelle McCottry called 911 and frantically told the operator that her former boyfriend, petitioner Davis, was assaulting her.<sup>50</sup> The call was made as the events were actually happening.<sup>51</sup> The Court ruled that McCottry’s statements were nontestimonial: “[T]he circumstances of McCottry’s interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency” and not to establish the facts of a past crime.<sup>52</sup> The statements elicited “were necessary to be able to *resolve* the present emergency rather than simply to learn (as in *Crawford*) what had happened

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<sup>44</sup> *Id.* at 68.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial’ . . . [I]t applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”). Foreshadowing *Crawford*, Justice Thomas, in his concurrence in *White v. Illinois*, articulated one possible formulation of testimonial hearsay: “[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused by prosecutors . . . depriving criminal defendants of the benefit of the adversary process . . .” 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and in judgment) (internal citations omitted).

<sup>47</sup> 547 U.S. 813, 822 (2006) (consolidated with *Hammon v. Indiana*).

<sup>48</sup> *Id.* (emphasis added).

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Id.* at 817.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 828.

in the past.”<sup>53</sup> McCottry was not acting as a witness or testifying, but rather was calling as a victim in present danger.<sup>54</sup>

The Court recognized that a conversation that begins as an interrogation to determine emergency assistance can “evolve into testimonial statements once that purpose has been achieved.”<sup>55</sup> In *Davis*, the 911 operator’s questioning and McCottry’s statements arguably became testimonial when Davis drove away from the premises and McCottry was no longer in immediate danger.<sup>56</sup>

The Court further ruled that the statements in *Hammon v. Indiana*—a case consolidated with *Davis*—were testimonial.<sup>57</sup> In *Hammon*, the police responded to a reported domestic disturbance at the home of Hershel and Amy Hammon.<sup>58</sup> When the police arrived at the home, Hershel and Amy were not in the same room—Amy was on the porch of the house and Hershel was in the kitchen.<sup>59</sup> The police questioned them separately about whether a physical altercation had occurred earlier in the night.<sup>60</sup> The Court held that the statements made were testimonial because the primary purpose of the questioning was to investigate “possibly criminal past conduct” and create a record for trial.<sup>61</sup> There was not an emergency in progress; Amy was not in imminent danger.<sup>62</sup>

### C. *The Primary Purpose Test is an Objective Inquiry*

Building on the primary purpose test established in *Davis*, the Court in *Michigan v. Bryant* reiterated that the test is an objective one.<sup>63</sup> In *Bryant*, the Government alleged that the defendant had shot a man named Covington.<sup>64</sup> Police officers, responding to a radio dispatch indicating that a man had been shot, found Covington lying in a pool of his own blood at a gas station.<sup>65</sup> The police asked Covington a series of questions about the shooting—who had shot him, where the shooting had occurred, and what had happened.<sup>66</sup> Covington named

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<sup>53</sup> *Id.* at 827.

<sup>54</sup> *Id.* at 828.

<sup>55</sup> *Id.* (internal quotation omitted).

<sup>56</sup> *Id.* at 828–29.

<sup>57</sup> *Id.* at 829.

<sup>58</sup> *Id.* at 819.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 819–20.

<sup>61</sup> *Id.* at 829–30.

<sup>62</sup> *Id.*

<sup>63</sup> 131 S. Ct. 1143, 1156 (2011).

<sup>64</sup> *Id.* at 1150.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Bryant as his shooter.<sup>67</sup> The Court held that these statements were nontestimonial because the circumstances objectively indicated that “the ‘primary purpose of the interrogation’ was to ‘enable police assistance to meet an ongoing emergency.’”<sup>68</sup>

The Court clarified that, in assessing whether the primary purpose of an interrogation is to meet an ongoing emergency, “the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”<sup>69</sup> Whether an ongoing emergency exists “is a highly context-dependent inquiry.”<sup>70</sup> Relevant factors include whether there is a threat to public safety,<sup>71</sup> the type of weapon used,<sup>72</sup> the medical condition of the declarant,<sup>73</sup> and whether the questioning was formal.<sup>74</sup>

With respect to the last factor, a majority of the Court held that formality is not dispositive but can inform the ultimate inquiry.<sup>75</sup> Formality “suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>76</sup> The inverse, however, is not necessarily true: “[I]nformality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.”<sup>77</sup> Justice Thomas, in his concurrence, maintained that formality is in fact a necessary condition of testimonial hearsay.<sup>78</sup> Put differently, Justice Thomas wrote that questioning must

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). The Court found that there were certain factors that counseled a finding that the statements were nontestimonial—for example, the fact that the interrogation “occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion” and the fact that the perpetrator used a gun, had not yet been apprehended, and, thus, could have been a continuing threat to the public. *Id.* at 1159–60.

<sup>69</sup> *Id.* at 1156.

<sup>70</sup> *Id.* at 1158.

<sup>71</sup> *See id.* (“Domestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety.”).

<sup>72</sup> *See id.* at 1158–59 (“[T]he duration and scope of an emergency may depend in part on the type of weapon used.”).

<sup>73</sup> *See id.* at 1159 (“The medical condition of the victim is important to the primary purpose inquiry . . .”).

<sup>74</sup> *See id.* at 1160 (“Another factor the Michigan Supreme Court did not sufficiently account for is the importance of *informality* in an encounter between a victim and police.”).

<sup>75</sup> *See id.* at 1160 (joining Justice Sotomayor, who wrote the opinion, were Justices Roberts, Kennedy, Breyer, and Alito).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1167 (Thomas, J., concurring in the judgment).

bear the necessary “indicia of solemnity” to be considered testimonial and, thus, protected by the Confrontation Clause.<sup>79</sup> Thomas identified a deposition or affidavit as examples of “formalized testimonial materials.”<sup>80</sup>

#### D. Open Questions with Respect to the Primary Purpose Test

In *Williams v. Illinois*, a splintered Court added two slight wrinkles to the *Crawford* analysis.<sup>81</sup> Williams was on trial for rape.<sup>82</sup> Following the attack in question, a blood sample and vaginal swab were taken from the rape victim.<sup>83</sup> The hospital sent the sealed samples to the Illinois State Police laboratory, which then transferred them to a private laboratory, Cellmark, for DNA testing.<sup>84</sup> Cellmark prepared a DNA profile (the Cellmark report) and sent it to the Illinois State Police.<sup>85</sup> Sandra Lambatos, a forensic specialist for the police, then conducted a computer search to see if the DNA profile sent back from Cellmark matched any of the profiles in the state DNA database.<sup>86</sup> She found a match to Williams’s profile—a blood sample taken after an unrelated arrest.<sup>87</sup> Lambatos testified to the match on direct examination as an expert witness for the prosecution.<sup>88</sup> On cross-examination, she admitted that she relied on the Cellmark report as a basis for her expert testimony.<sup>89</sup>

Williams argued his right to confrontation was violated because the lab technician who prepared the Cellmark report did not testify to his analysis and verify that the DNA profile was derived from the vaginal swabs sent from the hospital, rather than another source.<sup>90</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 132 S. Ct. 2221 (2012).

<sup>82</sup> *Id.* at 2227.

<sup>83</sup> *Id.* at 2229.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 2229.

<sup>88</sup> See *id.* at 2267 (“Q Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams? A Yes, there was. Q Did you compare the semen . . . from the vaginal swabs of [L.J.] to the male DNA profile . . . from the blood of Sandy Williams? A Yes, I did. . . . Q [I]s the semen identified in the vaginal swabs of [L.J.] consistent with having originated from Sandy Williams? A Yes.” (emphasis added)).

<sup>89</sup> *Id.* The Cellmark report was not admitted into evidence or shown to the jury. See *id.* at 2230.

<sup>90</sup> See *id.* at 2227 (“Petitioner’s main argument is that the expert went astray when she referred to the DNA profile provided by Cellmark as having been produced from semen found on the victim’s vaginal swabs.”).

