# Gaming the Confrontation Clause: How Courts Deny Non-Citizen Defendants the Dignity of Proper Procedure

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*Statement of Originality*

*This note focuses on the limitations of the current Confrontation Clause doctrine under the primary purpose test by illustrating its application in the context of immigration forms admitted into evidence against non-citizen defendants in criminal trials.*

*Immigration offenses are the most prosecuted offenses in federal courts. Most immigration forms are produced in custodial interrogations with an immigration officer who records a non-citizen's nationality, former removals, or the lack of a requisite permission to enter the United States. These forms are gathered into A Files that assist the prosecution in proving the essential elements of immigration offenses. Thus, convictions for immigration offenses largely rest upon evidence produced by immigration officials in interrogations with non-citizens.*

*Yet courts systematically deny immigrants the right to cross-examine immigration officials who produce the immigration documents used against them. Under the current doctrine, non-citizen defendants are deemed second-class defendants whose constitutional rights are dismissed due to the limitations of the primary purpose test.*

*By building upon the current literature on the primary purpose test and Confrontation Clause doctrine, including critiques and statistical assessments produced by John R. Grimm, Caleb Mason and Jessica Berch, Carolyn Zabrycki, and Adam A. Field, this note narrows in on the Confrontation Clause in a lesser studied field: the context of immigration offenses in criminal courts.*

*Through several case studies across circuit courts, this note illustrates the profound dignitary concerns that the current doctrine*

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*raises for non-citizen defendants. To protect the procedural rights of non-citizen defendants, this note argues that the current doctrine should be expanded beyond the primary purpose test and into a two-tiered analysis. Under this approach, a defendant would have the right to confront their witness if the evidence was produced either: 1) as testimonial hearsay under the primary purpose test, or 2) by an adverse government agent, regardless of whether the government witness was producing the documents with an eye toward prosecution or to create a record for trial. Because the immigration system is by its nature adversarial against non-citizens, such a test would assure that non-citizen defendants have the right to cross-examine immigration agents who produce the immigration forms used as evidence against them.*

*Professor David A. Sklansky has reviewed this note and is familiar with the piece and its authorship. Professor Jeffrey L. Fisher, Professor Jennifer M. Chacón, and Professor César Cuauhtémoc García Hernández would be well-suited to evaluate this submission.*

## INTRODUCTION

On January 2, 2010, Julio Cesar Montalvo-Rangel's life changed when he was stopped by a police officer in Downtown San Antonio.[1] Though he was abiding by all traffic laws while driving with his family, the officer still ran his license plate and found an arrest warrant for the owner of the vehicle.

Montalvo-Rangel was taken into custody. While in custody, he was interrogated by a U.S. Immigration and Customs Enforcement (ICE) agent, who asked him when and how he last re-entered the United States and whether he had the requisite permission to enter. The agent then produced an immigration form, detailing that Montalvo-Rangel had re-entered the United States without the requisite permission.[2]

Only after completing the interrogation did the ICE agent administer the required *Miranda* warnings. At this time, Montalvo-Rangel invoked his right to counsel. However, the ICE agent proceeded to generate another immigration form stating that Montalvo-Rangel desired to create a sworn statement regarding his illegal re-entry.[3]

At a hearing for his illegal re-entry charge, the District Court of Western Texas suppressed the immigration forms due to the *Miranda* violation. The case proceeded to a bench trial, where the court admitted a *separate* form completed by a *different* ICE agent produced in an

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[1] *See* United States v. Montalvo-Rangel, No. SA-10-CR-64, 2010 WL 1484708, at *1 (W.D. Tex. Apr. 13, 2010), *aff'd*, 437 F. App'x 316 (5th Cir. 2011).
[2] *Id.*
[3] *Id.*

interrogation in 2008 that did not pose the same *Miranda* issues.[4] During this interrogation, Montalvo-Rangel had admitted to the agent that he was a citizen of Mexico.

Because nationality is an essential element of the crime of illegal re-entry, this 2008 form became a key element of the prosecution's case.[5] Montalvo-Rangel was charged and sentenced for illegal re-entry in violation of 8 U.S.C. § 1326(a). At no point was he allowed to cross-examine the ICE agent who produced the 2008 form.

On appeal, Montalvo-Rangel argued that the district court violated his Confrontation Clause right by denying him the opportunity to cross examine the ICE agent who interrogated him in 2008. The Fifth Circuit held that Montalvo-Rangel had no such right, concluding that the introduction of the immigration form was not a violation of the Confrontation Clause because "the only witness [Montalvo-Rangel] has the right to confront is himself."[6] Despite the fact that the immigration form was a pivotal part of his conviction, Montalvo-Rangel was stripped of the opportunity to dispute the immigration officer's testimony, highlight any inconsistencies or biases, or assess the officer's credibility.

Overnight, Montalvo-Rangel went from being a father abiding by traffic laws in downtown San Antonio to a criminal defendant not even afforded the dignity to effectively argue his own defense. His Mexican nationality alone – written somewhere on the top of a two-year-old form produced by an immigration officer who was not even a witness at his trial – was enough to help secure his conviction.

Montalvo-Rangel's case is not unlike other prosecutions of immigration offenses in federal district courts. Immigration offenses are the most prosecuted federal offense, with the most common immigration offense being illegal re-entry.[7] These convictions often rest upon statements given to immigration officials in interrogations. All of the cases described in this note begin with a non-citizen being interrogated by an immigration official and end with that same non-citizen being denied

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[4] *Id.* (detailing how Montalvo-Rangel had previously been found in the United States in 2008).

[5] As will be described in depth in the next section, nationality is an essential element of illegal re-entry. To prove illegal re-entry under 8 U.S.C. § 1326(a), the prosecution must prove that the defendant is an alien, that the defendant has been deported or removed, and that the defendant has entered or been found in the United States without the requisite permission. *See* 8 U.S.C. § 1326(a).

[6] *Montalvo-Rangel*, 437 F. App'x at 318.

[7] *See* Mark Motivans, *Immigration, Citizenship, and the Federal Justice System, 1998-2018,* BUREAU OF JUST. STATS. (Jan. 27, 2019), https://bjs.ojp.gov/content/pub/pdf/icfjs9818.pdf.

the right to confront the immigration official who produced the form that is later used to prosecute and convict them.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him."[8] In 2004, the Supreme Court replaced the "amorphous notions of 'reliability'" under *Roberts* with a standard requiring that criminal defendants test the evidence introduced against them under the "crucible of cross-examination."[9] Yet courts today routinely violate non-citizen defendants' constitutional rights by denying them the proper procedure of cross-examining the immigration officers who prepare the evidence used to convict them.

The current Confrontation Clause doctrine is the primary purpose test. Under the primary purpose test, courts consider whether the primary purpose of the statements at issue is to create a record for trial.[10] If the evidence satisfies the primary purpose test, then the statements are considered testimonial, meaning they cannot be admitted if the defendant does not have the opportunity to cross-examine the witness who produced them. Overwhelmingly, courts find that immigration forms are not testimonial because they are produced for routine government purposes and not for future prosecutions. In effect, non-citizens charged with these immigration offenses are treated as second-class defendants – their dignity, their constitutional rights, and their ability to successfully argue their cases are diminished by the Government's ability to game the vague Confrontation Clause doctrine.

This note does not argue for the complete overhaul of the current doctrine. The primary purpose test should remain in place. Rather, the doctrine should be expanded beyond the primary purpose test and into a two-pronged approach that accounts for evidence produced against defendants by government agents in adversarial settings. Under this approach, a defendant would have the right to confront a witness if the evidence was produced either: 1) as testimonial hearsay under the primary purpose test, *or* 2) by an adverse government agent, regardless of whether the government agent was producing the documents with an eye toward prosecution or to create a record for trial.

A two-pronged approach to the Confrontation Clause would not

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[8] U.S. CONST. amend. VI.

[9] Crawford v. Washington, 541 U.S. 36, 61 (2004).

[10] Davis v. Washington, 547 U.S. 813, 822 (2006) (holding that courts must consider whether the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

be necessary if every document produced by the government was created in a neutral setting. Yet government records created by a government agent in an adversarial role *always* have a possibility of prosecution lurking in the background. Immigration forms are a prime example. The Department of Homeland Security (DHS), the emblematic figure of the United States' immigration system, is designed "to secure the nation from the many threats we face."[11] Such threats include non-citizens – particularly "[i]llegal aliens [who] compromise the security of our Nation" and those who "disregard our national sovereignty, threaten our national security, compromise our public safety, exploit our social welfare programs, and ignore lawful immigration processes."[12]

Thus, by enforcing immigration laws and securing the nation's borders, the immigration system aims to prevent these harms. And it does so every day – through detentions, deportations, prosecutions, and the production of records that track every movement of non-citizens in and out of the United States. In fact, the routine nature of the production of these documents is another reason that the system is so effective at promoting its national security goals.

Because of the adversarial nature of the immigration system in the United States, immigration documents produced to keep a record of non-citizens are always adversarial. Even if a form is not later used for a criminal prosecution, it has a strong likelihood of being used against the immigrant in detention or deportation proceedings or merely in a denial of benefits or adjustment of status. And when these government records are presented to juries in criminal trials, they are largely perceived as undisputed, absolute pieces of evidence against the defendant.

The Confrontation Clause recognizes a deep requirement of dignity and fair process that should be protected. Yet because the current doctrine prioritizes a nebulous distinction between "testimonial" and "non-testimonial" evidence that fails to account for the adversarial setting in which the evidence was produced, it only further legitimizes the violation of non-citizens' constitutional rights.

When it comes to the mass prosecution of immigration offenses in federal courts, it would be disingenuous to turn a blind eye to the

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[11] U.S. DEP'T OF HOMELAND SEC., *About DHS,* https://www.dhs.gov/about-dhs (last visited Jan. 18, 2021).

[12] U.S. DEP'T OF HOMELAND SEC., *Secure U.S. Borders and Approaches*, https://www.dhs.gov/secure-us-borders-and-approaches (last visited Jan. 18, 2021); *see also* Mark Green, *We Need a New Structure to Secure Our Border*, HILL (Sept. 13, 2019, 7:30 PM), https://thehill.com/blogs/congress-blog/homeland-security/461378-we-need-a-new-structure-to-secure-our-border/.

aspects of the law that directly disparage immigrant defendants. The primary purpose test should be supplemented with another disjunctive test that accounts for evidence produced by an adversarial government witness. Thus, if a witness does not satisfy the primary purpose test, a defendant may still have the constitutional right to cross-examine them if they are an adverse government agent who produced statements in an interview, interrogation, or similar adversarial setting that is now being used against them. This interpretation would render all immigration documents inadmissible unless the defendant has the right to confront the immigration officer who produced them.

