NOTE

GOVERNMENT ADMISSIONS AND FEDERAL RULE OF EVIDENCE 801(D)(2)

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INTRODUCTION

THE common law of evidence generally permitted statements by a party opponent, i.e., admissions, to establish the truth of the matter asserted. Nevertheless, some courts excluded government admissions as hearsay in criminal proceedings.[1] These courts reasoned that the government is an objective representative of the public and disinterested in the outcome of a prosecution. In other words, the government is not an opposing party.[2] These courts also reasoned that no individual can bind the sovereign.[3] As a result, government admissions in criminal proceedings had no substantive evidentiary effect.[4]

The Federal Rules of Evidence displaced the relevant common law in 1975.[5] Rule 801(d)(2) provided for the continued admissibility of statements by a party opponent in five circumstances: (A) direct statements made by an opposing party; (B) statements adopted by an opposing party; (C) statements made by a representative of an opposing party who was authorized to speak on the subject; (D) statements made by an agent or employee of an opposing party concerning a matter within the scope of that relationship; and (E) statements made by a co-conspirator of an opposing party in furtherance of a joint conspiracy.[6] The plain language of Rule 801(d)(2) did not differentiate between the government and private parties, or between civil and criminal proceedings, instead dictating what appeared to be a blanket means of introducing previous statements attributable to and offered as substantive evidence against an opposing party.

[1] See United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967) ("[T]he inconsistent out-of-court statements of a government agent made in the course of the exercise of his authority and within the scope of that authority, which statements would be admissions binding upon an agent's principal in civil cases, are not so admissible here as 'evidence of the fact.'"); Anne Bowen Poulin, Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?, 87 Minn. L. Rev. 401, 412 (2002) ("[P]arty admissions were almost never admitted against the government in criminal cases.").

[2] See *Santos*, 372 F.2d at 180.

[3] Id.

[4] Id.

[5] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[6] Fed. R. Evid. 801(d)(2).

Shortly thereafter, the U.S. Court of Appeals for the District of Columbia Circuit held that Rule 801(d)(2) applies against the government in criminal proceedings, at least in some circumstances.[7] The Seventh Circuit, in contrast, perpetuated the common law limitation.[8] The remaining circuits eventually joined the fray, developing a collage of conflicting positions and solidifying a split in jurisprudence that traverses the various provisions of Rule 801(d)(2).[9]

The exact contours of the circuit split, however, are difficult to articulate. Some courts have embarked on a granular analysis of Rule 801(d)(2) and permit government admissions under some provisions, but not necessarily others. Meanwhile, the various provisions of Rule 801(d)(2) are not always practically distinguishable even if they are conceptually distinct. Statements are often amenable to categorization as any one of multiple types of admissions, and courts are inconsistent in their subsequent designations—if they choose to specify which provision of Rule 801(d)(2) applies at all. Courts also frequently provide alternative holdings for each evidentiary ruling, minimizing discussion of Rule 801(d)(2) or arguably rendering it dicta.[10] These complications make comparing cases difficult and might explain why the circuit split persists, preventing a clean presentation of the issue for resolution by the Supreme Court.

Underlying the divergent circuit positions is disagreement on three fundamental issues: First, whether the government is a party opponent for purposes of Rule 801(d)(2); second, whether an individual can bind the sovereign; and third, whether the common law limitation on government admissions in criminal proceedings survives the enactment of the Federal Rules. While Professor Anne Poulin[11] and others[12] have writ-

[7] United States v. Morgan, 581 F.2d 933, 937–38 & nn.10–11 (D.C. Cir. 1978).

[8] United States v. Kampiles, 609 F.2d 1233, 1246 (7th Cir. 1979).

[9] See infra Part II.

[10] But see, e.g., United States v. Ganadonegro, 854 F. Supp. 2d 1088, 1124 (D.N.M. 2012) ("While the Court may not be bound by Tenth Circuit dicta, the Court takes seriously anything that the Tenth Circuit says, at least as persuasive guidance.").

[11] See Poulin, supra note 1.