Williams claimed that Lambatos, in giving her expert opinion, assumed this fact without personal knowledge.<sup>91</sup>

The Supreme Court addressed the issue of whether an expert can disclose out-of-court statements (here, the contents of the Cellmark report) as a basis for his or her opinion.<sup>92</sup> In a plurality opinion written by Justice Alito, four members of the Court answered this question in the affirmative.<sup>93</sup> They held that the testimony was properly admitted and that there was no Confrontation Clause violation.<sup>94</sup> First, the plurality ruled that the Cellmark report was not hearsay because it was not introduced for the truth of the matter asserted, but rather, pursuant to Illinois Rule of Evidence 703,<sup>95</sup> as a basis for Lambatos's expert opinion.<sup>96</sup> Justice Alito explained, "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause."<sup>97</sup>

Second, the plurality claimed that even if the Cellmark report was introduced for its truth, it was nontestimonial hearsay and, therefore, was not covered by the Confrontation Clause.<sup>98</sup> This is where Justice Alito tweaked the existing *Crawford* test: An out-of-court statement is testimonial if it has the "primary purpose of accusing a *targeted individual* of engaging in criminal conduct."<sup>99</sup> Alito justified the targeting element of the test on veracity grounds.<sup>100</sup> He wrote that first, the risk of fabrication of evidence or suspect-framing was a historical practice that the Confrontation Clause sought to eliminate;<sup>101</sup> second, where there is no suspect identified, there is "no prospect of fabrication and no incentive to produce anything other than a scientifically sound and

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2227.

<sup>93</sup> See *id.* at 2228 (explaining that Justice Alito was joined by Chief Justice Roberts and Justices Kennedy and Breyer).

<sup>94</sup> *Id.*

<sup>95</sup> ILL. R. EVID. 703. This rule is substantively identical to Federal Rule of Evidence 703 with respect to the following proposition: An expert is allowed to rely on inadmissible hearsay in forming his or her opinion. FED. R. EVID. 703.

<sup>96</sup> *Williams*, 132 S. Ct. at 2228 ("Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert. . . . [M]odern practice . . . permits an expert to explain the facts on which his or her opinion is based without testifying to the truth of those facts.").

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2242.

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> *Id.* at 2244.

<sup>101</sup> *Id.*

reliable profile.”<sup>102</sup> The plurality concluded that the Cellmark report was nontestimonial because the lab analysts did not have a suspect in mind when preparing the profile.<sup>103</sup>

It is important to note that *Williams* only produced a plurality opinion. The justices were sharply divided in their reasoning. Justice Thomas concurred in the judgment but on different grounds: He argued that the Cellmark report was nontestimonial because it was not sufficiently formal, and thus, was not covered by the Confrontation Clause.<sup>104</sup>

Open questions remain as to the appropriate contours of the *Crawford* test—the law is far from settled. To summarize, four justices believe that one condition of the primary purpose test is that statements are only testimonial if they target a particular individual.<sup>105</sup> Five justices believe the primary purpose test does not involve a targeting element;<sup>106</sup> a statement is testimonial if made or elicited with the primary purpose of proving “past events potentially relevant to later criminal prosecution,” regardless of whether a suspect has been identified.<sup>107</sup> Of the latter five, one justice, Justice Thomas, believes that a statement cannot be considered “testimonial” unless it is sufficiently formal and solemn.<sup>108</sup>

With respect to expert testimony, four justices believe that, under Federal Rule of Evidence 703, an expert can disclose hearsay statements as the basis for their opinion without violating the Confrontation Clause because the statements are not introduced for their truth.<sup>109</sup> Five justices believe this is a fallacy.<sup>110</sup> These justices argue

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<sup>102</sup> *Id.* (internal citations omitted).

<sup>103</sup> *See id.* at 2243 (“When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time.”).

<sup>104</sup> *See id.* at 2255 (“Cellmark’s statements lacked the requisite ‘formality and solemnity’ to be considered ‘testimonial’ for purposes of the Confrontation Clause.”).

<sup>105</sup> *See id.* at 2242 (explaining that the plurality opinion was written by Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer).

<sup>106</sup> *See id.* at 2273–74 (Kagan, J., dissenting) (arguing that the targeting test is not grounded in the text or the history of the Confrontation Clause). Justice Kagan was joined in her dissent by Chief Justice Roberts and Justices Kennedy and Breyer. Justice Thomas wrote a separate concurrence but agreed with Justice Kagan that Justice Alito’s targeting test was not grounded in the text or history of the Confrontation Clause. *See id.* at 2263.

<sup>107</sup> *See id.* at 2273 (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)) (explaining the views of Justices Kagan, Scalia, Ginsburg, Sotomayor, and Thomas).

<sup>108</sup> *See id.* at 2259 (Thomas, J., concurring in the judgment) (“Testimony, in turn, is [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . In light of its text, I continue to think that the Confrontation Clause regulates only the use of statements bearing indicia of solemnity.” (citations omitted)).

<sup>109</sup> *See id.* at 2228 (explaining that Justice Alito wrote for the plurality and was joined by Chief Justice Roberts and Justices Kennedy and Breyer). *Williams* was a bench trial. *Id.* at 2227. It is unclear if the plurality would accept the Rule 703 analysis in a jury trial—where

that there is no meaningful distinction between a statement offered for its truth and a statement offered as a basis for an expert's opinion: "[A]dmission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so the credibility of the conclusion it serves to buttress."<sup>111</sup>

## II

### APPLYING *CRAWFORD* TO TERRORISM PROSECUTIONS

In terrorism prosecutions, tension exists between the government's desire for secrecy and a defendant's right to confront the evidence against him.<sup>112</sup> The government aims to make a strong case against the defendant and secure a conviction without compromising its sources and classified information.<sup>113</sup> The defendant, however, deserves a fair trial and needs to know the evidence against him in order to put on an effective defense: "By stripping the defendant of the ability to probe weaknesses in the government's evidence, secrecy threatens to turn a criminal trial into an empty ritual drained of the adversarial features that are its very reason for being."<sup>114</sup> The Confrontation Clause is one of several constitutional provisions that ensures the integrity of the criminal justice system by promoting an adversarial proceeding.<sup>115</sup>

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it would be the jurors, not the judge, deciphering how to use the evidence—as a basis for the expert's opinion and not for the truth of the matter asserted.

<sup>110</sup> See *id.* at 2268–70 (Kagan, J., dissenting). In his concurrence, Justice Thomas agreed with Justice Kagan that the plurality's Rule 703 analysis defied logic. See *id.* at 2257 (finding "no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth. To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true" (citations omitted)).

<sup>111</sup> *Id.* at 2269 (citations omitted).

<sup>112</sup> See SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE AT N.Y.U. SCH. OF LAW, THE SECRECY PROBLEM IN TERRORISM TRIALS 16 (2005) ("[A]ny government genuinely concerned with meeting its national security obligations and honoring a defendant's fundamental rights may face difficult decisions in the prosecution of suspected terrorists.").

<sup>113</sup> Cf. Kenneth L. Wainstein, *Terrorism Prosecutions and the Primacy of Prevention Since 9/11*, in CTR. ON LAW AND SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2009, 25 (2010), available at [http://www.lawandsecurity.org/Portals/0/documents/02\\_TTRCFinalJan142.pdf](http://www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan142.pdf) ("Some have argued that the need to preserve secrecy means that prosecutors cannot bring charges for the full range of criminal activity they believe a defendant to be guilty of, but instead must limit the indictment to those charges that they can prove without having to introduce sensitive evidence.").

<sup>114</sup> TURNER & SCHULHOFER, *supra* note 112, at 6.

<sup>115</sup> *Id.* at 10–11.