Part I of this note describes the immigration documents used in criminal proceedings. Part II discusses the various reasons used by the courts to admit immigration forms without providing defendants the opportunity to cross-examine of the officers who produce them. Part III argues for the expansion of the primary purpose test into a two-prong Confrontation Clause doctrine that accounts for the adversarial nature in which evidence is produced.

## I. IMMIGRATION DOCUMENTS AS EVIDENCE

### 1. A Files

Immigration offenses include illegal entry, illegal re-entry, willfully failing to leave, and bringing in or harboring "aliens," or non-citizens, not admitted by an immigration officer.[13] Illegal re-entry is currently the most common immigration offense prosecuted in federal court. In 2018, 72.1% of non-U.S. citizens prosecuted in federal court were prosecuted for illegal re-entry.[14]

To prove illegal re-entry under 8 U.S.C. § 1326(a), the Government must show that the defendant was a non-citizen at the time of his re-entry, that the defendant had formerly been removed or departed while an order of removal was outstanding, that the defendant was subsequently found in the United States, and that the defendant reentered without the requisite permission or consent.[15] For cases in which the defendant is "found in" the United States, the Government must also prove that the defendant was free from official restraint, meaning that he

[13] Mark Motivans, *Federal Justice Statistics, 2015-2016,* BUREAU OF JUST. STATS. 2 (Jan. 2019), https://bjs.ojp.gov/content/pub/pdf/fjs1516.pdf.

[14] Only 3.9% were prosecuted for alien smuggling, and 2.2% were prosecuted for misuse of visas. Motivans, *supra* note 7, at 18.

[15] 8 U.S.C. § 1326(a). *See also* United States v. Parga-Rosas, 238 F.3d 1209, 1211 (9th Cir. 2001).

was not "deprived of his liberty and prevented from going at large within the United States."[16]

The Confrontation Clause is vital in these cases because the Government's case is often built almost entirely upon the evidence documenting alienage, former removals, and interrogations produced by immigration officials. Most of this evidence is stored in a non-citizen's A File. An A file "will most likely have all the necessary information to make a charging decision and secure a conviction." [17] A-files may include "forms, applications, petitions, attachments and supporting materials, photographs, identification documents, birth certificates, passports, fingerprints, court records, deportation warrants, reports of investigations, statements, and correspondence."[18]

For example, the A-file of a non-citizen who has already been deported will most likely contain a warrant of removal or deportation (I-205), containing "a photograph of the alien, the alien's fingerprint and signature, and the signature of an immigration official indicating that he or she witnessed the alien depart from the United States."[19]

Another form that has been admitted to prove alienage or unlawful status is a Field Encounter Form (I-826). These forms record the date and location of the non-citizen's arrest, biographical information including name and place of birth, and allow the non-citizen to initial an option requesting a hearing or admitting that they are in the United States illegally.[20]

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[16] United States v. Cruz-Escoto, 476 F.3d 1081, 1085 (9th Cir. 2007).

[17] U.S. DEP'T OF JUST., *Prosecuting Criminal Immigration Offenses,* 65 U.S. ATT'YS' BULL. NO. 4 16 (2017), https://www.justice.gov/usao/page/file/986131/download.

[18] *Id.* at 11.

[19] United States v. Becerra-Valadez, 448 F. App'x 457, 459 (5th Cir. 2011).

[20] The I-826 is described in *United States v. Morales*, where the Ninth Circuit held that its introduction did not violate the Confrontation Clause because the forms were non-testimonial, although the admissions made by the non-citizens to the agents were inadmissible hearsay. *See* United States v. Morales, 720 F.3d 1194, 1200 (9th Cir. 2013).

> "The Field 826 contains three sections. The first section requires the Border Patrol agent to record the date and location of the alien's arrest, the funds found in the alien's possession, and basic biographical information about the alien, such as the alien's name, gender, and date and place of birth. The second section contains a 'Notice of Rights,' and advises the alien of the reason for the arrest and corresponding rights, such as the right to a hearing, the right to obtain low-cost legal representation, and the right to communicate with legal representatives or consular officials. The third section contains a 'Request for Disposition,' and asks the alien to initial next to one of three options: 'I request a hearing before the Immigration Court to determine whether or not I may remain in the United States'; 'I believe I face harm if I return to my country. My case will be referred to the Immigration Court for a hearing'; or 'I admit

A non-citizen's File may also contain a Record of Sworn Statement (I-215B) or a Record of a Deportable/Admissible Alien (I-213), both of which are produced in custodial interrogations and contain narrative information from the defendant. A Record of Sworn Statement requires the defendant to be Mirandized, whereas a Record of a Deportable/Admissible Alien does not.

These forms detail the essential elements required to prove most immigration offenses. For example, on the first page of a Record of a Deportable/Admissible Alien (I-213 Form), there is a line for "Country of Citizenship" and a line for "Country of Birth," both of which may help prove alienage. On the subsequent pages of the form, the immigration official documents the non-citizen's criminal history, any prior immigration apprehensions, family data, and any health or humanitarian considerations.[21] The immigration official also registers any narrative statements provided by the non-citizen during questioning and any other allegations, including allegations of gang membership.[22]

The Government also frequently legitimizes these forms by bringing in expert witnesses from the Department of Homeland Security who often testify as "custodian[s] of records." In other words, the courts consider them to have sufficient knowledge to speak about the forms in an immigrant's A-File without having ever seen, met, or spoken to the immigrant in question. The first time that the custodian ever sees the person whose file they read is often at trial. Yet somehow, this agent is authorized to speak about the defendant's prior deportations, interrogations, and statements to other immigration agents with the legitimacy that is granted to them as a government witness.

In its cross-examination of this expert, the defense has very little left to attack. They can ask the expert witness if they ever personally saw the defendant get deported. They can ask if they ever personally asked the defendant about his nationality. They can ask if they ever personally witnessed the defendant sign an affidavit. Did they ever arrest the defendant? Did they ever write a warrant for them? Did they ever question

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> that I am in the United States illegally, and I believe I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure.' The form includes a line for the alien's signature under these options." *Id.* at 1197–98.

[21] Dree K. Collopy et al., *Challenges and Strategies Beyond Relief,* AM. IMMIGR. LAWS. ASS'N, 523-24 (Dec. 29, 2015), https://www.aila.org/File/Related/11120750b.pdf.

[22] *Id.* at 524.

them? The answer to all these questions is likely no, as many of these forms were usually produced years prior by other immigration agents who will not be called to the witness stand.

The defense is essentially stripped of its ability to question the reliability and accuracy of the documents because they cannot question the original agent who produced them. The use of the custodian of records also implies that the defense cannot raise issues of credibility surrounding the original immigration agent's bias or past misconduct or defects in their perception or recollection.

The jury, however, is unlikely to see a deprivation of the defendant's Sixth Amendment rights. They instead see an expert government witness telling them: *This is a document signed by an ICE agent showing that the defendant was deported on November 12, 2008; this is a warrant for removal signed by an immigration agent; this is an interrogation produced by an immigration officer and signed by the defendant stating he is a citizen of Mexico…*

And – unlike a witness who can be impeached for dishonesty or inconsistent statements – the evidence provided by these forms cannot be discredited. Inherently, they are undisputed facts that prove essential elements of the offense.

Upholding the protections of the Confrontation Clause would require the government to bring the immigration official who prepared the evidence in the defendant's A-File into court. Yet in the case of immigration offenses, courts routinely deny non-citizen criminal defendants the opportunity to cross-examine the immigration official who prepared the forms in their A-File. In doing so, courts distort the Confrontation Clause into a tiered system with second-class criminal defendants who are deemed worthy only of fragmented procedures, fragmented protections, and fragmented dignity.

### 2. The American Crimmigration System

The disparate treatment of non-citizen defendants under the Confrontation Clause cannot be contextualized without the history of increasingly punitive immigration laws beginning in the 1980s and continuing through the early 2000s. It would also be disingenuous to treat courts' opinions as untouched by the growing anti-immigrant rhetoric in this country.

Immigration offenses are the most prosecuted federal crime in the United States. Between 1998 and 2018, federal arrests for immigration

offenses increased by 418.9%.[23] Non-citizens composed 97.3% of these arrests.[24] By 2016, 45% of federal arrests involved an immigration offense as the most serious arrest offense.[25] Likewise, arrests in the five federal districts along the U.S.-Mexico border increased by 45% between 2006 and 2016.[26] Perhaps the most glaring statistic is that 98% of those charged with immigration offenses are convicted.[27]

Many legal analyses of crimmigration laws point to the Anti-Drug Abuse Act of 1988 and the 1996 immigration laws as the onset of the criminalization of immigration in the United States.[28] Yet the regulation of immigration is not confined to the civil sphere. Rather, "the apparent basis for using criminal law as a response to migration issues is the myth of migrant criminality, sometimes tinged with (or even steeped in) racism or nativism."[29] The five-fold increase in funding toward Customs and Border Protection after 9-11 correlates with an increase in federal prosecutions of immigration as well as heightened local and state enforcement of crimmigration laws, leading to the stark reality wherein "immigration offenses are now the single most commonly prosecuted federal criminal offenses."[30]

Under programs such as "Operation Streamline" and "Fast-Track" proceedings, the prosecution of non-citizen defendants in criminal courts has led to mass plea agreements that effectively strip non-citizen defendants of their procedural rights.[31] A prime example of a mass plea

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[23] Motivans, *supra* note 7, at 4.

[24] *Id.* at 10.

[25] *See id.* at 4.

[26] Motivans, *supra* note 13, at 1.

[27] *Id.* at 9.

[28] *See* Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 292 (2009). Podgorny argues that "the 1988 Act introduced the definition of aggravated felony to immigration law, to which it attached harsh penalties for immigrants. The penalties for an aggravated felony conviction included detention, expedited deportation proceedings, and an expanded bar on reentry into the United States." *Id.* Podgorny further argues that the 1996 laws, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and Immigration Reform and Immigrant Responsibility Act (IIRIRA), were created to limit non-citizens with criminal records from attaining legal residency and citizenship. *Id.* at 288. These laws expanded the definition of aggravated felonies, precluding judges from considering mitigating factors, and creating expedited deportation tracks. *Id.* at 295-296.

[29] Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 629 (2012).

[30] *Id.* at 647.

[31] Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 143 (2009).

agreement involves raids of workplaces, such as the Postville raid of 2008 or the Mississippi chicken processing plant raid in 2019. In these cases, ICE charges and detains hundreds of immigrants in mass plea agreements that result in nearly all defendants pleading guilty, such as in the Postville raid, where "297 of the 305 arrested pled guilty and were sentenced on federal felony charges."[32]

Because up to eighty defendants at a time plead guilty, counsel cannot raise counter-issues of citizenship or authorized entry, nor can they effectively challenge the *mens rea* requirement of aggravated identity theft.[33] The 9th Circuit has held that "'[n]o judge, however conscientious, could have possessed the ability to hear distinctly and accurately fifty voices at the same time."[34] Yet courts have failed to intervene absent a finding of individual prejudice.