[12] See 30B Michael H. Graham, Federal Practice and Procedure: Federal Rules of Evidence § 7023, at 252 & n.11 (2011 ed. & 2016 Supp.) [hereinafter Graham, Federal Practice and Procedure: Evidence]; 6 Michael H. Graham, Handbook of Federal Evidence § 801:23, at 439–43 & nn.11–12 (7th ed. 2012 & 2013 Supp.) [hereinafter Graham, Handbook of Federal Evidence]; 2 Charles McCormick, McCormick on Evidence § 259, at 295–96 (Kenneth S. Broun ed., 7th ed. 2013) [hereinafter McCormick]; 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:56, at 479–82 (4th ed. 2013); 5 Jack B. Weinstein & Mar-

ten on this subject, this Note attempts to synthesize the existing literature and further examine the viability of the common law limitation.

Part I provides background information on statements by a party opponent and the common law limitation on government admissions in criminal proceedings. Part II explores the competing circuit court positions and their disagreement in jurisprudence following the enactment of the Federal Rules. Part III analyzes the continuing viability of the common law limitation, ultimately finding the justifications unpersuasive. Part IV then briefly addresses certain practical considerations. The use of government admissions in criminal proceedings is a live issue in the lower courts and continues to be an important point of disagreement between the circuits.[13]

I. BACKGROUND

A. Hearsay Generally

Hearsay is defined as any statement[14] made outside the immediate legal proceeding that is offered to prove the truth of the matter asserted.[15] It is indirect testimony introduced as substantive evidence "to say . . . that an event happened or that a condition existed."[16] It does not, however, encompass so-called "verbal acts," where the existence of the

garet A. Berger, Weinstein's Federal Evidence § 801.33[3], at 801-98–801-100 (Mark S. Brodin & Joseph M. McLaughlin eds., 2d ed. 2016); Edward J. Imwinkelried, Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution, 71 Minn. L. Rev. 269, 271 (1986); Randolph N. Jonakait, The Supreme Court, Plain Meaning, and the Changed Rules of Evidence, 68 Tex. L. Rev. 745, 774–78 (1990); Irving Younger, Sovereign Admissions: A Comment on United States v. Santos, 43 N.Y.U. L. Rev. 108 (1968); Richard D. Geiger, Note, Vicarious Admissions by Agents of the Government: Defining the Scope of Admissibility in Criminal Cases, 59 B.U. L. Rev. 400 (1979).

[13] See, e.g., Reply Brief of Appellant at 11–12, United States v. Borda, Nos. 13-3074(L), 13-3101 (D.C. Cir. July 22, 2016), 2016 WL 3951881, at *11–12 (arguing in favor of allowing government admissions under Rule 801(d)(2)(D)); Memorandum of the United States in Opposition to Defendants' Motion *in Limine* at 13–16, United States v. Baroni, Jr., No. 15-193(SDW) (D.N.J. Aug. 18, 2016), 2016 WL 4478793 (objecting generally to government admissions under Rules 801(d)(2)(C) and (D)).

[14] "'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Fed. R. Evid. 801(a).

[15] Id. 801(a), (c).

[16] 2 McCormick, supra note 12, § 246, at 184 (emphasis omitted).

statement has independent significance regardless of its accuracy,[17] or statements used solely to impeach testimony.[18]

As a general matter, hearsay is inadmissible.[19] Direct testimony is traditionally considered superior to secondhand accounts that cannot be adequately substantiated due to the absence of the original declarant.[20] The prohibition on hearsay reflects an overarching desire in the American legal system to present a factfinder with live testimony that is given under oath, based on personal knowledge, and subject to confrontation.[21] This last consideration has become predominant, placing a premium on the requirement that testimony be refined and validated "in the crucible of cross-examination."[22]

B. Statements by a Party Opponent

The doctrine of party admissions "is much older than the hearsay rule."[23] Statements by a party opponent are justified by the nature of adversarial litigation,[24] and have been both designated nonhearsay by definition or otherwise excepted from the hearsay prohibition.[25] The Advisory Committee Notes to the Federal Rules explicitly adopt the former position, simply defining admissions as nonhearsay and explaining, "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[26]

[17] Fed. R. Evid. 801(c) advisory committee's notes to 1972 proposed rules; 2 McCormick, supra note 12, § 249, at 189–91.

[18] Fed. R. Evid. 801(c); 2 McCormick, supra note 12, § 249, at 195–96.

[19] Fed. R. Evid. 802.

[20] 2 McCormick, supra note 12, § 245, at 178–82.

[21] Id.

[22] Id.; Crawford v. Washington, 541 U.S. 36, 61 (2004).

[23] Edmund M. Morgan, Admissions, 12 Wash. L. Rev. 181, 182 (1937).