As outlined in Part I, there was a marked shift between *Ohio v. Roberts* and *Crawford v. Washington*. Despite limiting the scope of the Confrontation Clause to testimonial hearsay, the Supreme Court gave the Clause teeth, making the test for admission of testimonial hearsay much more rigorous.<sup>116</sup> The *Crawford* framework has yet to be tested in any major terrorism prosecution<sup>117</sup>—perhaps because most terrorism prosecutions, like other criminal trials, do not go to trial and instead end with a guilty plea.<sup>118</sup>

There are several possible situations where the Confrontation Clause could affect proceedings. This Part predicts three possible scenarios: the admission of 1) wiretap recordings authorized by the Foreign Intelligence Surveillance Act (FISA),<sup>119</sup> 2) *ex parte* affidavits sworn to by witnesses in interrogations conducted by government officials;<sup>120</sup> and 3) written summaries of out-of-court testimony crafted pursuant to the Classified Information Procedures Act (CIPA).<sup>121</sup> I chose these three hypotheticals because they involve commonly used tools in foreign intelligence gathering and terrorism law enforcement. The Federal Judicial Center published a report of national security case studies, in which they identified FISA wiretaps, *ex parte* interro-

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<sup>116</sup> See *supra* Part I.A for discussion of this shift.

<sup>117</sup> The federal courts have peripherally dealt with *Crawford* and the Confrontation Clause in a few notable terrorism cases, albeit in a cursory manner. See, e.g., *United States v. Naeem*, 389 F. App'x 245, 247 (4th Cir. 2010) (unpublished opinion) (holding that defendant's right to confrontation was not violated where admitted statements were offered "not to prove the truth of the matters asserted but to show the statements were made in furtherance of the conspiracy"); *United States v. Farhane*, 634 F.3d 127, 163 (2d Cir. 2011) (ruling that co-conspirator's recorded statements to an undercover government agent were nontestimonial where co-conspirator did not know the true identity of the agent); *United States v. Odeh (In re Terrorist Bombings of U.S. Embassies in E. Afr.)*, 552 F.3d 93, 135–36 (2d Cir. 2008) (holding that, in a joint trial, defendant's right to confrontation was not violated where testimonial statement of co-defendant was admitted against co-defendant who made the statement and limiting instruction was given to the jury explaining that the statement could be considered "only with respect to the speaker").

<sup>118</sup> One source estimates that 68.3% of terrorism prosecutions resolved between 2001 and 2009 ended with a guilty plea. See TERRORIST REPORT CARD 2009, *supra* note 13, at 26. Nevertheless, *Crawford* is vitally important because plea-bargaining works against the backdrop of what would happen if a case goes to trial. If the government does not have enough *admissible* evidence to meet their burden of proof, a savvy defense attorney will counsel their client not to take a plea.

<sup>119</sup> See 50 U.S.C.A. §§ 1801–12 (West 2010). FISA wiretaps are similar to domestic wiretaps in that they authorize electronic surveillance; however, FISA wiretaps are set up to intercept communications involving a "foreign power" or an "agent of a foreign power," which could be an American citizen. *Id.* § 1801.

<sup>120</sup> Professor Stephen Schulhofer and Serrin Turner have acknowledged that it is an open question whether, under *Crawford*, the government could introduce an *ex parte* sworn affidavit of witness testimony. TURNER & SCHULHOFER, *supra* note 112, at 45.

<sup>121</sup> 18 U.S.C.A. app. 3 §§ 1–16 (West 2013). CIPA "provides pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court." S. REP. NO. 96-823, at 1 (1980).

gations of detainees, and classified information as three common case management problems, among others.<sup>122</sup> These hypotheticals are intended to explain the contours of *Crawford*—what will be considered testimonial hearsay and what will be deemed nontestimonial hearsay and, therefore, outside the scope of the Confrontation Clause. Not every piece of evidence that is frequently used in terrorism prosecutions will be an issue under *Crawford*. The first example of a FISA wiretap is an illustration of nontestimonial evidence and is meant to provide a comparison to other forms of evidence—for example, *ex parte* affidavits and written summaries—that are more likely to be deemed testimonial and cause problems for prosecutors.

This Note assesses the admissibility of the hearsay evidence in each scenario in a two-step process. First, it asks whether the hearsay evidence satisfies an exception to the ban on hearsay, imposed by the Federal Rules of Evidence. Second, even if the evidence meets an exception, it asks whether the out-of-court statements are testimonial and, thus, barred by the Confrontation Clause.

### A. *FISA Wiretaps*

Suppose that a Federal Bureau of Investigation (FBI) agent applies to the Foreign Intelligence Surveillance Court for a surveillance warrant to monitor phone calls between two Al Qaeda members. The FBI does not know what role these individuals play in the Al Qaeda organization and would like to gather intelligence on them. The Foreign Intelligence Surveillance Court grants the request for surveillance. The FBI records hundreds of phone calls between the two individuals. These phone calls frequently mention another man, named Defendant X, who is also part of Al Qaeda. The two individuals frequently talk about how they will get Defendant X the money necessary to execute his “plan.” Defendant X is subsequently indicted for the attempted bombing of Flight 123. The Government wants to introduce the wiretap recordings and play them for the jury at Defendant X’s trial. The two individuals recorded on the wiretap are not available to testify at trial. The defense objects to admission of the recordings on hearsay and Confrontation Clause grounds.

As a threshold matter, the statements on the wiretap are technically not hearsay. They are permissible out-of-court statements under Federal Rule of Evidence 801(d)(2)(E)—statements of co-conspira-

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<sup>122</sup> ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., NATIONAL SECURITY CASE STUDIES: SPECIAL CASE MANAGEMENT CHALLENGES vii (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ts100222.pdf/\\$file/ts100222.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ts100222.pdf/$file/ts100222.pdf).

tors.<sup>123</sup> Does the Confrontation Clause nonetheless bar their admission under *Crawford*? Most likely, the answer is no. Hearsay statements covered by the co-conspirator exception to the hearsay ban are “by their nature” nontestimonial.<sup>124</sup> This is in part because, in order to be admitted under Rule 801(d)(2)(E), co-conspirator statements must be “in furtherance of the conspiracy.”<sup>125</sup> Thus, a co-conspirator, working to further a criminal enterprise, is trying to evade prosecution—not prove past events “potentially relevant to later criminal prosecution.”<sup>126</sup> The co-conspirators in our hypothetical were attempting to further the conspiracy by devising a plan to get Defendant X money to execute his criminal scheme. The declarants were talking amongst themselves and not to law enforcement.<sup>127</sup> As evidenced by this hypothetical, the admission of FISA wiretaps will likely pass constitutional muster under the *Crawford* test.

### B. Ex Parte Affidavits

The following is another hypothetical situation—though parts of it are based on an actual case.<sup>128</sup> Defendant Y, a legal permanent resident of the United States, has been indicted in the Eastern District of New York for conspiracy to use weapons of mass destruction on the New York City subway system. A CIA officer conducts an *ex parte* interrogation of another individual detained at Guantanamo. This specific detainee is suspected to be a member of Al Qaeda and is also believed to have knowledge about the attempted attack on the subway system. The CIA officer asks a range of questions:

*Did you know that a member of Al Qaeda was plotting an attack on New York City?*

*Was Defendant Y involved in this plot?*

*Is Al Qaeda plotting another attack on New York City?*

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<sup>123</sup> A statement can be admitted—it is not hearsay—if the statement is 1) made by the party’s co-conspirators, 2) during the course and 3) in furtherance of the conspiracy. FED. R. EVID. 801(d)(2)(E); *see generally* Bourjaily v. United States, 483 U.S. 171 (1987) (applying the requirements of Federal Rule of Evidence 801(d)(2)(E) and holding that a co-conspirator’s statement to an undercover agent was not hearsay).

<sup>124</sup> *Crawford v. Washington*, 541 U.S. 36, 56 (2004); *see also* *United States v. Logan*, 419 F.3d 172, 178 (2d Cir. 2005) (“In general, statements of co-conspirators in furtherance of a conspiracy are non-testimonial.”).

<sup>125</sup> FED. R. EVID. 801(d)(2)(E).

<sup>126</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006).

<sup>127</sup> The absence of law enforcement is significant. *See Crawford*, 541 U.S. at 68 (noting that testimonial hearsay “applies at a minimum . . . to police interrogations”).