Crimmigration scholars have largely focused on how civil immigration proceedings are increasingly criminalized, with very few civil protections for immigrant defendants.[35] Fewer studies track the ways in which immigration offenses are prosecuted in criminal courts, and even fewer depict the erosion of non-citizen defendants' constitutional rights. This note focuses on the lesser-studied realm of crimmigration, wherein non-citizens are prosecuted in criminal courts and the protections of criminal proceedings are not afforded to them.[36]

## II. HOW COURTS MISINTERPRET THE CONFRONTATION CLAUSE IN RELATION TO IMMIGRATION DOCUMENTS

[32] Sioban Albiol et al., *Re-Interpreting Postville: A Legal Perspective*, 2 DEPAUL J. FOR SOC. JUST. 31, 35 (2008).

[33] Chacón, *supra* note 31, at 144.

[34] *Id.* at 147.

[35] *See generally* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza*: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013); Renata Robertson, *The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens*, 15 SCHOLAR 567 (2013).

[36] Chacón, *supra* note 31, at 148 ("The ongoing erosion of the procedural rights of these [non-citizen] criminal defendants thus far has been effectively normalized. . . The prosecution of [immigration] offenses should not be allowed to reshape the criminal sphere to look more like the less rights-protective civil system where immigration enforcement has typically been centered. Unfortunately, at the moment, this is exactly what is happening.").

### 1. A Brief Overview of Hearsay and the Confrontation Clause

#### *A. Hearsay Statements and Hearsay Exceptions*

The Confrontation Clause is meant to prohibit the introduction of testimonial hearsay statements such as those "deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried."[37] If such hearsay evidence is admitted, then the Confrontation Clause requires that the defendant have the right to cross-examine the witness introducing it.[38]

Hearsay is an out-of-court statement offered in trial to prove the truth of the matter asserted. In Sir Walter Raleigh's trial in 1603, the focal piece of evidence against him was a written confession signed by an alleged co-conspirator, Lord Cobham. Lord Cobham's confession was hearsay because it was offered to prove that Sir Walter Raleigh was conspiring against the Crown. Raleigh pleaded, "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ."[39] Despite his protestations, the judges refused to bring Lord Cobham in for cross-examination. Because of this confession, Raleigh was sentenced to death for treason.

Much like Cobham's letter, immigration documents signed by immigration agents introduced at trial are hearsay statements. They are introduced as out-of-court statements to prove the truth of the matter asserted – namely that a defendant stated he was a citizen of Mexico, that an agent witnessed the deportation of the defendant across the border, or that an agent confirmed on paper that the defendant did not have legal permission to enter the United States.

Hearsay statements are generally inadmissible at trial, although there are various exceptions within the Federal Rules of Evidence that allow the introduction of certain hearsay evidence. Immigration forms, for example, have been admitted under Rule 803(8), the public records exception, and Rule 803(10), the exception for absence of a public record.[40] Their admission as public records, however, is the most

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[37] Crawford v. Washington, 541 U.S. 36, 50 (2004).

[38] Or, if the witness is unavailable, that "the defendant had had a prior opportunity for cross-examination." *Id*. at 54. Courts also consider whether the prosecution "made a good-faith effort to obtain his presence at trial." United States v. Matus-Zayas, 655 F.3d 1092, 1101 (9th Cir. 2011).

[39] *Crawford*, 541 U.S. at 44.

[40] *See* FED. R. EVID. 803(8)(b); FED. R. EVID. 803(10); *see generally* United States v.

common.[41]

As is discussed in the following section, the Confrontation Clause specifically protects defendants against the introduction of *testimonial* hearsay – or statements that were produced with an eye toward prosecution. Cobham's letter is a prime example of testimonial hearsay, as it was written by Cobham to assist the case against Raleigh.

Thus, as will be explained below, for admission under the current Confrontation Clause doctrine, hearsay statements must satisfy a hearsay exception under both the Federal Rules of Evidence *and* the primary purpose test – that is, they must not be testimonial. If a hearsay statement is testimonial, then a defendant has the right to cross-examine the witness who produced the evidence against him. Otherwise, as in the case of non-testimonial evidence, the hearsay evidence is admissible if a hearsay exception exists for it.

### *B. Testimonial Statements, Non-testimonial Statements, and Witnesses Against*

In its *Crawford* decision in 2004, the Supreme Court overturned the former *Roberts* "reliability" standard, which allowed for the admission of any hearsay statement that fell under a "firmly rooted hearsay exception."[42] In its place, the court emphasized the importance of testing testimonial statements through cross-examination: "the principal evil at

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Caraballo, 595 F.3d 1214, 1226 (11th Cir. 2010) (admitting an I-213 form under the public record exception because it is a "routinely and mechanically kept I.N.S. record"); United States v. Cervantes-Flores, 421 F.3d 825, 833 (9th Cir. 2005) (admitting a CNR under the absence of public record exception "regularly made and preserved by the I.N.S.").

[41] However, not every immigration form will satisfy the public records exception under Rule 803(8). For example, the Ninth Circuit has held that the introduction of statements from non-citizens that they were in the United States illegally written in I-826 field encounter forms cannot be used against a defendant in an alien-smuggling case because the non-citizens have not been shown to be unavailable and the forms "do not describe 'activities' of the government, and the government does not argue that aliens are under a 'duty to report' their immigration status." United States v. Morales, 720 F.3d 1194, 1202 (9th Cir. 2013). Still, the court found that these forms did not violate the Confrontation Clause because they were not testimonial evidence, as "a Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition" rather than to establish or prove a fact at trial *Id.* at 1200.

[42] The *Roberts* standard confused courts for years. Under *Roberts*, statements were admissible if they bore an indicia of reliability, meaning that the evidence fell under a "firmly rooted hearsay exception" or showed "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. at 68.

which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused."[43]

Since *Davis v. Alaska*, the Supreme Court has held that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."[44] Through cross-examination, the defense can impeach or discredit the witness for inconsistencies in their testimony and test the witness' credibility in front of the judge and jury. Likewise, cross-examination is used to bring a witness' ulterior motives or bias to light.[45]

The Court defined the meaning of "witnesses against" in the Confrontation Clause as those who "bear testimony" against the defendant.[46] The Court used the definition from the 1828 version of *Webster's American Dictionary of the English Language*. They reasoned that testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[47] Thus, testimonial evidence is inadmissible against a defendant if the defendant has not had the opportunity to confront his witness.[48]

Defining testimonial evidence, however, would prove to be more complicated. The Court deemed testimonial statements to be those produced "under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." [49] The Court also reasoned that various forms of testimonial statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[50] For example, "[s]tatements taken by police officers in the course of interrogations" are considered testimonial.[51]

Yet beyond this, the Court failed to properly define "testimonial" statements. Rather, the Court stated:

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[43] *Crawford*, 541 U.S. at 50.
[44] Davis v. Alaska, 415 U.S. 308, 316 (1974).
[45] *Id.* at 316-17.
[46] *Crawford*, 541 U.S. at 51.
[47] *Id.*
[48] *Id.*
[49] *Id*. at 52.
[50] *Id*. at 51.
[51] *Id.* at 52.

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.[52]

In his concurrence, Justice Rehnquist disagreed with the majority's emphasis on testimonial evidence, arguing that the distinction between testimonial and nontestimonial statements "is no better rooted in history than our current doctrine."[53] Justice Rehnquist noted:

> As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.[54]

Two years later in *Davis v. Washington*, the Court attempted to rid itself of the open-endedness surrounding testimonial statements left in its wake. As such, the Court developed the primary purpose test: testimonial statements are those gathered during an interrogation in which "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[55]

In its *Melendez-Diaz* decision in 2009, the Court held that sworn affidavits from a state laboratory were testimonial because they "are incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'" and provided "the precise testimony the analysts would be expected to provide if called at trial."[56] Thus, the forms were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[57]

Two years later in *Michigan v. Bryant*, the Supreme Court further explained that another factor in deciding the primary purpose of a document was the informality of the situation or interrogation. Specifically, the Court looked at whether a statement was "procured with

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[52] *Id.* at 68.
[53] *Id.* at 69.
[54] *Id.* at 71.
[55] Davis v. Washington, 547 U.S. 813, 822 (2006).
[56] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (quoting *Crawford*, 541 U.S. at 51).
[57] *Id.* at 311 (quoting Davis, 547 U.S. at 830) (emphasis deleted).

a primary purpose of creating an out-of-court substitute for trial testimony."[58] Thus, statements made to the police to help resolve an ongoing emergency are not testimonial, as compared to statements given to the police during an interrogation or investigation of past events.[59] In his dissent in *Bryant*, Scalia warned that the Court had receded from *Crawford* by requiring "judges to conduct 'open-ended balancing tests' and 'amorphous, if not entirely subjective,' inquiries into the totality of the circumstances bearing upon reliability."[60]

Today, Sir Walter Raleigh would have the opportunity to cross-examine Lord Cobham, just as criminal defendants have the right to cross-examine lab technicians who produced a drug analysis certificate related to their offense.[61] Similarly, in the case of blood alcohol tests, the Supreme Court has held that "surrogate testimony" from a different analyst at a lab does not satisfy the Sixth Amendment because it cannot "convey what [the analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part."[62] The Confrontation Clause requires as much, and the process that it affords criminal defendants is more paramount than the scheduling conflicts that may arise at a lab. "Tellingly, in jurisdictions in which it is the [acknowledged] job of . . . analysts to testify in court . . . about their test results, the sky has not fallen."[63]

Likewise, courts have found that a "transfer form to the DMV only after receiving a Notice of Seizure from CBP" triggers Confrontation Clause protections.[64] Even an interpreter's English-language statements produced in interrogations by CBP officers at an airport in connection to the investigation of an offense are also considered testimonial.[65]

However, unlike these pieces of evidence, immigration documents do not trigger Confrontation Clause protections. Because they can be introduced under the public records exception under Rule 803(8), a custodian of records generally introduces the immigration forms and speak on behalf of the agent who produced them. The defense may try to

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[58] Michigan v. Bryant, 562 U.S. 344, 358 (2011).
[59] *Id.* at 357.
[60] *Id.* at 393.
[61] *See Melendez-Diaz*, 557 U.S. at 314.
[62] Bullcoming v. New Mexico, 564 U.S. 647, 661-62 (2011).
[63] *Id.* at 667-68 (citing Brief for Pub. Def. Serv. for D.C. et al. as Amici Curiae Supporting Petitioner at 23 (citations omitted)).
[64] *See* United States v. Esparza, 791 F.3d 1067, 1074 (9th Cir. 2015).
[65] *See* United States v. Charles, 722 F.3d 1319, 1324 (11th Cir. 2013).

highlight the idea that this "custodian" did not in fact witness or produce any of the evidence brought before the jury. But the defense is stripped of the right to cross-examine the agent who produced the evidence. The following section highlights the various ways that immigration forms are used in federal district courts and the reasonings that courts employ to admit them.