[24] 2 McCormick, supra note 12, § 254, at 261 ("On balance, the most satisfactory justification of the admissibility of admissions is that they are the product of the adversary system, sharing on a lower level the characteristics of admissions in pleadings or stipulations."); Morgan, supra note 23, at 182 ("It stands in a class by itself; the theory of [party admissions] . . . can be explained only as a corollary of our adversary system of litigation.").

[25] 2 McCormick, supra note 12, § 254, at 259–61; Sam Stonefield, Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Backstory and a Suggested Amendment, 5 Fed. Cts. L. Rev. 1 (2011).

[26] Fed. R. Evid. 801(d)(2) advisory committee's note to 1972 proposed rules.

The apparent need for cross-examination is not implicated when a party opponent is already present in a proceeding to explain, justify, or even deny an alleged admission.[27] As expressed by Professor Edmund Morgan, "A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath."[28] Accordingly, admissions are not required to be against the declarant's interest[29] or to demonstrate any of the traditional guarantees of trustworthiness that underlie other hearsay-related rules.[30] Admissions are also not usually subject to the requirement of personal knowledge.[31]

[27] 2 McCormick, supra note 12, § 254, at 259–61; Edmund M. Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L.J. 355, 361 (1921).

[28] Edmund M. Morgan, Basic Problems of Evidence 266 (1963); see 5 Weinstein & Berger, supra note 12, § 802.05[3][d], at 802-72.4 ("[A] party cannot seriously claim that his or her own statement should be excluded because it was not made under oath or subject to cross-examination.").

[29] 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7015, at 186 & n.6 (collecting sources) ("[N]either Rule 801(d)(2) nor the common law cases lay down a requirement that the statement be against interest either when made or when offered, and the theory of the exception is not based thereon."); 2 McCormick, supra note 12, § 254, at 262–63 ("An admission does not need to have that dramatic effect, be the all-encompassing acknowledgment of responsibility that the word confession connotes, or give rise to a reasonable inference of guilt. Admissions are simply words or actions of the opposing party inconsistent with that party's position at trial, relevant to the substantive issues in the case, and offered against that party." (footnote omitted)); John S. Strahorn, Jr., A Reconsideration of the Hearsay Rule and Admissions, 85 U. Pa. L. Rev. 564, 575 (1937) ("[T]he admission need not be against interest when made . . . . ").

[30] Fed. R. Evid. 801(d)(2) advisory committee's note to 1972 proposed rules ("The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility."); see 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7015, at 184 n.3 (collecting sources); 2 McCormick, supra note 12, § 254, at 261 ("[A]dmissions need not satisfy the traditional requirement for hearsay exceptions that they possess circumstantial guarantees of trustworthiness. Rather admissions are outside the framework of hearsay exceptions, classed as nonhearsay, and excluded from the hearsay rule."); Morgan, supra note 23, at 182 ("Certainly [an admission] is receivable; its reception is much older than the hearsay rule; it is an unsworn, uncross-examined statement offered for the truth of the matter asserted in it; and often it hasn't even an attenuated guaranty of trustworthiness."); Strahorn, supra note 29, at 573 ("The principal justification for placing admissions under hearsay rule inapplicable is that there is no concern for their trustworthiness.").

[31] 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7015, at 188 & n.10 (collecting sources) ("Personal knowledge of the matter admitted is not required . . . ."); id. § 7024, at 261–62 & n.4 (collecting sources) ("Whatever the merits of requiring personal knowledge in connection with any of the foregoing rules, the fact remains that lack of per-

Principles of agency—along with a party's supposed close relationship with, control over, or responsibility for agents, employees, and co-conspirators—extend this rationale to statements concerning a matter within the scope of those relationships as well.[32] As relevant here, government admissions might range from official government publications and reports to casual statements by government employees.[33] The Advi-

sonal knowledge on the part of the declarant does not bar introduction of a statement as an admission of a party-opponent under Rule 801(d)(2)." (footnote omitted)); 2 McCormick, supra note 12, § 255, at 265 ("[T]he traditional view that firsthand knowledge is not required for admissions is accepted by the vast majority of courts and adopted by the Federal Rules." (footnote omitted)); 5 Weinstein & Berger, supra note 12, § 801.30[1] & n.13, at 801-64–801-65 (collecting sources) ("[T]he requirement of personal knowledge imposed by Rule 602 is rarely applied to opposing statements, since the party is usually in a position to explain the statement at trial."); cf. Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