<sup>128</sup> For a description of the case this hypothetical is based on, see Press Release, United States Dept. of Justice, Najibullah Zazi Indicted for Conspiracy (Sept. 24, 2009), *available at* <http://www.justice.gov/opa/pr/2009/September/09-ag-1017.html>. That case involved the indictment of Najibullah Zazi, the Al Qaeda member who attempted to bomb the New York City subway system. *Id.*

The detainee answers these questions orally. The CIA officer uses the detainee's answers to write out an affidavit, which implicates Defendant Y. The detainee swears to the veracity of the affidavit. The Government wants to admit this affidavit at trial.<sup>129</sup> Defendant Y has not had a prior opportunity to cross-examine the detainee. The Government refuses to put the declarant on the stand because it would threaten national security to transport him from Guantanamo to Brooklyn.<sup>130</sup> Defendant Y argues that admission of the affidavit would violate his right to confront the evidence against him.

As an initial matter, the assertions made by the detainee, contained in the affidavit, are hearsay, as they are out-of-court statements admitted for their truth.<sup>131</sup> The statements do not fit neatly within the defined exceptions to the bar on hearsay. They may, however, be admissible under Federal Rule of Evidence 807—the “residual exception”—if, among other requirements, the statements have “circumstantial guarantees of trustworthiness.”<sup>132</sup> Federal courts have been unpredictable in their application of the residual exception.<sup>133</sup> For purposes of this example, I assume the statements qualify under this exception.<sup>134</sup>

A court will next need to determine whether the Confrontation Clause nonetheless bars admission of the hearsay. Is the affidavit testimonial? First, we must ask what the purpose of the interrogation was, assessing this from the vantage point of the government official conducting the interrogation, as well as from the detainee's perspective,

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<sup>129</sup> Najibullah Zazi actually pleaded guilty but, for purposes of this hypothetical, I am changing the facts to say Defendant Y proceeded to trial. See Press Release, United States Dept. of Justice, Najibullah Zazi Pleads Guilty to Conspiracy to Use Explosives Against Persons or Property in U.S., Conspiracy to Murder Abroad and Providing Material Support to Al-Qaeda (Feb. 22, 2010), available at <http://www.justice.gov/opa/pr/2010/February/10-ag-174.html> (announcing Zazi's guilty plea).

<sup>130</sup> The National Defense Authorization Act of 2014 prohibits the use of appropriated funds to transfer detainees from Guantanamo Bay to the United States. Pub. L. No. 113-66, § 1034, 127 Stat. 672, 679 (2013).

<sup>131</sup> See FED. R. EVID. 801 (defining hearsay to encompass only out-of-court statements offered for their truth).

<sup>132</sup> FED. R. EVID. 807. Under the residual exception, a judge can admit a statement that does not fall under one of the hearsay exceptions, if the judge nonetheless finds it trustworthy. *Id.* This provision gives the judge flexibility beyond the categories.

<sup>133</sup> See 30C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 7095 (2d ed. 2013) (noting that the residual exception is employed on a case-by-case basis and there is “[n]o pattern” apparent in the decisions that utilize this exception).

<sup>134</sup> If these statements do not in fact meet the requirements of the residual exception, they will be held inadmissible under the Federal Rules of Evidence. The court will not need to reach the constitutional question under the Confrontation Clause.

using an objective standard for both.<sup>135</sup> Was the purpose to resolve an ongoing emergency? Or, rather, was it to build a case against Defendant Y? The Government will likely argue that the primary purpose of the interrogation was “to meet an ongoing emergency”<sup>136</sup>—i.e. to prevent another terrorist attack—and, therefore, the statements are nontestimonial. The CIA officer in our hypothetical asked the detainee whether Al Qaeda was planning another attack—a forward-looking question. The defense will likely counter that the thrust of the interrogation was focused on establishing “past events potentially relevant to later criminal prosecution.”<sup>137</sup> Was Defendant Y involved? What steps did Defendant Y take to execute the attack? It will be difficult to parse these statements. In all likelihood, there was a mixed purpose.

In *Michigan v. Bryant*, the Court outlined several factors relevant to whether an ongoing emergency exists.<sup>138</sup> The first factor is especially pertinent to our fact pattern. Terrorism poses an enormous threat to public safety. But could it be said that the public is *perpetually* in danger of terrorist acts? If the answer is yes, hearsay evidence will routinely fit in the *Davis v. Washington* emergency exception in terrorism cases and be nontestimonial. It is hard to imagine that the Supreme Court would approve of such a broad exception to the Confrontation Clause.

Given that, we must ascertain what the primary purpose of the interrogation was—intelligence gathering or ordinary law enforcement. The timing of the interrogation may be a good clue. Did the interrogation occur shortly after the subway plot was uncovered? If so, perhaps the government needed to know immediately if other explosive devices were planted around the city in order to disarm them and prevent future harm. If the interrogation occurred months after the event, it seems less plausible that the government was responding to an ongoing emergency and more likely that the government was gathering evidence to convict Defendant Y.

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<sup>135</sup> See *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011) (“[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”).

<sup>136</sup> See *id.* (explaining that statements made in order to “meet an ongoing emergency” are unlikely testimonial).

<sup>137</sup> *Id.* at 1157.

<sup>138</sup> See *supra* notes 71–74 (listing threats to public safety, the type of weapon used, the medical condition of the declarant, and whether the questioning was formal as relevant factors).

Of course, the entire interrogation does not need to fit neatly into one category of purpose: A conversation that begins as an interrogation to determine emergency assistance can “evolve into testimonial statements once that purpose has been achieved.”<sup>139</sup> If the detainee told the CIA officer that no future attacks were planned and the CIA officer redirected his questions to focus on past events, then ostensibly the statements elicited from that point forward were testimonial. Trial courts can “determine in the first instance when any transition from non-testimonial to testimonial occurs, and exclude ‘the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.’”<sup>140</sup> In our example, it appears clear that at least the statements focusing on Defendant Y and his past acts were testimonial.

As explained in Part I.D, four justices believe the primary purpose test is limited to statements that target a particular individual.<sup>141</sup> Five justices believe the primary purpose test does not involve a targeting element.<sup>142</sup> Regardless of how the Court decides to prioritize this element in future cases, it is met here. The CIA had a suspect in mind—Defendant Y—when they conducted the interrogation.

The last consideration is whether the statements are sufficiently formal.<sup>143</sup> Justice Thomas believes that statements cannot be considered testimonial unless they bear the necessary “indicia of solemnity.”<sup>144</sup> According to Thomas, an affidavit is a “formalized testimonial material[ ].”<sup>145</sup> He also notes that statements made in “formalized dialogue such as a custodial interrogation” are testimo-

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<sup>139</sup> *Davis v. Washington*, 547 U.S. 813, 828 (2006) (internal quotations omitted). The Court provided an analogy to the Fifth Amendment: “[P]olice officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect . . . .” *Id.* (quoting *New York v. Quarles*, 467 U.S. 649, 658–59 (1984)).

<sup>140</sup> *Bryant*, 131 S. Ct. at 1159–60 (quoting *Davis*, 547 U.S. at 829). It is worth noting that the task of parsing testimonial from nontestimonial statements may, in reality, be quite difficult. Interrogations often occur over a course of hours, days, and even weeks, and are frequently conducted by several different government officials. As a result, it will be challenging for a judge to determine the objective intent of the questioner and declarant at any given moment. Given the renewed strength the Court gave the right to confrontation in *Crawford*, I predict lower courts will err on the side of caution and—when in doubt—will characterize ambiguous statements as testimonial.

<sup>141</sup> See *supra* note 105 and accompanying text.

<sup>142</sup> See *supra* note 106 and accompanying text.

<sup>143</sup> See *supra* notes 75–80 and accompanying text (discussing whether formality is a necessary element of testimonial statements).

<sup>144</sup> *Id.* at 2259.

<sup>145</sup> *Id.* (Thomas, J., concurring in the judgment).

nial.<sup>146</sup> As such, Justice Thomas would likely find the sworn affidavit in our fact pattern sufficiently formal to be considered testimonial.