### 2. The Introduction of Immigration Documents Across Circuit Courts

This note proposes that, due to the confusing nature of the primary purpose test, the government can game the Confrontation Clause and introduce immigration forms against criminal defendants without implicating their right to cross-examination. Yet the primary purpose test is not entirely flawed and doing away with it entirely would likely cause confusion across courts, as did the switch from the *Roberts* to *Crawford* doctrines. [66]

This note proposes a two-tiered system in which documents trigger Confrontation Clause protections in one of two ways: 1) if they fall under the primary purpose test or 2) if they are produced by an adverse government witness.

Before exploring why such a two-tiered system is the most logical way to protect defendants from the "principal evil" from which the Confrontation Clause sought to shield them, the following examples highlight the various ways in which courts currently interpret the introduction of immigration documents under the Confrontation Clause doctrine.[67]

Although courts do not necessarily misinterpret or misapply the primary purpose test, they regularly deny non-citizens the right to confront the immigration official who produced the evidence used against them. In doing so, courts find that immigration forms are not produced with an eye toward trial. More recently, there has been a trend in circuit courts toward admitting partial forms, or the first page of an immigration

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[66] Under the *Roberts* standard, evidence introduced "under a firmly rooted exception to the hearsay rule does not violate the Confrontation Clause." United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 (9th Cir. 2001). *See also* United States v. Quezada, 754 F.2d 1190, 1193 (5th Cir. 1985). Under the reliability standard, courts frequently held that immigration forms were the public records, and public records were a firmly rooted exception to hearsay. Thus, defendants did not have the right to confront immigration officials because the immigration forms were public records. *See, e.g.,* United States v. Agustino-Hernandez, 14 F.3d 42, 43 (11th Cir. 1994).

[67] *See* Crawford v. Washington, 541 U.S. 36, 50 (2004).

form, to avoid Confrontation Clause concerns related to the entire form packet. And some courts today go as far as finding that there is "no witness" involved in the production of the form, thus rendering a Confrontation Clause analysis unnecessary.

These circuit court case studies highlight two things, which will be discussed in Part III. First, hearsay evidence contained in immigration forms is precisely the evil which the Framers had in mind in emphasizing the Confrontation Clauses' necessary protections. As such, the primary purpose test must be supplemented by a new test that accounts for the adversarial nature in which documents are produced. Second, although courts continue to use the primary purpose test to determine the admission of immigration forms, some courts have used the vagueness of the primary purpose test as a shield that allows the government to game the Confrontation Clause. All immigration documents are produced in an adversarial setting and by their nature have the potential for use at future trial.

### *A. The Admission of Immigration Documents Post-*Crawford *and Pre-*Davis

A few weeks after *Crawford* was decided, the United States District Court of Southern California applied the new Confrontation Clause analysis to the introduction of a witness' statement surrounding her Mexican nationality to the United States Border Patrol. The court held that introduction of the evidence without cross-examination violated of the Confrontation Clause.[68] The court reasoned:

> [T]he statement is undeniably untested by cross-examination and therefore lacking reliability for purposes of the Confrontation Clause. The interrogation of a material witness in a custodial setting directly raises an acute concern: "involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout history with which the Framers were keenly familiar."[69]

The court's main concern was the "potential for prosecutorial abuse" that was imminent without the opportunity for cross-examination. Likewise, the court held that "a custodial statement by the alleged illegal alien regarding her alienage is material and goes to the heart of the Government's case against Defendant because it proves an element of the

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[68] United States v. Gonzalez-Marichal, 317 F. Supp. 2d 1200, 1203 (S.D. Cal. 2004).
[69] *Id.* at 1202 (quoting *Crawford*, 541 U.S. at 56 n.7).

offense."[70]

The interpretation of the Confrontation Clause as protecting the non-citizen defendant from prosecutorial abuse would not prevail. After the primary purpose test was developed in *Davis*, district and circuit courts alike began to strip away this protection. Courts today routinely allow the government to introduce immigration documents while denying the defendant the opportunity to cross-examine the immigration official who produced them. Their reasons for doing so completely disregard the historical protections of the Confrontation Clause. Rather, in a time of mass immigration prosecutions, courts are authorizing the government to cut corners while hiding behind a faulty definition of testimonial evidence as their excuse. The next sections outline the ways that courts misconstrue the Confrontation Clause doctrine.

### *B. The Primary Purpose Test*

The primary purpose test requires courts to consider whether evidence sought to be admitted into trial is testimonial by determining whether the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[71] Courts have held that evidence that satisfies the primary purpose test and requires the opportunity for cross-examination includes blood alcohol tests produced in a lab,[72] other drug laboratory analyses,[73] plea allocutions,[74] deposition testimony,[75] and police interrogations of defendants as well as witnesses meant to help the police "prove past events potentially relevant to later criminal prosecution."[76]

Despite this, circuit courts across the United States have held that immigration forms are not testimonial because they are produced to track the movement of aliens rather than with an eye toward prosecution. The substantive guarantee that their reliability be assessed through cross-examination is thus not guaranteed.

Every day, immigration officers complete interrogations, conduct witness deportations, and sign off on narrative interviews that are entered into an immigrant's A File. These forms remain there permanently. And for non-citizens who dare return to the United States, these forms help

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[70] *Id.* at 1203.
[71] Davis v. Washington, 547 U.S. 813, 822 (2006).
[72] Bullcoming v. New Mexico, 564 U.S. 647, 665 (2011).
[73] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009).
[74] Crawford v. Washington, 541 U.S. 36, 64 (2004).
[75] *Davis*, 547 U.S. at 824 n.3.
[76] *Id.* at 822.

prove every element of the crime they may later be accused of: that they are not from here, that they have been removed before, and that they do not have the permission to re-enter.

While no immigration form in an immigrant's A File is produced for the same reason, all circuit courts seem to find that they are. The most litigated immigration form in the context of the Confrontation Clause is the warrant of removal (I-205), which allows ICE or CBP to arrest and deport individuals for civil immigration violations.[77] However, warrants of removal are *routinely* used in criminal proceedings without providing defendants the right to cross-examine the immigration officer who produced the warrant of removal.

In an illegal re-entry case from 2010, the Ninth Circuit held that "warrants of removal have 'inherent reliability because of the Government's need to keep accurate records of the movement of aliens.'"[78] In this case, the government is "required to prove beyond a reasonable doubt that Orozco–Acosta, prior to being apprehended, had in fact been physically removed from the United States."[79] They introduced the warrant of removal to prove that Orozco-Acosta had been ordered removed and had later been physically removed. Warrants of removal are signed by an immigration officer who witnesses the removal. However, Orozco-Acosta was not allowed to cross-examine the immigration officer. Without cross-examination, the defense could not highlight any inconsistencies or biases in the immigration officer's account of Orozco-Acosta's departure. Rather, his departure was taken as an indisputable fact because of the form. The prosecution proved an essential element of the crime and the defense did not have any real chance to dispute it.

Nearly all circuit courts have reached a similar decision. The Fifth Circuit has held that *Melendez-Diaz* "does not require that warrants of removal be subject to confrontation" because they are "memorialize an alien's departure" and thus are not prepared for use at trial.[80] The Seventh Circuit has reasoned that warrants of removal are "created for the internal

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[77] U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T, ICE FORM I-205: WARRANT OF REMOVAL/DEPORTATION, https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF (last visited Aug. 11, 2021).

[78] United States v. Orozco-Acosta, 607 F.3d 1156, 1163 (9th Cir. 2010) (quoting United States v. Hernandez-Rojas, 617 F.2d 533, 535 (9th Cir. 1980)). In its decision, the Ninth Circuit entirely dismissed the lack of cross-examination and failed to reconcile how its reasoning was still relevant after *Crawford* overruled *Roberts*. *See id.*

[79] *Id.* at 1162.

[80] United States v. Garcia, 887 F.3d 205, 213 (5th Cir. 2018).

use of agencies tasked with enforcing immigration laws, and only a small percentage ever are used in criminal prosecutions."[81] Likewise, the Eighth Circuit has held that "[w]arrants of deportation are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."[82]

Despite being produced for a different purpose than a warrant of removal, verifications of removal (I-286) have also been found to be non-testimonial because they are used to "record the alien's physical removal across the border" and are "made for the purpose of recording the movement of aliens."[83] Yet a verification of removal is entirely different from a warrant of removal. A warrant of removal allows immigration officers to arrest and deport individuals; meanwhile, a verification of removal is issued in the expedited removal process and includes a warning of future prosecution for illegal re-entry, the immigrant's fingerprints, photographs, and signatures from immigration officers.

For example, the top half of the verification of removal warns that "if the removed alien attempts to enter, enters, or is found in the United States he can be prosecuted for a felony under 8 U.S.C. § 1326 and could face severe penalties." And the officer who serves this warning enters his signature on that portion of the form.[84] Meanwhile, the bottom half of the form includes information about the non-citizen's departure and "bears a photograph of the alien removed, his signature, his right index fingerprint, and the signature of the official taking that fingerprint." In Lopez's case, there was a signature from two immigration officers – one who verified the removal and the other who took his fingerprint. "Neither of these signatures is legible and none of the government's witnesses could identify the officers who signed the form."[85] Still, the Ninth Circuit found that the verification of removal was like a warrant of removal – merely meant to keep track of the movement of aliens.

The Ninth Circuit has similarly held that Field Encounter Forms (I-826s), reports taken of non-citizens by border patrol agents at the time of apprehension, are not testimonial because they are not created for the purpose of proving or establishing a fact at trial.[86] Rather, "a Border Patrol

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[81] United States v. Arias-Rodriguez, 636 F. App'x 930, 933 (7th Cir. 2016).
[82] United States v. Torres-Villalobos, 487 F.3d 607, 613 (8th Cir. 2007).
[83] United States v. Lopez, 762 F.3d 852, 859-60 (9th Cir. 2014).
[84] *Id.* at 856.
[85] *Id.*
[86] *See* United States v. Morales, 720 F.3d 1194, 1200 (9th Cir. 2013).

agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition," and thus "[t]he Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally."[87] Yet these forms contain the non-citizen's statements surrounding their name, place of birth, and in some cases, a signed admission by the non-citizen to being in the United States illegally.[88]

Somehow, even I-213 forms, which are based almost entirely on a detailed narrative obtained through an interrogation, are deemed to be non-testimonial under the primary purpose test. The Eleventh Circuit has held that "[i]t is of little moment that an incidental or secondary use of the interviews underlying the I–213 forms actually furthered a prosecution."[89] The court held that the I-213s, much like other immigration forms, are produced "routinely" by Border Patrol agents "in the course of their non-adversarial duties."[90] Likewise, the Eleventh Circuit has held that "[l]ike an I–213 form, the I–867 form that records the sworn statement of an alien prior to removal contains "routine biographical information" obtained primarily "for the proper administration of our immigration laws and policies."[91]

The "routine tracking" of non-citizens and the insidious prosecution of the same non-citizens stem from the same purpose. In a world where immigration offenses are the most prosecuted federal offense, courts are persuaded by the argument that the routine tracking of immigrants for record-keeping is mutually exclusive from the routine tracking of immigrants for furthering future prosecutions and securing future convictions.