[32] 2 McCormick, supra note 12, § 259, at 277–79 (explaining the various justifications for vicarious admissions); Imwinkelried, supra note 12, at 271 ("Vicarious admissions are admitted against the party-opponent on the theory that, given the party's close relationship with the third party, it is fair to impute the statement to the party-opponent."); Strahorn, supra note 29, at 579–80 ("The principle of vicarious admissions permits offering in evidence against a party any statement by another who bears a relevant relation to the party, where the statement is made concerning the content of the relation."); see also Thomas F. Green, Jr., Highlights of the Proposed Federal Rules of Evidence, 4 Ga. L. Rev. 1, 38 (1969) ("There is general agreement concerning their admissibility but some disagreement as to the theoretical justification for the result.").

[33] Other commentators have explored these possibilities extensively and argued the relative merits of each application. See, e.g., Poulin, supra note 1, at 418–79. Statements made by informants provide a particularly interesting possibility. United States v. Reed, 167 F.3d 984, 987–89 (6th Cir. 1999) (recognizing that informants can qualify as government agents for purposes of Rule 801(d)(2)); United States v. Branham, 97 F.3d 835, 850–51 (6th Cir. 1996) (same); see also Lippay v. Christos, 996 F.2d 1490, 1499 (3d Cir. 1993) ("We do not believe that the authors of Rule 801(d)(2)(D) intended statements by informers as a general matter to fall under the rule, given their tenuous relationship with the police officers with whom they work. In reaching this conclusion, we do not adopt a *per se* rule that an informer can never serve as an agent for a law enforcement officer for the purposes of Rule 801(d)(2)(D). We recognize that there may be situations where a police officer and informer will have an agency relationship. Thus, we will apply a case-by-case analysis to determine whether the officer had a sufficiently continuous supervisory relationship with the informer to establish agency."); United States v. Pena, 527 F.2d 1356, 1361 (5th Cir. 1976) (suggesting an informant could qualify as a government agent, but failing to reach the question because statements were made after relationship with the government had ceased); Poulin, supra note 1, at 456–57 ("Close examination of the role played by some informants, however, leads to the conclusion that at least some of their out of court statements fall within Rule 801(d)(2)(D)."). But see United States v. Yildiz, 355 F.3d 80, 82 (2d Cir. 2004) ("Like the Third Circuit, '[w]e do not believe that the authors of Rule 801(d)(2)(D) intended statements by informers as a general matter to fall under the rule, given their tenuous relationship with

sory Committee Notes emphasize the expansive reach of Rule 801(d)(2) to even unauthorized admissions, explaining:

> The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements *related to* a matter within the scope of the agency or employment.[34]

McCormick on Evidence conveys that this had actually become the predominant view even before the Federal Rules were enacted.[35] The Federal Rules therefore detach admissions from the strict laws of agency as long as a statement relates to an area within the agency or employment relationship.[36] Statements made by or attributable to a party opponent

the police officers with whom they work.'" (alteration in original) (citation omitted)); 4 Mueller & Kirkpatrick, supra note 12, § 8:56, at 481–82 ("Usually statements by informants should not be viewed as admissions by the government. Unlike the more usual government agents and employees, the scope of an informant's responsibility is hard to define. Moreover, informants are expected to deal in and report rumor, speculation, suspicion, and opinion, and often they themselves are implicated in criminal ventures and labor under a mix of motives that is hard to unravel. Informants more closely resemble independent contractors than typical agents. Absent special circumstances in which actual government agents authorize an informant to speak on a certain matter or an actual government agent adopts what an informant says, or some similarly unusual facts appear, an informant should not be viewed as an agent of the government for purposes of the exception.").

[34] Fed. R. Evid. 801(d)(2)(D) advisory committee's notes to 1972 proposed rules (emphasis added).

[35] 2 McCormick, supra note 12, § 259, at 279 & n.6 (collecting cases) ("[E]ven before adoption of the Federal Rules, the predominant view was to admit a statement by an agent if it concerned a matter within the scope of the declarant's employment and was made before that relationship was terminated.").