This hypothetical illustrates that the Government may have trouble admitting sworn affidavits made by unavailable witnesses under the *Crawford* test regardless of which formulation of the primary purpose test—set forth in aforementioned opinions of the Court—is used. The Supreme Court has expressed concern about this particular type of evidence, noting that the “principal evil at which the Confrontation Clause was directed” was the use of “*ex parte* examinations.”<sup>147</sup> In the context of terrorism, whether an affidavit is admissible will turn on whether the court finds that the interrogation in question occurred during an ongoing emergency. This inquiry is fact-specific and will differ with each case. As noted earlier, it is highly unlikely that the Court will conclude that every terrorism-related interrogation should be characterized as occurring during an ongoing emergency. This categorization would be only a small step away from saying that the United States is in a constant state of emergency. As such, at least under certain fact patterns—for example, where the interrogation is conducted weeks or months after an attack and focuses on past events—the Government will likely have trouble admitting *ex parte* affidavits against suspected terrorists.

### C. CIPA Written Summaries

Our last fact pattern is based on an actual case: *United States v. Moussaoui*.<sup>148</sup>

Zacarias Moussaoui was charged with conspiracy to commit acts of terrorism in relation to the September 11 terrorist attacks.<sup>149</sup> Moussaoui claimed he was not involved in the attacks.<sup>150</sup> He sought to call three witnesses that would testify in his favor.<sup>151</sup> The Government refused to produce these witnesses—despite the fact that they were in United States custody—because it claimed that these witnesses were

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<sup>146</sup> *Id.* (internal quotations omitted).

<sup>147</sup> *Crawford v. Washington*, 541 U.S. 36, 50 (2004). Jurors have no way to assess whether the testimony was voluntary. “Through leading questions or pressure tactics, government interrogators, bent on securing a conviction, can induce testimony implicating the defendant in a crime.” TURNER & SCHULHOFER, *supra* note 112 at 12.

<sup>148</sup> 382 F.3d 453 (4th Cir. 2004). *Crawford* came down in March 2004, and *Moussaoui* was decided in September 2004. Nevertheless, the Fourth Circuit in *Moussaoui* never addressed *Crawford*.

<sup>149</sup> *Id.* at 457.

<sup>150</sup> *Id.* at 458.

<sup>151</sup> *Id.* at 458–59.

national security assets.<sup>152</sup> The Fourth Circuit ruled that, under the Sixth Amendment Compulsory Process Clause, Moussaoui had a right to the witnesses' testimony.<sup>153</sup> The court noted, however, "this right must be balanced against the Government's legitimate interest in preventing disruption . . . of the enemy combatant witnesses."<sup>154</sup> The district court used CIPA as a guidepost for crafting a compromise.<sup>155</sup>

Ultimately, the prosecution offered to give the defendant written summaries of any statements the detainees had made during the government interrogations,<sup>156</sup> which tended to exculpate Moussaoui.<sup>157</sup> The summaries were intended to be "substitutions" for the detainees' testimony.<sup>158</sup> The Fourth Circuit held that these substitutions would be read to the jury at trial and the trial court would instruct the jury that the substitutions are "what the witnesses would say if called to testify" and were "derived from statements obtained under conditions that provide circumstantial guarantees of reliability."<sup>159</sup>

Moussaoui pleaded guilty.<sup>160</sup> For the purposes of this example, suppose Moussaoui proceeded to trial. The first question is whether it matters that Moussaoui, the defendant, was the party requesting the testimony. The substitutions would be part of his defense, rather than the Government's case-in-chief. Because the Confrontation Clause refers to a defendant's right to confront witnesses "*against him*,"<sup>161</sup> Moussaoui could not invoke the clause to confront non-adverse witnesses<sup>162</sup>—here, those testifying on his behalf.

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<sup>152</sup> See *id.* at 470 (noting that these witnesses were "critical" to the ongoing effort to combat terrorism and "interruption . . . of these witnesses [would] have devastating effects on the ability to gather information from them").

<sup>153</sup> *Id.* at 468.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 471 n.20. The district court orders in *Moussaoui* were not technically covered by CIPA, but the Fourth Circuit ruled that CIPA nonetheless "provide[d] a useful framework for considering the questions raised by Moussaoui's request for access to the enemy combatant witnesses." *Id.*; see also Classified Information Procedures Act, 18 U.S.C. app. §§ 1–16 (2013); *supra* note 121 (describing CIPA's function).

<sup>156</sup> *Moussaoui*, 382 F.3d at 473, 477–78.

<sup>157</sup> See *id.* at 473–74 (explaining how the detainees' testimony could provide evidence of the defendant's innocence).

<sup>158</sup> *Id.* at 477.

<sup>159</sup> *Id.* at 480.

<sup>160</sup> Alberto R. Gonzales, Attorney General, Prepared Remarks on Zacarias Moussaoui (Apr. 22, 2005), available at [http://www.justice.gov/archive/ag/speeches/2005/prepared\\_remarks\\_042205.htm](http://www.justice.gov/archive/ag/speeches/2005/prepared_remarks_042205.htm).

<sup>161</sup> U.S. CONST. amend. VI (emphasis added).

<sup>162</sup> See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313, 129 S. Ct. 2527, 2533 (2009) (explaining that the Confrontation Clause applies to accusatory witnesses, witnesses called by the prosecution that provide testimony against the defendant); *United States v. Dodgington*, 822 F.2d 818, 821 (8th Cir. 1987) (holding that the Confrontation Clause was

What if, instead, the Government had offered the evidence and the witnesses' testimony had implicated Moussaoui? Written statements, crafted by the Government, may not be fully accurate.<sup>163</sup> There is a danger that the Government will mold a declarant's testimony to fit its own agenda.<sup>164</sup> The risk of such abuse "applies with special force in terrorism prosecutions, where cases attract considerable political attention and the government faces considerable pressure to obtain convictions."<sup>165</sup>

Even if the CIA officer who drafted the summaries testified to their creation, the statements by the witnesses contained within the report are still embedded hearsay. While this hearsay may fit the residual exception,<sup>166</sup> there is likely to be a confrontation problem. The same analysis from the example in Part II.B—*ex parte* affidavits—would apply here. The critical question remains whether the interrogation had the primary purpose of intelligence gathering or law enforcement. The timing of the interrogation is germane to the inquiry. If, for example, the detainees were questioned just days after 9/11, it is plausible that the purpose of the interrogation was to resolve an ongoing emergency. Moussaoui was indicted in December 2001.<sup>167</sup> If the detainees were questioned after Moussaoui was indicted—over two months after 9/11—it is more probable that the aim of the interrogation was to collect evidence about past events and bring the terrorists responsible for the attacks to justice.<sup>168</sup> The latter situation would likely involve testimonial hearsay evidence, which would be inadmissible under the Confrontation Clause.<sup>169</sup>

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not implicated where defendant called the witness in question and the witness did not testify for the prosecution).

<sup>163</sup> See TURNER & SCHULHOFER, *supra* note 112, at 12 (noting that if it is "allowed to summarize the witness's testimony in writing, the government can use its control over the drafting process to further shade and shape the witness's testimony").

<sup>164</sup> *Id.* at 67.

<sup>165</sup> *Id.*

<sup>166</sup> FED. R. EVID. 807; see also *supra* notes 132–34 and accompanying text (describing the residual exception and the unpredictable manner in which it is applied).

<sup>167</sup> Indictment at 1, United States v. Moussaoui, 282 F.Supp.2d 480 (E.D.Va. 2003) (No. 01-455-A), 2001 WL 34914270.

<sup>168</sup> However, a court would need much more information to make this determination. See *supra* Part I.B (outlining the primary purpose test used to determine whether an out-of-court statement is testimonial). In order to determine the objective intent of the questioner and declarant, a judge would not only need to look at the timing of the interrogation but also the specific line of questioning. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011) (noting that in order to determine the primary purpose of an interrogation, a court must conduct an objective analysis of "the circumstances of an encounter and the statements and actions of the parties").

<sup>169</sup> See *supra* Part I.B.

Moreover, because of the risk of government manipulation, it is potentially misleading for the judge to instruct the jury that written substitutions are “what the witnesses would say if called to testify.”<sup>170</sup> *Crawford* established that the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>171</sup> Going forward, a CIPA-like solution may not be viable for evidence presented at trial.