The only routine aspect of this system is the ease of convictions for immigration offenses – convictions so easy that immigration officers do not have to leave their posts to appear at the trial of the non-citizen whose future and livelihood rests on a form they produced.

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[87] *Id.*

[88] The signed admission is a checkbox wherein the non-citizen initials their name and then signs next to a statement that reads "I admit that I am in the United States illegally, and I believe I do not face harm if I return to my country. I give up my right to a hearing before the Immigration Court. I wish to return to my country as soon as arrangements can be made to effect my departure. I understand that I may be held in detention until my departure." *Id.* at 1198.

[89] United States v. Caraballo, 595 F.3d 1214, 1229 (11th Cir. 2010).

[90] *Id.* at 1226.

[91] United States v. Rivera-Soto, 451 F. App'x 806, 808 (11th Cir. 2011) (citing *Caraballo,* 595 F.3d at 1229).

### *C. The Case of CNRs – a Full 180*

The Certificate of Non-Existence of Record (CNR) is a prime example of the haphazard application of the primary purpose test in context of immigration documents.

A CNR is a form that the government uses to show that a defendant does not have the permission to re-enter the United States. Prior to 2010, many courts held CNRs were not testimonial. In 2005, the Fifth Circuit held that CNRs do not "fall into the specific categories of testimonial statements referred to in *Crawford.*"[92]

That same year, the Ninth Circuit held that although the CNR in question was prepared for litigation, "the document her certification addresses is part of a class of documents that were not prepared for litigation."[93] Rather, the court attempted to argue, "[t]he CNR certifies the nonexistence of a record within a class of records that themselves existed prior to the litigation, much like business records."[94] Interestingly, the Ninth Circuit admitted that the CNR was created at the request of the prosecution yet declined to designate it as a document prepared for litigation: "Although [the immigration officer] made the certification at the request of the prosecutor, the class of records as to whose contents she prepared her certification were created and kept in the ordinary course of the INS's activities, prior to and regardless of Cervantes' prosecution."[95] Thus, the court reasoned, "that the CNR does not resemble the examples of testimonial evidence given by the Court," such as police interrogations or prior testimony at a former trial.[96]

The Ninth Circuit admitted that CNRs are prepared for litigation and at the request of the prosecution – yet proceeded to find that CNRs were not testimonial under the primary purpose test. This contradictory logic was adopted for years across circuits. In 2008, the Eighth Circuit held that CNRs are not testimonial, although they are prepared for trial:

> Although prepared in anticipation of trial, a CNR simply memorializes the contents of the Department database, maintained in the ordinary course of business-or, more particularly, the *absence* of a certain sort of record in that database. This, we noted in *Ellis,* "was too far removed from the examples of testimonial evidence provided by *Crawford.*" In other words, because the database underlying the CNR is not

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[92] United States v. Rueda-Rivera, 396 F.3d 678, 680 (5th Cir. 2005).
[93] United States v. Cervantes-Flores, 421 F.3d 826, 832-33 (9th Cir. 2005).
[94] *Id.* at 833.
[95] *Id.*
[96] *Id.*

> maintained for the primary purpose of proving facts in criminal prosecutions, the CNR itself, attesting to the absence of a record within that database, is a nontestimonial business record.[97]

In this case, the court used the same reason that its sister courts had used to deem other immigration forms non-testimonial: the primary purpose was not to prove facts in a criminal trial. Yet like its sister court, the Eighth Circuit admitted that CNRs *are* prepared in anticipation of trial before choosing to backpedal and find that CNRs are "too far removed" from the examples provided in *Crawford.*

It was not until 2010 that courts began to realize the obvious truth: that CNRs are testimonial.[98] In *Martinez-Rios*, the Fifth Circuit applied *Melendez-Diaz* to their analysis of a CNR finding that "CNR's are not routinely produced in the course of government business but instead are exclusively generated for use at trial. They are, therefore, testimonial."[99] The court reasoned that, just as the affidavits in *Melendez-Diaz* were used to show that the bags in evidence contained cocaine, the reason that the government wanted to introduce the CNR was to establish a necessary element of the crime required to convict the defendant.[100] Specifically, CNRs "establish that there is no record indicating that the alien had obtained government consent to reapply for admission-a fact necessary to convict."[101]

A CNR proves an essential element of the immigration offense – that a non-citizen did not have the requisite status for entry. How is this different from a warrant of deportation or a record of sworn statement, which are used to show other essential elements of immigration offenses, including nationality and former removals?

Prior to *Melendez-Diaz*, courts were eager to admit CNRs as non-testimonial. Under the primary purpose test, these forms were once considered "too far removed from the examples of testimonial evidence."[102] Now, they are the only immigration form that circuit courts find to violate the Confrontation Clause.

At its best, such a radical turn away from former decisions is an illustration of the faultiness in the Confrontation Clause doctrine today. At its worst, it is a depiction of the court system's haphazard—and rather blatantly xenophobic—application of the law and of the deep dignitary

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[97] United States v. Burgos, 539 F.3d 641, 645 (7th Cir. 2008).
[98] United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010).
[99] *Id.* at 586.
[100] *See id.* at 586.
[101] *Id.*
[102] *Burgos,* 539 F.3d at 645.

concerns this raises for non-citizens.

### *D. From Primary Purpose to the Introduction of Partial Forms*

Courts have also begun to drift from the primary purpose test in a rather unexpected way: through the introduction of *partial* forms. This gaming occurs in situations where immigration forms contain narrative information that would otherwise raise serious Confrontation Clause concerns. However, by turning in only the first page of a form, whose primary purpose may otherwise be contested, the prosecution attempts to game the primary purpose test. And courts allow it.

The I-213 form is a prime example. An I-213 form is a Record of a Deportable/Inadmissible Alien. The first page contains information such as the defendant's country of citizenship, passport number, and date and time of last entry. The remaining pages of the I-213 form contain narrative information conducted through an interview or interrogation. The form's directions to immigration officers state:

> Narrative (Outline particulars in which alien was located/apprehended. Include details not shown above regarding time, place, and manner of last entry, attempted entry, or any other entry, *and elements which establish administrative and/or criminal violation.* Indicate means and route of travel to interior.)[103]

The "narrative" section documents criminal history, immigration history, gang affiliations, and a thorough interview conducted by an immigration agent.

This note describes two circuit court decisions that allow the admission of "partial" I-213 forms to justify the conclusion that such forms—despite the fact that they contain narrative information that may establish a criminal violation—are non-testimonial.

In *United States v. Noria*, the Fifth Circuit began its discussion by noting that the government admitted only a partial form to circumvent the Confrontation Clause:

> Both the court and the Government appeared to agree with defense counsel that because the I-213s contained narrative information about agents' interviews with Noria, *they could not be admitted in full unless each of the interviewing officers testified.* So, the Government offered only the first page of each I-

[103] *See* MIJENTE, *ICE Targets Undocumented Immigrants Who Share Their Story in the Media* (Feb. 26, 2018), https://mijente.net/2018/02/maru/ (emphasis added).

> 213, which showed Noria's "routine biographical information," including his name and birthplace.[104]

The Fifth Circuit did not discuss its practice of cherry-picking which portions of forms would withstand a Confrontation Clause challenge. Rather, they admitted the first portion of the I-213 form into evidence to help prove the defendant's nationality as non-testimonial and under the public-records exception to the hearsay clause.[105]

Importantly, the Fifth Circuit rested its decision on the distinction between public records produced by law-enforcement in adversarial and non-adversarial settings. They noted that "Rule 803(8)(A)(ii)'s prohibition against public records of 'matter[s] observed by law-enforcement personnel' in criminal cases does not prevent the admission of all reports prepared by law enforcement officers." Instead, relying on a previous opinion, they distinguished between "'law enforcement reports prepared in a routine, non-adversarial setting, and those resulting from the arguably more subjective endeavor of investigating a crime and evaluating the results of that investigation.'"[106] Under this theory, they held that Noria's biographical information fell under (non-adversarial) public records.

Next, in relation to the Confrontation Clause concerns, the court held that Noria's biographical information was not testimonial, although the rest of the form contained testimonial narrative information. In basing its decision, the court looked towards cases from the Eleventh and Ninth Circuit that found that the biographical, non-narrative, information in I-213 forms is administrative, non-adversarial, and not completed in anticipation of litigation.

*United States v. Caraballo* in the Eleventh Circuit is one such case relied upon by the Fifth Circuit in *Noria*. In *Caraballo*, the Court allowed the admission of a partial I-213 form wherein the pages with narrative information were excluded and only the first page was admitted into evidence.[107] The Court reasoned:

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[104] United States v. Noria, 945 F.3d 847, 850 (5th Cir. 2019) (emphasis added).

[105] In its reply brief for the appellant, the defense argued that the I-213 form is anything but routine. Rather, "[t]he agent completing the I-213 is recording statements made by someone else for use in the determination whether to admit, deport or prosecute that individual." Reply Brief for Appellant at *10, *Noria*, 945 F.3d 847 (5th Cir. 2019) (No. 19-20286), 2019 WL 4268082,

[106] *Noria*, 945 F.3d at 858-59 (citing United States v. Quezada, 754 F.2d 1190, 1194 (5th Cir. 1985)).

[107] United States v. Caraballo, 595 F.3d 1214 (11th Cir. 2010).

> The I–213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A–File. It is of little moment that an incidental or secondary use of the interviews underlying the I–213 forms actually furthered a prosecution.[108]

Ultimately, according to the Eleventh Circuit, because the *partial* forms contained only routine biographical information, their primary purpose was not to elicit testimonial evidence for prosecution.[109] The court was not concerned with the potential gaming of the Confrontation Clause by the prosecution, nor was it concerned that the rest of the form contained narrative information that would require the immigration officer to testify in court.

The same pattern occurred in the Ninth Circuit in *Torralba-Mendia*. Torralba-Mendia was on trial for smuggling people across the border. In that case, the government introduced biographical information on I-213 forms to prove that the migrants Torralba-Mendia was accused of smuggling were either deported or voluntarily returned to their home countries.[110] The government did not introduce the narrative portions of the I-213, including statements made by the migrants surrounding the apprehension.[111] These narrative statements were redacted.[112]

Like its sister courts, the Ninth Circuit found that there was no hearsay violation, as the form fell under the public records exception.[113] Next, and again like its sister courts, the Ninth Circuit held that the introduction of the I-213 was not a violation of the Confrontation Clause because it was not created for the purpose of litigation. Instead, they found that the form "merely collects the alien's biographical information, gives the officer an opportunity to describe how the person was apprehended (which the government redacted), and states whether they were deported or voluntarily returned. Agents complete I–213 forms regardless of whether the government decides to prosecute anyone criminally."[114] The court thus found that there was no violation in the admission of the redacted, or partial, forms into evidence.