[36] 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7023, at 241–51 ("Authority to speak is thus no longer of concern; all that is required is that the statement concern a matter within the scope of the agency or employment, and that the agent or employee still be employed at the time of making the statement." (footnotes omitted)); see 6 Graham, Handbook of Federal Evidence, supra note 12, § 801:23, at 428 n.7 ("Rule 801(d)(2)(D) states 'concerning a matter within the scope' of employment which is much broader than 'within the scope of' employment . . . ."); Poulin, supra note 1, at 418 ("[Courts] disregard the radical change Rule 801(d)(2)(D) injected into the law governing party admissions and do not apply the expanded rule admitting non-authorized vicarious admissions against the government."); id. at 451 ("Rule 801(d)(2) unquestionably separates the law of party admissions from the law of vicarious liability and treats agents' statements as

are thus nonhearsay by definition and can be introduced as substantive evidence to prove the truth of the matter asserted.

C. Common Law Limitation

The common law limitation on government admissions in criminal proceedings can be traced to *United States v. Santos*, decided January 30, 1967.[37] Armando Santos was charged with assaulting an officer from the Bureau of Narcotics with a deadly weapon.[38] In his defense, Santos produced the sworn affidavit of another narcotics officer, Edward Dower, who had witnessed the assault and identified a different assailant before later changing his testimony to accuse Santos at trial.[39] The district court excluded the evidence as hearsay, and Santos was convicted.[40]

On appeal, Santos's attorney and Judge Irving Kaufman commented on the "dearth of authority" surrounding the use of government admissions in criminal proceedings.[41] Both seemed to acknowledge that there was no controlling precedent.[42] Nevertheless, the Second Circuit affirmed the judgment of the district court and held without citation that "statements of a government agent made in the course of the exercise of his authority and within the scope of that authority, which statements would be admissions binding upon an agent's principal in civil cases, are not so admissible here as 'evidence of the fact.'"[43]

The Second Circuit justified this "apparent discrimination" against criminal defendants by noting "the peculiar posture of the parties in a criminal prosecution—the only party on the government side being the

admissions of the principal even when the agent was authorized neither to speak nor to bind the principal.").

[37] 372 F.2d 177, 180 (2d Cir. 1967). But see Poulin, supra note 1, at 415 ("*Santos* and other pre-Rules decisions accurately reflected the law of vicarious admissions when they were decided . . . .").

[38] *Santos*, 372 F.2d at 178.

[39] Id. at 179. The assault was carried out by three assailants, two of whom had already been convicted. Id at 178–79. Santos offered Dower's affidavit as affirmatively identifying a different third assailant. Id.; see Younger, supra note 12, at 110–12 (describing the facts of *Santos*).

[40] *Santos*, 372 F.2d at 179.

[41] Younger, supra note 12, at 112 & nn.27–28. Professor Irving Younger was the attorney who argued the case before the Second Circuit. Unfortunately, neither the Second Circuit, the National Archives in New York City, nor the Federal Records Center in Lenexa, Kansas, were able to locate a copy of the transcript from oral argument.

[42] Id. at 112.

[43] *Santos*, 372 F.2d at 180.

Government itself whose many agents and actors are supposedly uninterested personally in the outcome of the trial and are historically unable to bind the sovereign."[44] In other words, the government is not truly a party opponent in a criminal proceeding and cannot be bound against its sovereign will. The Second Circuit referenced generally the law of agency and the special obligations of prosecutors but otherwise did not provide any direct support for this holding. Consequently, *Santos* has become the root source of authority for every subsequent decision perpetuating the common law limitation.[45] Even if some form of antecedent precedent does exist, courts look to *Santos* as the "seminal case."[46]

1. Government as a Disinterested Party

The Second Circuit reasoned in *Santos* that "when the Government prosecutes, it prosecutes on behalf of all the people of the United States."[47] The government does not pursue charges on its own behalf but rather on behalf of the public.[48] As a disinterested party, therefore, "out-of-court statements or actions of a government agent said or done in the course of his employment take on quite a different probative character in a government criminal case from that which [they] generally take on at a trial."[49] The implication is that the government is not the adversary of the accused but rather an objective seeker of truth.

The Supreme Court has famously explained:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

[44] Id.

[45] See, e.g., United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975) (citing *Santos*, 372 F.2d); United States v. Powers, 467 F.2d 1089, 1095 (7th Cir. 1972) ("The determination of the agent falls squarely within the rule enunciated in United States v. Santos, which we adopt." (citation omitted)); Younger, supra note 12, at 112 (describing *Santos* as "the first appellate decision on the question whether the admissions exception to the hearsay rule is available against the sovereign" (footnote omitted)). But see Poulin, supra note 1, at 415 ("*Santos* and other pre-Rules decisions accurately reflected the law of vicarious admissions when they were decided . . . .").