This Part explained the potential repercussions of *Crawford* with respect to terrorism prosecutions. It outlined challenges prosecutors may face should they seek to use hearsay evidence to convict suspected terrorists. Prosecutors will not face confrontation issues when trying to admit wiretap recordings, as this evidence is nontestimonial. However, the government will likely have trouble admitting *ex parte* affidavits and written summaries of witness testimony because these items of evidence—depending on the objective circumstances—are likely to be deemed testimonial.

### III

#### SOLUTIONS TO POTENTIAL *CRAWFORD* ISSUES IN TERRORISM PROSECUTIONS

In order to address the *Crawford* problems outlined in Part II, this next Part offers three possible solutions<sup>172</sup>—ways in which the government could collect and use valuable witness testimony to effectively prosecute suspected terrorists without compromising defendants’ rights. I present each solution’s benefits and disadvantages. I ultimately argue that the best solution is greater use of witness depositions abroad, pursuant to Federal Rule of Criminal Procedure 15(c)(3).<sup>173</sup>

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<sup>170</sup> *United States v. Moussaoui*, 382 F.3d 453, 480 (4th Cir. 2004).

<sup>171</sup> *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

<sup>172</sup> I do not think a viable solution is for the Supreme Court to overrule *Crawford* or to create a terrorism exception to the right to confrontation. *See, e.g.*, Abrams, *Terrorism Prosecutions in U.S. Federal Court*, *supra* note 11, at 76–78 (proposing an “exception” to confrontation where a court finds a statement made in a terrorism interrogation context is otherwise trustworthy and reliable); Scott, *supra* note 11, at 1078–79 (arguing that *Crawford* “might effectively bar certain terrorism trials in federal court” and suggesting it should be overruled). Rather, I chose to focus on solutions that fall within the existing contours of the law and do not require any overhaul.

<sup>173</sup> FED. R. CRIM. P. 15(c)(3).

### A. *Military Commissions as Tribunals for Terrorism Prosecutions*

The first option is to move terrorism trials from Article III courts to military commissions.<sup>174</sup> Military commissions are not bound by the Federal Rules of Evidence.<sup>175</sup> Pursuant to the Military Commissions Act of 2009 (MCA), in order to admit an out-of-court statement, the military judge must find:

(I) [T]he statement is offered as evidence of a material fact; (II) the statement is probative on the point for which it is offered; (III) direct testimony from the witness is not available as a practical matter . . . ; and (IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.<sup>176</sup>

These requirements may only be met, however, by assessing the totality of the circumstances surrounding the taking of the statement, “including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne.”<sup>177</sup> This test is similar to the one enunciated by *Ohio v. Roberts*.<sup>178</sup> It is much less demanding than the primary purpose test. Under the primary purpose test, if a statement was made during an interrogation where the primary purpose was to prove past events, it is of no consequence that the statement is deemed reliable; it is testimonial and, thus, barred by the Confrontation Clause. An open question remains as to whether the Confrontation Clause of

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<sup>174</sup> The jurisdictional reach of the military commissions is beyond the scope of this Note but has important implications for trying alleged terrorists. The Military Commissions Act of 2009 states: “Any *alien* unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.” 10 U.S.C. § 948c (emphasis added). The Act defines “alien” as “an individual who is not a citizen of the United States.” *Id.* § 948a(1). It appears that the word *alien* modifies *unprivileged enemy belligerent*, suggesting that military commissions only have jurisdiction over non-United States citizens. *Cf.* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (emphasizing a bipartisan agreement that United States citizens should not be tried in military commissions). If it is true that United States citizens cannot be tried in military commissions, this will be significant as there is increasingly more “homegrown terrorism”: “Of the defendants prosecuted in relation to the top 50 plots prosecuted since 9/11, 81% were homegrown.” TERRORIST REPORT CARD 2010, *supra* note 6, at 3 (noting that, for purposes of the study, homegrown means defendants who were either born in the United States or have lived here for at least ten years).

<sup>175</sup> See FED. R. EVID. 1101(a)–(b) (listing the courts in which the Federal Rules of Evidence apply and not mentioning military tribunals).

<sup>176</sup> Military Commissions Act of 2009, 10 U.S.C. § 949a(b)(3)(D)(ii) (2012).

<sup>177</sup> *Id.*

<sup>178</sup> See 448 U.S. 56, 65–66 (1980) (noting that an out-of-court statement is admissible only if it bears adequate “indicia of reliability”).

the Sixth Amendment applies to these tribunals.<sup>179</sup> Assuming it does not, and only the MCA governs, military commissions have much more flexibility than Article III courts with regards to the admission of hearsay evidence.

While military commissions may make it easier to prosecute terrorists, there are two overlapping, countervailing concerns: the continuing legitimacy of the criminal justice system and the need to protect defendants' rights. The main criticism of military commissions has been that "secret and un-rebutted evidence will play a major part in the process, unfairly depriving the defendant of the means to defend himself and opening the door to error and executive abuse."<sup>180</sup> Former federal prosecutor—and now Executive Director of Human Rights Watch—Kenneth Roth has pointed out that "lax hearsay rules mean that [defendants] could be sentenced to death based on second- or third-hand affidavits summarizing statements obtained through abuse, without any meaningful opportunity to challenge the evidence."<sup>181</sup> He warns that "[t]his is a dangerous approach" because "[c]onvictions under these conditions would be seen as illegitimate and generate widespread outrage."<sup>182</sup> Moreover, as noted in the Introduction of this Note, both President Obama and Attorney General Holder have expressed a strong preference for trying terrorists in Article III courts.<sup>183</sup> For these reasons, military commissions are not a satisfactory alternative to the Article III courts.

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<sup>179</sup> This Note does not attempt to answer this significant question. It is important, however, to point out that the Supreme Court has previously ruled that certain provisions of the Sixth Amendment do not apply to military commissions. *See, e.g.,* *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions.").

<sup>180</sup> TURNER & SCHULHOFER, *supra* note 112, at 2.

<sup>181</sup> Kenneth Roth, Comment, *After Guantánamo: The Case Against Preventive Detention*, 87 FOREIGN AFF. 9, 12 (2008). Statements coerced by torture are not formally admissible in military commissions. 10 U.S.C. § 948r(a) (2012). The standard, however, for whether a statement was made voluntarily is "looser" in military commissions than in the federal courts. Robert S. Litt & Wells C. Bennett, *Better Rules for Terrorism Trials 17* (May 8, 2009) (working paper) (on file with the Brookings Institution, Georgetown University Law Center, and Hoover Institution), available at [http://www.brookings.edu/~media/research/files/papers/2009/5/08%20terrorism%20litt%20bennett/0508\\_terrorism\\_litt\\_bennett.pdf](http://www.brookings.edu/~media/research/files/papers/2009/5/08%20terrorism%20litt%20bennett/0508_terrorism_litt_bennett.pdf).

<sup>182</sup> Roth, *supra* note 181, at 12.

<sup>183</sup> *See supra* notes 3–4 and accompanying text; *see also* Press Release, The White House, Remarks by the President on National Security (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09> ("First, whenever feasible, we will try those who have violated American criminal laws in federal courts—courts provided for by the United States Constitution."); Eric Holder, Attorney General, Commencement Address at the University of California Berkeley School of Law (May 11, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130511.html> ("[O]ur federal courts have proven to be an unparalleled instrument for

### B. Government Analysts as Experts

Another option is for the Government to call an expert to the stand and employ the same strategy used in *Williams v. Illinois*.<sup>184</sup> The prosecution could call an analyst—from the CIA, the National Security Agency (NSA), the FBI, or another agency—to testify at trial based on his or her skill or experience.<sup>185</sup> This testimony could address, for example, typical terrorist activities or patterns of behavior that match the facts of the case at hand. Pursuant to Federal Rule of Evidence 703, an expert can rely, in part, on testimonial hearsay statements to form his or her opinion.<sup>186</sup> The expert can disclose the underlying hearsay statements to the jury “if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”<sup>187</sup> The hearsay statements can only be admitted for a not-for-truth purpose—for example, to explain context or the basis of the expert’s opinion.<sup>188</sup> This situation has surfaced in some international tribunals: “[S]tatements that would likely be considered to be testimonial hearsay have been introduced as background material in the form of a report or other document.”<sup>189</sup>

Does this scheme pass constitutional muster? *Williams* is far from settled law; it produced a splintered plurality opinion.<sup>190</sup> A majority of the Supreme Court did not agree that experts could disclose this type of hearsay statement without implicating the Confrontation Clause. Four justices believe that an expert can disclose hearsay statements as the basis for their opinion under Rule 703 without violating the Confrontation Clause, because the statements are not introduced for their

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bringing terrorists to justice. They have enabled us to convict scores of people of terrorism-related offenses since September 11.”).