Essentially, courts have created a bifurcated system in which a

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[108] *Id.* at 1229.
[109] *Id.*
[110] United States v. Torralba-Mendia, 784 F.3d 652, 658 (9th Cir. 2015).
[111] *Id.*
[112] *Id.*
[113] *Id.* at 665.
[114] *Id.* at 666.

form produced in an interrogation may be both testimonial and non-testimonial. The distinction rests on the "adversarial" nature of the information in the form: narrative interviews are testimonial, while biographical information that helps prove the Government's case is not. It is unclear how this dichotomy protects a criminal defendant's Confrontation Clause right, for on its face, it seems to do the opposite.

The admission of these partial forms is distinguishable from the admission of a partial 9-1-1 call played in court because, as explained by *Davis v. Washington*, 9-1-1 calls are generally non-testimonial due to their emergency nature. Specifically, "at least the initial interrogation conducted in connection with a 9-1-1 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance."[115]

The argument proposed in this note would not alter the introduction of partial 9-1-1 calls because such calls are neither produced with an eye toward trial nor in an adversarial setting. The cherry-picking that occurs in 9-1-1 calls is not problematic in the way that the cherry-picking of immigration forms is problematic. A 9-1-1 call is placed to resolve an emergency, whereas immigration forms are produced to maintain the government's official and adversarial position against non-citizens.

This note argues that under a two-tiered approach, every element of a form created by an adversarial government witness, including the "biographical" first page of the I-213 form, triggers Confrontation Clause protections due to the adversarial setting in which it was produced. In contrast, 9-1-1 calls are placed so that police can respond to an emergency rather than investigate a past event. Unless the individual who placed the 9-1-1 call is an adverse government agent to the defendant, their statements to the police are not testimonial, and thus the admission of their partial phone call does not produce the same evil from which the Framers sought to protect defendants.

Under this two-tiered approach, the government would not be able to cherry-pick immigration forms. Instead, the introduction of *any* section of the I-213 would be impermissible unless the defense has the opportunity to cross-examine the agent who produced it.

### *E. The Legacy of* Roberts *and its Public Records Exception*

One of the more perplexing applications of the Confrontation

[115] Davis v. Washington, 547 U.S. 813, 827 (2006).

Clause in relation to immigration forms has been its conflation of the public records exception with the former *Roberts* reliability standard. As was previously discussed, the *Roberts* reliability standard allowed for the introduction of hearsay as long as it was rooted in a "firmly rooted hearsay exception."[116] For example, because hearsay evidence under the public records hearsay exception in F.R.E 803(8) was admissible, the Confrontation Clause protection did not apply.

In this vein of reasoning, courts would find the introduction of immigration documents without the opportunity for cross-examination to be constitutional because immigration documents fall under a hearsay exception as public records under F.R.E. 803(8).

Yet in 2004, the *Crawford* Court held that reliability was not an adequate substitute for cross-examination: "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability."[117] The Supreme Court emphasized that:

> [a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the 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.[118]

Thus, post-*Crawford*, hearsay has been treated disparately depending on its testimonial nature. Today, hearsay that is testimonial can only be introduced if it is admissible under a hearsay exception and if the defendant has the opportunity to cross-examine the witness who produced it. Meanwhile, hearsay that is *non-testimonial* can be introduced so long as it satisfies a hearsay exception, as the Confrontation Clause is not triggered.

Yet a year after *Crawford* was decided, the Ninth Circuit conflated the new doctrine with the old *Roberts* reliability standard when they reasoned that warrants of deportation are not testimonial because of their "inherent reliability." [119] The court quoted a 1980 case, in which they held that "t]he notation that [defendant] was deported to Mexico was a

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[116] Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36, 68 (2004).
[117] *Crawford*, 541 U.S. at 61.
[118] *Id.*
[119] United States v. Bahena-Cardenas, 411 F.3d 1067, 1075 (9th Cir. 2005).

ministerial, objective observation, which has inherent reliability because of the Government's need to keep accurate records of the movement of aliens."[120] The court failed to reconcile how its reasoning from the 1980s was still relevant after *Crawford* overruled *Roberts*, or why it chose to focus on this reliability standard rather than on the new doctrine.

Several years after the development of the primary purpose test, the Ninth Circuit continued to quote the 1980's case referencing the inherent reliability of immigration documents.[121] In *Orozco-Acosta*, the court held that "[r]esolution of this issue is controlled by our previous decision in *United States v. Bahena–Cardenas*" where "[w]e reasoned that warrants of removal have "inherent reliability because of the Government's need to keep accurate records of the movement of aliens."[122]

Other circuit courts are hardly immune from the conflation of the Sixth Amendment with hearsay exceptions. The Tenth Circuit has held that forms from the ICE Central Index System are public records and thus not testimonial because "[t]he definition of 'public record' in Rule 803(8)(B) excludes records created with an eye toward litigation and criminal prosecution."[123] Likewise, the Fifth Circuit has held that ICE computer printouts are public records, which are equivalent to business records, and thus "by their nature [are] not testimonial."[124]

The Sixth Amendment and hearsay exceptions are not interchangeable. To conflate the two is to revert back to the *Roberts* doctrine that the *Crawford* court explicitly warned against ("Where testimonial statements are involved, we do not think that the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability.").[125]

As the court in *Melendez-Diaz* explains, public records generally fail to trigger the Confrontation Clause not because they fall under a hearsay exception, but because they have not been created for the purpose of establishing the facts for litigation.[126] But the Court alludes to the idea that not every public record is immune from Confrontation Clause protections. In fact, the analysis should never end at the hearsay exception because "[w]hether or not they qualify as business or official records, the

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[120] *Id.* (quoting United States v. Hernandez–Rojas, 617 F.2d 533, 535 (9th Cir. 1980)).
[121] *See* United States v. Orozco-Acosta, 607 F.3d 1156, 1163 (9th Cir. 2010).
[122] *Id.*(quoting United States v. Hernandez–Rojas*,* 617 F.2d 533, 535 (9th Cir.1980)).
[123] United States v. Mendez, 514 F.3d 1035, 1044 (10th Cir. 2008).
[124] United States v. Lopez-Moreno, 420 F.3d 420, 437 (5th Cir. 2005).
[125] Crawford v. Washington, 541 U.S. 36, 61 (2004).
[126] *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).

analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment."[127]

As will be explained in Part III, the most logical way to distinguish public records that may still trigger Confrontation Clause protections is by separating public records produced in adversarial and non-adversarial settings. This is not a new approach. In fact, the Fifth Circuit has already used this approach to distinguish between admissible and inadmissible public records, or documents with "the arguably more subjective endeavor of investigating a crime and evaluating the results of that investigation" and those that are not adversarial.[128]

This note does not argue that the public records analysis should change. Instead, even if a court finds that immigration forms fall under a public record exception, their introduction would instantly force the government to produce the adverse witness for the defense's cross-examination.

### *F. No Witnesses Here: The Declarant is His Own Witness*

Not all applications of the Confrontation Clause are a result of the vagueness of the primary purpose test. In reality, due to the disparate treatment of non-citizens and immigration forms under the Sixth Amendment, some decisions are entirely haphazard. The designation of immigrant defendants under interrogation as their "own witness[es]" is a prime example.

Recently, a new reasoning has begun to emerge in the Fifth Circuit's treating of "the declarant as his own witness," thus precluding the need for a Confrontation Clause analysis altogether.

In *Crawford v. Washington*, the Supreme Court borrowed from a 1991 United States amicus brief in the case *White v. Illinois* when it determined the meaning behind a "witness against" the defendant.[129] The

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[127] *Id.*

[128] United States v. Noria, 945 F.3d 847, 858-59 (5th Cir. 2019) (citing United States v. Quezada, 754 F.2d 1190, 1193-94 (5th Cir. 1985)).

[129] Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause,* 92 B.U. L. REV. 1865, 1879 (2012) (describing how the amicus brief in *White v. Illinois* asked the court to admit a young child's out-of-court allegations of sexual abuse, proposing that the term "witnesses against" "more fittingly describes those individuals who actually provide in-court testimony or the functional equivalent – i.e., affidavits, depositions, prior testimony or other statements (such as confessions) that are made with a view to legal proceedings.").

Court defined "witnesses against" the defendant as "those who bear testimony."[130] In choosing this definition, the Supreme Court dismissed other definitions that would have made sense at that time, such as "a person who knows or sees anything", "one personally present", or "an eye-witness."[131] "[A]t least colloquially, a witness is more than just someone who testifies under narrow circumstances, and the [F]ramers of the Sixth Amendment would have been familiar with this definition."[132]

In the context of immigration forms, the Fifth Circuit has recently taken a radical turn away from protecting defendants from the witnesses against them. In *United States v. Montalvo-Rangel*, the Fifth Circuit decided that the admission of form I-215B did not violate the Confrontation Clause because the immigration officer was not the "witness against" the defendant. Rather, the court held that the defendant was his own witness:[133]

> The "form" in question, however, is actually an affidavit executed by Montalvo–Rangel. Although it was typed by an immigration officer, it was signed and attested to by Montalvo–Rangel. In that respect, it is no different from a person's dictating an affidavit to an assistant before signing it.[134]

It is unclear what "assistantship" situation the Fifth Circuit envisioned for an individual interrogated in custody by ICE agents, but the court boldly maintained that "[t]he form is nothing more than a statement by Montalvo–Rangel; accordingly, the only witness he has the right to confront is himself."[135]

Eight years later, the Fifth Circuit held that their *Montalvo-Rangel* logic applied to I-213 forms as well. In *United States v. Noria*, the defendant attempted to suppress the admission of five I-213 forms created by various immigration officials documenting his Mexican citizenship. Finding inconsistencies among the I-213s, the defense requested the

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[130] *Crawford*, 541 U.S. at 51.

[131] In fact, the definition the Court chose is only one of five provided in Noah Webster's 1828 dictionary. Bellin, *supra* note 129, at 1883.

[132] John R. Grimm, *A Wavering Bright Line: How* Crawford v. Washington *Denies Defendants a Consistent Confrontation Right*, 48 AM. CRIM. L. REV. 185, 199-200 (2011).

[133] The statement that the defendant sought to suppress was an admission he made to the ICE agents during his interrogation that he was a citizen of Mexico. The district court had granted the defendant's motion to suppress because it found it "'troubling' that there 'appears to be a standard practice by ICE agents to interrogate individuals first and provide *Miranda* warnings afterward.'" United States v. Montalvo-Rangel, 437 F. App'x 316, 317 (5th Cir. 2011).

[134] *Id.* at 318.

[135] *Id.*

opportunity to confront the immigration officials who prepared them.[136]

Yet the court decided that "it is quite possible the Confrontation Clause is not implicated in this case."[137] Much like *Montalvo-Rangel*, the court reasoned that Noria was the "sole declarant" of the forms produced during the interrogation with the immigration officer: "Because Noria's A-file contained no documents indicating his citizenship or birthplace, Noria concedes that the interviewing agents obtained all information from Noria's own oral responses to their questions. These facts indicate that Noria is the sole declarant of the I-213 data he challenges."[138]

In comparing *Noria* and *Montalvo-Rangel*, the Court furthered the notion that immigration officials function as assistants or transcribers:

> Noria's I-213s are distinguishable from Montalvo-Rangel's I-215Bs in several respects: Noria was not Mirandized, he did not sign the I-213s, and they contain processing codes and disposition information that must have been supplied by the interviewing officer, not Noria. However, the key information Noria contests—his country of citizenship—*was* supplied by Noria. At least as to that data, the logic of *Montalvo-Rangel* would situate Noria as the "witness" and the interviewing officer as a mere transcriber.[139]

The Fifth Circuit was also painfully unaware of its hypocrisy in light of a case they had decided a few years prior, where they held that a warrant of removal was not testimonial because it did "not contain any language indicating that the form was 'subscribed and sworn to'" by the defendant or immigration official.[140] Now, eight years later, *Noria* and *Montalvo-Rangel* were doing just that—treating defendants as if they had sworn to forms produced in their interrogations.

Under the logic of the Fifth Circuit, if a non-citizen defendant—in custody and under interrogation—dares to answer immigration officials' questions, he forfeits the right to confront that official at trial. Surely the *Crawford* court never imagined that their decision would be so misconstrued as to essentially nullify Confrontation Clause protections.

Still, even if a court accepts a non-sensical argument akin to that advanced by the Fifth Circuit, the soundness of the claim must be tested by cross-examination of the immigration official who was present at the

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[136] *See* Brief for Appellant at *10-11, U.S. v. Noria, 945 F.3d 847 (5th Cir. 2019) (No. 19-20286), 2019 WL 3285648 (arguing that the inconsistencies among the forms listed the defendant's place of birth as Honduras or Mexico and the defendant's height as 71 inches or 62 inches).

[137] *Noria*, 945 F.3d at 855 (5th Cir. 2019).

[138] *Id.* at 854.

[139] *Id.* at 855.

[140] United States v. Becerra-Valadez, 448 F. App'x 457, 462 (5th Cir. 2011).

time the evidence was produced. How can we know that the defendant understood what he was signing and meant to endorse it, if not by confronting the agent who witnessed and "transcribed" the statement? Ironically, the immigration official is the only witness who can testify surrounding the soundness of the Government's argument that the defendant is his own witness.

## III. MOVING TOWARD A FRAMEWORK THAT PRESERVES THE RIGHTS OF NON-CITIZEN CRIMINAL DEFENDANTS

As described in the prior section, the primary purpose test fails to protect defendants from the abuses that cross-examination seeks to prevent. This section frames an amended way of interpreting the Confrontation Clause doctrine that would provide non-citizen defendants the dignity of a fair process.

Rather than rely solely on the primary purpose test, courts should determine that documents trigger Confrontation Clause protections under two scenarios: 1) if they fall under the primary purpose test, or 2) if they are produced by an adverse government witness.

If courts applied this two-tiered approach, then all immigration documents would be considered testimonial. The admission of any immigration form in criminal trial would require the government to bring in the immigration official who produced the form, and the Government's failure to do so would be a violation of the Confrontation Clause.

### 1. The Disparate Procedural Rights Afforded to Defendants Disputing the Introduction of Laboratory Analyses Versus Immigration Forms

As a result of its "application, manipulability, and breadth," the primary purpose test is insufficient for assuring defendants Confrontation Clause rights are protected.[141] Specifically, the primary purpose test allows for the admissibility of immigration documents without cross-examination simply because the majority of them are produced in routine proceedings and are not used at future trials. Although immigrant defendants ought to have the right to test the reliability of the statements used to prove the essential elements of their offense, they are treated differently from their citizen counterparts simply because the evidence is not considered "testimonial."

The significance attached to laboratory analyses in *Melendez-*

[141] *See* Adam A. Field, *Beyond* Michigan v. Bryant*: A Practicable Approach to Testimonial Hearsay and Ongoing Emergencies*, 2012 U. ILL. L. REV. 1265 (2012).

*Diaz* highlights the disparate treatment of immigration offenses and immigration forms as evidence in criminal trials. In *Melendez-Diaz*, the Court held that the forensic analysist's statements helped prove essential elements in the criminal case.[142] Similarly, in immigration offenses, the A File is generally the centerpiece of the prosecution's case. The United States Attorneys' Bulletin from July 2017 states that "A-Files are critical in criminal prosecutions under a variety of criminal statutes," and A Files "will most likely have all the necessary information to make a charging decision and secure a conviction."[143]

One article published in the United States Attorneys' Bulletin goes as far as to note:

> Upon the filing of an Illegal Reentry complaint, the [A File] archive seems to magically appear from the case agent, wholly intact and ready for use, like the morning newspaper on a driveway at dawn. But even prosecutors who juggle a heavy Illegal Reentry caseload generally have little reason or opportunity to know much about the creation, storage, and maintenance of these files that are so integral to the successful resolution of their Illegal Reentry caseload.[144]

The A File is integral to the prosecution of immigration offenses because it contains the forms that help to prove essential elements of the immigration offense.[145] Yet courts routinely ignore this fact when they deem that the documents contained in an A File are not prepared in anticipation of litigation. Although immigration documents contained in an A file are not prepared solely or perhaps primarily for the purpose of a criminal prosecution, criminal prosecutions for immigration offenses would largely flounder without them.

Moreover, the Court in *Melendez-Diaz* also reasoned that laboratory analyses are not "as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation."[146] The Court cited a study finding that "[t]he majority of

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[142] "The fact in question is that the substance found in the possession of Melendez–Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009).

[143] U.S. DEP'T OF JUST., *supra* note 17, at 16.

[144] *Id.* at 19.

[145] *See Melendez-Diaz*, 557 U.S. at 310-11 (finding that affidavits from a state laboratory confirming the nature of a substance "are incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'" and provided "the precise testimony the analysts would be expected to provide if called at trial.").

[146] *Id.* at 318 (citing NAT'L RSCH. COUNCIL NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 6–1 (Prepublication Copy Feb.

[laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency."[147] Thus, the Court reasoned that "a forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."[148] And just like forensic analysts, immigration officials report to law enforcement agencies. In fact, both forensic analysts and immigration officials *are* members of law enforcement agencies. Although the Supreme Court believed that the relationship between forensic analysts and law enforcement triggered the Confrontation Clause, this reasoning has not been extended to immigration officials.

Not only did the Court in *Melendez-Diaz* reasoned that government officials have an incentive to manipulate evidence, the Court also reasoned that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials."[149] However, a lab technician may not only be inclined to lie or to manipulate testimony. The Supreme Court also recognized that "[l]ike expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."[150]

Yet while a criminal defendant has the right to cross-examine the forensic analyst who produced a lab report proving an essential element of the offense, non-citizen defendants do not have the right to cross-examine immigration officials who produce forms showing their nationality, citizenship, or former deportations. When it comes to immigration offenses, non-citizens do not have the right to show the jury that the immigration official who prepared their I-205 has a history of lying; that the agent who created a field encounter form had not received sufficient training or been fired for misconduct; nor can they try to elicit testimony to show that the agent who witnessed their deportation was under pressure to write false statements.

Similarly, in *Bullcoming v New Mexico*, the Supreme Court held that the Confrontation Clause precludes the introduction of "forensic laboratory reports containing testimonial certifications – made for the purpose of proving a particular fact – through the in-court testimony of a

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2009)).
[147] *Id.*
[148] *Id.*
[149] *Id.* at 319.
[150] *Id.* at 320.

scientist who did not sign the certification or perform or observe the test reported in the certification."[151] A different lab analyst cannot describe the observations another analyst certified, nor would a different lab analyst "expose any lapses or lies on the certifying analyst's part."[152] As such, the Court held that such "surrogate testimony … does not meet the constitutional requirement."[153]

Immigration officials testifying as "custodians of record" for the government resemble the surrogate lab analyst in *Bullcoming*. Like surrogate lab analysts, A-file custodians provide surrogate testimony. A-file custodians have not observed the events they are describing, including the deportation or interrogation, and they likely have never met the defendant. Because they never prepared the forms in question, they cannot speak about any "lapses or lies" made by the immigration officer who produced the forms. Yet unlike surrogate lab analysts, A file custodians meet the Confrontation Clause requirements because courts consider the A files to be non-testimonial evidence.

Immigration forms are introduced into evidence by agents who did not produce them but who are classified as witnesses who can speak on behalf of the observations and the signatures of other agents. Their testimony surrounding the evidence is uncontested – nearly akin to the former *Roberts* standard of reliability. Yet "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[154]

The primary purpose test is inadequate when it comes to the prosecution of immigration offenses because it renders any "routine" immigration record-keeping as mutually exclusive from testimonial evidence. Yet it is the routine nature of these immigration forms that helps secure convictions of immigration offenses when they arise. Instead, the primary purpose test creates a system wherein non-citizen defendants are left to dispute the facts contained in the forms admitted as evidence without the opportunity to cross-examine the immigration official who produced them.

Immigration documents may not be prepared in anticipation of litigation under the definition of the primary purpose test, but their admissibility without the opportunity for cross-examine is *precisely* the

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[151] Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011).
[152] *Id.* at 661-62.
[153] *Id.* at 652.
[154] Crawford v. Washington, 541 U.S. 36, 62 (2004).

principal evil which the Confrontation Clause sought to protect.[155]

### 2. The Confrontation Clause Doctrine Must Account for the Adversarial Nature in Which the Documents are Produced

The Confrontation Clause is meant to protect against the modern equivalents of the "*ex parte* examination in Sir Walter Raleigh's trial for treason," which the Supreme Court has "frequently identified as 'the principal evil at which the Confrontation Clause was directed.'"[156] Yet the current Confrontation Clause doctrine under the primary test fails to do just that.