<sup>184</sup> 132 S. Ct. 2221 (2012); see also *supra* Part I.D (discussing *Williams* and whether it is permissible under the Confrontation Clause for an expert to disclose testimonial hearsay as a basis for his or her expert opinion).

<sup>185</sup> See FED. R. EVID. 702 (describing the requirements for introduction of expert testimony).

<sup>186</sup> An expert can rely on any information upon which other experts in the field would reasonably rely in forming an opinion. FED. R. EVID. 703. This information need not itself be admissible. *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Unless the statements meet a hearsay exception, they would be barred under the Federal Rules of Evidence if introduced for their truth. FED. R. EVID. 802.

<sup>189</sup> AM. BAR ASS’N STANDING COMM. ON LAW AND NAT’L SEC., TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES AND LESSONS LEARNED 25 (2009), available at [http://www.americanbar.org/content/dam/aba/migrated/natsecurity/trying\\_terrorists\\_artIII\\_report\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/natsecurity/trying_terrorists_artIII_report_final.authcheckdam.pdf). “As a safeguard in these cases, attorneys were permitted to ask the court to require interrogatories to authenticate certain disputed information.” *Id.*

<sup>190</sup> *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012); see *supra* Part I.D (discussing the *Williams* splintered plurality opinion).

truth.<sup>191</sup> Five justices, including Justice Thomas, believe this is a fallacy. Justice Alito was able to garner a plurality in *Williams* to support his position that the Cellmark report was nontestimonial only because Justice Thomas did not think the evidence at issue was sufficiently formal to be considered testimonial.<sup>192</sup> It is highly questionable whether it is permissible for an expert to disclose testimonial hearsay as a basis for his or her opinion, especially if the underlying evidence is formal, as in a certified affidavit. As such, this strategy is not a proven or guaranteed way for the government to deal with the strictures of *Crawford*.

### C. Pre-Trial Depositions Abroad

The *Crawford* Court did not mandate that cross-examination of testimonial witnesses occur at trial.<sup>193</sup> Former testimony is admissible at trial if the witness is unavailable, the testimony was given at a lawful deposition, and the testimony is offered against a party who had “an opportunity and similar motive to develop it by direct, cross-, or redirect examination.”<sup>194</sup>

Federal Rule of Criminal Procedure 15(c)(3), added to the rules in a 2012 amendment, authorizes pre-trial depositions abroad and outside the presence of the defense under certain circumstances.<sup>195</sup> The requirements include: 1) the witness’s testimony could provide “substantial proof of a material fact”; 2) the witness is unable to attend the trial or is beyond the subpoena power of the United States; 3) the defendant cannot be present at the deposition because secure transportation or continuing custody at the witness’s location cannot be guaranteed; and 4) the defendant must be able to “meaningfully participate in the deposition through reasonable means.”<sup>196</sup> Typically, these depositions take the following form: The prosecutor and one or more of the defense attorneys depose the witness abroad.<sup>197</sup> The

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<sup>191</sup> See *supra* note 109 and accompanying text (analyzing the plurality opinion); *supra* notes 110–11 and accompanying text (explaining Justice Kagan’s dissent and Justice Thomas’s concurrence in *Williams*).

<sup>192</sup> *Williams*, 132 S. Ct. at 2255.

<sup>193</sup> See *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (“Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”).

<sup>194</sup> FED. R. EVID. 804(b)(1).

<sup>195</sup> FED. R. CRIM. P. 15(c)(3). These depositions are an important “mechanism for taking depositions in cases in which important witnesses—government and defense witnesses both—live in, or have fled to, countries where they cannot be reached by the court’s subpoena power.” FED. R. CRIM. P. 15 advisory committee’s note.

<sup>196</sup> FED. R. CRIM. P. 15(c)(3)(A)–(E).

<sup>197</sup> See Sabin et al., *supra* note 13, at 36 (providing examples of the typical form virtual depositions take).

defendant stays in the United States and watches the deposition via a two-way live video feed.<sup>198</sup> Normally, the defendant will have another defense attorney with him in the United States as he watches.<sup>199</sup>

This Note argues that the best way for the Government to obtain and admit testimonial evidence without violating the Confrontation Clause is to utilize pretrial depositions. There are many reasons why, in a terrorism prosecution, it may be difficult to obtain witness testimony at trial in the presence of the defendant. The National Defense Authorization Act of 2014 prohibits the use of appropriated funds to transfer detainees from Guantanamo Bay to the United States.<sup>200</sup> A foreign official or individual not in custody, and thus beyond the subpoena power of the United States, may be reluctant to travel to the United States to testify.<sup>201</sup> Due to security concerns, it may also be difficult, if not impossible, to transport the defendant—an alleged terrorist—to a deposition conducted abroad. Rule 15(c)(3) accommodates these concerns by authorizing depositions taken abroad and without the defendant's presence.

There are, however, downsides to conducting Rule 15(c)(3) depositions in lieu of in-person live testimony at trial. Namely, there are four possible problems: secrecy, costs, the need to re-gather evidence, and the qualified right to in-person confrontation. Ultimately, this Note concludes that these drawbacks do not outweigh the benefits of this flexible mechanism. Rule 15(c)(3) depositions allow the Government to collect legitimate and reliable testimony for trial and still protect a defendant's right to confrontation.

The first potential concern is secrecy. A primary objection to using Article III courts in terrorism cases is that a defendant's right "in that forum . . . to confront the evidence against him . . . jeopardize[s] secret information vital to counterterrorism efforts."<sup>202</sup> In the case of a two-way live video deposition, the concern is that a witness might disclose classified information to the defendant. This risk,

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Pub. L. No. 113-66, § 1034, 127 Stat. 851 (2013). President Obama has expressed disagreement with this prohibition. Press Release, The White House, Statement by the President on H.R. 3304 (Dec. 26, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304>. However, even if this provision is repealed in the future and the ban is lifted, it may be too dangerous to have a witness, detained at Guantanamo or abroad, transported to an Article III court.

<sup>201</sup> See, e.g., *United States v. Abu Ali*, 528 F.3d 210, 239 (4th Cir. 2008) (noting that the deponents were Saudi citizens who reside in Saudi Arabia and are thus outside the subpoena power of a United States court). Foreign witnesses may not want to travel or may be concerned about becoming subject to United States civil and criminal lawsuits. Sabin et al., *supra* note 13, at 39.

<sup>202</sup> TURNER & SCHULHOFER, *supra* note 112, at 2.

however, has a conceivable remedy: The video can be paused after each answer in order to allow prosecutors time—before the defendant hears the answer—to decide whether a witness’s answer contained classified information.<sup>203</sup> The videotape can also be redacted before it is played for the jury.

Another concern is the costs associated with depositions conducted outside of the United States. The Government would need to send a prosecutor abroad to take the deposition and the defense attorney will also incur travel costs. The technology involved is also not costless.<sup>204</sup> All other costs associated with Rule 15(c)(3) depositions, however, are similar to the costs of conducting a deposition in the United States and are perhaps even less than bringing a witness to trial.<sup>205</sup> Rule 15(c)(3) depositions actually save the cost of travel for the defendant—an expense often covered by the government.<sup>206</sup> The cost differential—if it in fact exists—is not substantial enough to forgo Rule 15(c)(3) depositions.

A third concern relates to evidence collection. If the Government has already collected testimony through *ex parte* interrogations, it will need to gather that evidence again. This requires time, manpower, and resources. It is, however, important to remember that the Government would only need to *re-gather* testimonial evidence. As explained in Part II.B, if the evidence was collected for intelligence purposes—to uncover and thwart plans for future terrorism acts rather than for prosecution—it is most likely nontestimonial and, therefore, not barred by the Confrontation Clause.<sup>207</sup> Information gaps may exist where prior interrogations focused on past events and backward-looking information. In conducting new depositions, pursuant to Rule 15(c)(3), the prosecution can limit its questions to these subject areas. Depositions do require time and resources, but conducting deposi-

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<sup>203</sup> This may push the bounds of what is permissible under *Crawford*. *Crawford* held that there is an “absolute bar” to admitting testimonial statements, absent a prior opportunity for cross-examination. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004). The above noted solution may curtail defense counsel’s ability to fully and effectively cross-examine the deponent. Further, Federal Rule of Criminal Procedure 15(c)(3) does not comment on whether it is permissible to pause a live video feed deposition; however, the rule does require that the defendant be able to meaningfully participate in the deposition. FED. R. CRIM. P. 15(c)(3).

<sup>204</sup> The newest technology is telepresence, which is “capable of full-duplex, high-definition, immersive video conferencing.” Sabin et al., *supra* note 13, at 38. “The picture is 1080p full high-definition, there is little or no sound delay, and it includes the capability to show a document directly to the opposing side in real-time.” *Id.*

<sup>205</sup> An interpreter and court reporter are likely necessary.

<sup>206</sup> If the defendant is unable to bear the cost, the government must pay for “any reasonable travel and subsistence expenses of the defendant and the defendant’s attorney to attend the deposition.” FED. R. CRIM. P. 15(d).

<sup>207</sup> See *supra* Part II.B (explaining the primary purpose test).

tions is a far better alternative than losing the information entirely—the inevitable result if *Crawford* bars admission of the previously collected evidence.<sup>208</sup>

The last concern is of constitutional dimension. There is a qualified right to face-to-face confrontation; however, this right is “not absolute.”<sup>209</sup> In the case of a two-way live video deposition, the defendant is able to see the witness but the two individuals are not physically present in the same room. The Fourth Circuit addressed this concern in *United States v. Abu Ali*.<sup>210</sup> The court ruled that taking live video depositions of Saudi Mabahith officials in Saudi Arabia<sup>211</sup> for subsequent introduction at trial—without the defendant being physically present—did not violate the Confrontation Clause.<sup>212</sup> Relying on the Supreme Court’s decision in *Craig v. Maryland*, the Fourth Circuit explained that testimony may be received without in-person confrontation if two criteria are satisfied: 1) “the denial of ‘face-to-face confrontation’ must be ‘necessary to further an important public policy,’” and 2) “the district court must ensure that protections are put in place so that ‘the reliability of the testimony is otherwise assured.’”<sup>213</sup>

With respect to the first prong, the court in *Abu Ali* concluded that “no governmental interest is more compelling than the security of the Nation,”<sup>214</sup> and “[t]he prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is . . . just the kind of important public interest contemplated by the *Craig* decision.”<sup>215</sup> The court wrote:

Insistence on face-to-face confrontation may in some circumstances limit the ability of the United States to further its fundamental interest in preventing terrorist attacks. . . . If the government is flatly prohibited from deposing foreign officials anywhere but in

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<sup>208</sup> See *Crawford*, 541 U.S. at 61 (noting that there is an “absolute bar” to admitting testimonial statements, absent a prior opportunity for cross-examination).

<sup>209</sup> *Maryland v. Craig*, 497 U.S. 836, 850 (1990); see also *Coy v. Iowa*, 487 U.S. 1012, 1024 (1988) (O’Connor, J., concurring) (noting a “preference for face-to-face confrontation at trial” but recognizing that “this preference may be overcome in a particular case if close examination of competing interests so warrants” (internal quotation marks omitted)).

<sup>210</sup> 528 F.3d 210 (4th Cir. 2008). *Abu Ali* was decided before Federal Rule of Criminal Procedure 15 was amended to expressly allow depositions outside of the United States and outside the defendant’s presence. FED. R. CRIM. P. 15(c)(3).

<sup>211</sup> See *Abu Ali*, 528 F.3d at 239–40 (describing the process by which the video deposition was conducted).

<sup>212</sup> *Id.* at 238.

<sup>213</sup> *Id.* at 240 (quoting *Craig*, 497 U.S. at 850).

<sup>214</sup> *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

<sup>215</sup> *Id.* at 241.

the United States, this would jeopardize the government's ability to prosecute terrorists using the domestic criminal justice system.<sup>216</sup>

Following this reasoning, it is hard to imagine that any court would deny that prosecuting alleged terrorists advances an important public policy. As demonstrated above, prong one of the *Craig* test is not an obstacle to utilizing Rule 15(c)(3) depositions in the terrorism context.

The second prong of the *Craig* test—requiring certain safeguards to ensure the reliability of testimony—is also easily met. The Court in *Craig* outlined four tools used to assess reliability: physical presence, oath, cross-examination, and observation of the witness's demeanor.<sup>217</sup> The Court concluded that the physical presence of the witness is not required by the Sixth Amendment.<sup>218</sup> The Fourth Circuit in *Abu Ali*, relying on *Craig*, held that oath, cross-examination, and demeanor were enough to ensure reliability in a deposition taken over a live video link.<sup>219</sup> The court noted that the two-way video link employed was actually more protective than the one-way video deposition utilized, and approved of, in *Craig*.<sup>220</sup> The witnesses testifying in *Abu Ali* were able to see the defendant and his reaction to their responses—a safeguard not present in *Craig*.<sup>221</sup> Going forward, prosecutors should seek to replicate the procedures employed in *Abu Ali*.<sup>222</sup>

## CONCLUSION

The stakes are high in terrorism trials. The government has a strong interest in obtaining convictions without compromising its sources or jeopardizing classified information. Defendants, in turn, have a compelling interest in protecting their liberty. They deserve fair process and the opportunity to put on an effective defense. The Federal Rules of Evidence, and in particular the ban on hearsay, seek

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<sup>216</sup> *Id.* The Court specifically mentioned the importance of being able to depose foreign officials; however, it is equally true that detainees being held abroad or individuals residing beyond a federal court's subpoena power could also be helpful in building the government's case against an alleged terrorist.

<sup>217</sup> See *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (stating that their combined effect serves the purposes of the Confrontation Clause).

<sup>218</sup> *Id.* at 847.

<sup>219</sup> *Abu Ali*, 528 F.3d at 241–42.

<sup>220</sup> *Id.* at 242.

<sup>221</sup> *Id.*

<sup>222</sup> See, e.g., *United States v. Ahmed*, 587 F. Supp. 2d 853, 855 (N.D. Ohio 2008) (“[I]f the government meets its burden of showing relevance and materiality, it and the defendants’ attorneys, with whatever assistance of the court is needed, shall implement the procedures the Fourth Circuit approved in *U.S. v. Abu Ali*.”); see also Sabin et al., *supra* note 13, at 36 (outlining six lessons to learn from *Abu Ali*).

to ensure that evidence presented at trial is reliable and trustworthy. Before *Crawford*, the Confrontation Clause did not add much more to the calculus. Under *Ohio v. Roberts*, hearsay evidence was admissible and passed constitutional scrutiny if it was reliable. In 2004, the Supreme Court decided *Crawford* and added more bite to the Confrontation Clause. *Crawford* specifies not that the evidence be reliable but that reliability must be assessed in a particular manner—cross-examination.

This Note illustrated that *Crawford* may create significant obstacles for the prosecution of alleged terrorists in Article III courts. In particular, it will be difficult for prosecutors to admit *ex parte* sworn affidavits or CIPA-like written summaries of witness testimony. How then should the Government proceed? This Note considered three possible solutions and ultimately argued that the best course of action is for the Government to utilize pretrial depositions abroad more often. Rule 15(c)(3) depositions allow the Government to collect vital witness testimony and preserve it for trial, without compromising a defendant's right to confrontation.