In fact, the distinction between testimonial and non-testimonial evidence under today's doctrine may not be entirely historically accurate. Scalia's decision in *Crawford* "did not identify any framing-era source that distinguished between testimonial and nontestimonial hearsay."[157] Similarly, "history does not support the notion that their concern was limited to such statements. Instead, evidence suggests that any statement that might be used to convict an accused was of concern to the Framers."[158]

In reality, the adversarial setting in which evidence is produced is not only a more logical test for determining whether there has been a violation of the Confrontation Clause, but also a more historically accurate one. As the Crawford court stated, "[t]he common-law tradition is one of live testimony in court subject to adversarial testing.[159] Similarly, Carolyn Zabrycki argues that a statement prepared by an adversarial official "(a) articulates a danger against which the Framers could have intended confrontation to protect, and (b) articulates a danger and a factor conforming to the historical foundation of the Confrontation Clause, as described by the Court in *Crawford*."[160]

By their nature, immigration forms are adversarial. The meaning

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[155] *Id.* at 50 ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.").

[156] Ohio v. Clark, 576 U.S. 237, 249 (2015) (quoting *Crawford,* 541 U.S. at 50); *see also* Michigan v. Bryant*,* 562 U.S. 344, 358 (2011).

[157] Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington*,* 71 BROOK. L. REV. 105, 191 (2005).

[158] Grimm, *supra* note 132, at 201.

[159] *Crawford*, 541 U.S. at 43.

[160] Carolyn Zabrycki, *Toward A Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CALIF. L. REV. 1903, 1095 (2008).

of "adversarial" as defined by Black's Law Dictionary is "[i]nvolving or characterized by dispute or a clash of interests."[161] The mission of DHS is to "secure the nation from the many threats we face."[162] In regards to national borders, DHS states: "Illegal aliens who enter the United States and those who overstay their visas disregard our national sovereignty, threaten our national security, compromise our public safety, exploit our social welfare programs, and ignore lawful immigration processes."[163]

Because of the nature of the immigration system in the United States, the routine recording or tracking of non-citizens is an adversarial process. DHS is an active participant in the prosecution of immigration offenses: in 2010, "54% of suspects in matters concluded by U.S. attorneys had been referred by the Department of Homeland Security."[164] Likewise, "criminal referrals to U.S. attorneys increased the fastest in southwest border districts" from 2006-2010, with the increase "due to greater immigration enforcement."[165] To turn a blind eye to these facts and to disguise the real nature of the American immigration system under routine business matters is not only dismissive but fully disparaging to the thousands of non-citizens who are prosecuted and detained for years within American prisons.

Under the current doctrine, anything that is routine is largely considered to be produced outside of the scope of prosecution. This essentially renders routine and adversarial processes to be mutually exclusive – which they are not. There is no debate that immigration officials must conduct interviews and fill out forms documenting the entrance and exit of non-citizens in and out of this country. Their routine tracking is a necessary component of the success of the adversarial process and of the immigration system's mission to secure the nation against the "threat" of non-citizens. The current Confrontation Clause doctrine does not account for this.

The prosecution of immigration offenses without the opportunity to cross-examine immigration officers *is* the modern equivalent of the danger that the Framers feared. Immigration forms contained in an A File are the centerpiece of evidence used against the defendant, and beyond deportation, immigration offenses carry a median of 12 months in prison

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[161] *Adversarial*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[162] U.S. DEP'T OF HOMELAND SEC., *supra* note 11.
[163] U.S. DEP'T OF HOMELAND SEC., *supra* note 12; *see also* Green, *supra* note 12.
[164] U.S. DEP'T OF HOMELAND SEC., *supra* note 12; *see also* Green, *supra* note 12.
[165] Mark Motivans, *Federal Justice Statistics 2010*, BUREAU OF JUST. STATS. 11 (Dec. 2013), https://www.bjs.gov/content/pub/pdf/fjs10.pdf.

followed by deportation.[166] Because the length of incarceration is dependent upon a defendant's criminal history, those with the most serious criminal histories face up to 20 years in federal prison followed by deportation.[167]

Yet circuit courts refuse to admit that immigration documents are procured in an adversarial setting.[168] *Montalvo-Rangel* is a prime example. In this case, immigration officials conducted an interview requiring a *Miranda* warning for a I-215 form that they entirely failed to give until they had completed the interview.[169] The Fifth Circuit held that the introduction of the form did not violate the Confrontation Clause because it was "no different from a person's dictating an affidavit to an assistant before signing it."[170] However, Mirandizing an individual during a custodial interrogation is akin to the questioning that took place in *Pena-Gutierrez* years prior, which the Ninth Circuit found to be "akin to a criminal investigation."[171] Montalvo-Rangel's interrogation was the furthest thing from a person dictating to his assistant. Rather, he was in a custodial interrogation with immigration officials – and whether this interrogation was "routine" or not does not take away from the fact that it was clearly adversarial.

A two-tiered analysis under the Confrontation Clause that accounts for both the primary purpose test and the adversarial nature in which evidence is produced is the only way to prevent the designation of non-citizen defendants as second-class citizens. It is time to re-define the

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[166] *See* Motivans, *supra* note 13, at 10. *See also* U.S. SENT'G COMM'N, *Sentence Length of Immigration Offenders Over Time: Fiscal Years 2009-2018,* 2018 SOURCEBOOK OF FED. SENT'G STATS. 137 fig. I-3 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/FigureI3.pdf.

[167] *See* 8 U.S.C. § 1326(b)(2).

[168] Prior to *Crawford*, it was not entirely uncommon for courts to find that immigration forms were produced in an adversarial setting. In 2000, the Ninth Circuit held that the INS questioning of the defendant was conducted in an adversarial manner akin to "a criminal investigation." United States v. Pena-Gutierrez, 222 F.3d 1080, 1087 (9th Cir. 2000). Specifically, the questioning of the defendant took place in the INS fraud office "before the INS decided what, if any, action to take regarding this incident." *Id.* The defendant was also "not subjected to objective or scientific testing, or even the standardized administrative questioning asked of everyone at a border crossing. [The INS officer] was conducting a criminal interrogation." *Id.* In 2002, the Ninth Circuit again found that an immigration officer's interview with a defendant was "adversarial in nature." United States v. Orellana-Blanco, 294 F.3d 1143, 1150 (9th Cir. 2002).

[169] *See* United States v. Montalvo-Rangel, 437 F. App'x 316 (5th Cir. 2011).

[170] *Id.* at 318.

[171] *See Pena-Gutierrez*, 222 F.3d at 1087.

Confrontation Clause into a doctrine that fulfills the historical purpose of the Confrontation Clause's protections. Evidence produced in an adversarial setting by an adversarial agent should never be allowed in court without providing defendants the opportunity to cross-examine the witness who produced it.

### 3. Policy Implications

#### *A. Alternative Approaches*

One critique of the two-tiered test is that it foregoes the potential for more efficient, alternative approaches. One such approach would be an expanded primary purpose test – one wherein defendants have the right to confront witnesses who introduce evidence that has a *secondary* purpose in prosecution. In the immigration context, this would mean that immigration forms should be considered testimonial because tracking immigrants has at least a secondary purpose of prosecution. Alternatively, producing a warrant for removal may not pass the primary purpose test because its primary purpose is related to deporting an individual, but it surely has a secondary purpose in prosecution.

While this approach may not completely overhaul the current doctrine, it would ask courts to turn their interpretation of "testimonial" on its head to include any document that has a *potential* secondary purpose in prosecution. It would be difficult to draw the line that separates documents with any chance of having criminal liability or consequence. Courts would likely be hesitant of this slippery slope, as it could have far-reaching effects outside of the criminal legal system.

Instead, this note proposes a narrower expansion: the primary purpose test should remain as is, but documents produced in adversarial settings by an adverse government agent should also be afforded Confrontation Clause protections. This change would almost be specifically tailored towards the immigration enforcement context, which is inherently closer to the criminal legal system than other administrative legal spaces.

#### *B. The Resource Strain of Allowing for Proper Procedure*

Another critique of the two-tiered primary purpose test is that allowing non-citizen defendants to confront every agent who produces documents in their A-File would cost the federal judiciary and government significant time and resources. And while courts have generally not accounted for the "resource drain" of affording defendants

the proper procedure, this concern is likely superficial at best.

The main reason that such a critique fails is because of the nature of the federal criminal system and the high rates of guilty pleas that ensue from it. In FY 2019, there were 29,348 individuals prosecuted for federal immigration offenses.[172] 96.7% of these offenses resulted in a guilty plea.[173] Only 0.4% of immigration cases went to bench or jury trial, and only 0.1% of all immigration cases in FY 2019 resulted in the defendant not being convicted at the bench or jury trial stage.[174]

In other words, approximately 117-118 individuals charged with immigration offenses in FY 2019 went to trial. Yet having a Confrontation Clause protection would likely not result in turning the 96.7% of guilty pleas into trial-bound cases. Although the defense's ability to attack the Government's case surely is bolstered by a two-tiered primary purpose test, affording non-citizens proper procedure does not change the countless other oppressive factors stacked against non-citizen defendants in the federal system.

Like other criminal defendants, non-citizen defendants face draconian sentencing guidelines and enhancements for past offenses. Yet unlike citizen defendants, many non-citizen defendants also face language barriers and a fear of deportation following their criminal sentence. Under these circumstances, being afforded the right to confront an immigration official who interviewed them in 2008 is likely not incentive enough for most defendants to turn down a more favorable plea agreement and risk their chances at trial.

Yes, a two-tiered primary purpose test may bolster the defense of the 0.4% of individuals who take their cases to trial. But would more defendants decide to go to trial? Maybe. Yet the reality is that probably not a significant amount and believing as much would ignore the bleak reality of the nature of federal prosecutions. Still, even if only a dozen outcomes change under this approach, it does not make it any less important to provide non-citizens the dignity of proper procedure that they deserve and that they have continuously and systematically been denied under the court's current interpretation of the primary purpose test.

Even in the most extreme thought experiment where other barriers to trial do not exist, any resource strain placed on the courts should be outweighed by the need for our judiciary to honor the basic constitutional

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[172] Mark Motivans, *Federal Justice Statistics, 2019,* BUREAU OF JUST. STATS. 10 (Oct. 2021), https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf.
[173] *Id.*
[174] *Id.*

rights of non-citizen defendants. Our judicial system should be more concerned with ensuring the dignity of proper procedure more than it is in securing mass convictions.

## CONCLUSION

In the context of immigration offenses, non-citizen defendants in criminal trials are not afforded the dignity of proper procedure. This is because courts routinely violate non-citizen defendants' constitutional rights by allowing the government to game the current Confrontation Clause doctrine.

The American immigration system has always been adversarial in nature. The current inclination of courts to deem it anything but adversarial in the context of the Confrontation Clause is not rooted in history, but in the disparaging attitude toward non-citizens that American courts continue to practice, uphold, and legitimize.

To protect the dignitary rights of non-citizen defendants, courts must move toward an interpretation of the Confrontation Clause that accounts for the adversarial nature in which the evidence has been produced. To maintain the current doctrine is to knowingly uphold a dual standard of justice that unconstitutionally singles out defendants by nationality.