[46] Imwinkelried, supra note 12, at 278.

[47] *Santos*, 372 F.2d at 180.

[48] Id.

[49] Id.

> whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[50]

As a result, the government is subject to various restrictions intended to ensure the fairness of a criminal proceeding.[51] Prosecutors are prohibited from pursuing charges known to be frivolous,[52] and have the somewhat counterintuitive responsibility to ensure that the accused is advised of his or her legal rights.[53] In addition, a prosecutor cannot ask a defendant to waive important pretrial rights if the defendant is not represented by counsel.[54] Prosecutors are also required to "make timely disclosure to the defense of all evidence or information . . . that tends to negate the guilt of the accused or mitigates the offense,"[55] to "produce any statement . . . [of a government] witness in the possession of the United States which relates to the subject matter as to which the witness has tes-

[50] Berger v. United States, 295 U.S. 78, 88–89 (1935).

[51] See Model Rules of Prof'l Conduct r. 3.8 (Am. Bar Ass'n 2016); see also 28 U.S.C. § 530B (2012) (subjecting prosecutors to state rules of professional responsibility); Criminal Justice Standards for the Prosecution Function (Am. Bar Ass'n 2015), http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html [https://perma.cc/5YN6-2XKC] (providing aspirational guidance for the conduct of prosecutors); U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-2.101: American Bar Association Standards for Criminal Justice (2016), https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals [https://perma.cc/QBN8-SS3M] (recommending that United States Attorneys become familiar with the American Bar Association Standards for Criminal Justice given that courts utilize them in disciplinary proceedings); Poulin, supra note 1, at 435–36 & nn.194–95 (discussing the ethical obligations of prosecutors). States have overwhelmingly adopted some variation of the Model Rules of Professional Conduct. See State Adoption of the ABA Model Rules of Professional Conduct, Am. Bar Ass'n, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html [https://perma.cc/522Q-PFQ5]; see also Variations of the ABA Model Rules of Professional Conduct: Rule 3.8, Am. Bar Ass'n (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8.authcheckdam.pdf [https://perma.cc/3S25-4KQM] (outlining state variations on the special responsibilities of prosecutors in Model Rule of Professional Conduct 3.8).

[52] See Model Rules of Prof'l Conduct r. 3.8(a).

[53] Id. r. 3.8(b); cf. Fed. R. Crim. P. 11 (requiring a court to ensure that the defendant understands certain rights, including the right to be represented by counsel, before entering a guilty or nolo contendere plea); Miranda v. Arizona, 384 U.S. 436 (1966) (requiring that government actors advise an individual in custody of certain rights, including the right to be represented by counsel, prior to questioning).

[54] Model Rules of Prof'l Conduct r. 3.8(c); cf. *Miranda*, 384 U.S. at 436.

[55] Model Rules of Prof'l Conduct r. 3.8(d); see Brady v. Maryland, 373 U.S. 83, 87 (1963).

tified,"[56] and to "promptly disclose" any "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."[57] These requirements suggest that the government is not truly an opposing party in criminal proceedings and thus not subject to the normal rules governing admissions.

2. Inability to Bind the Sovereign

The Second Circuit in *Santos* also asserted that government actors are "historically unable to bind the sovereign."[58] This general proposition appears in early American case law on agency and is likely an extension of sovereign immunity to the law of evidence.[59]

In *Lee v. Munroe*, the government successfully argued before the Supreme Court that it was not bound by the statements of an agent unless such statements were duly authorized and within the scope of the agent's specific authority to speak on behalf of the sovereign.[60] The Supreme Court later explained in *Whiteside v. United States*:

> Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority . . . ; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the

[56] 18 U.S.C. § 3500(b) (2012); see Fed. R. Crim. P. 26.2 (incorporating 18 U.S.C. § 3500(b)).

[57] Model Rules of Prof'l Conduct r. 3.8(g).

[58] *Santos*, 372 F.2d at 180.

[59] See Geiger, supra note 12, at 410; cf. United States v. Lee, 106 U.S. 196, 205–07 (1882) (discussing the history of sovereign immunity in English and American jurisprudence); The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (emphasis omitted)); Gregory C. Sisk, The Continuing Drift of Federal Sovereign Immunity Jurisprudence, 50 Wm. & Mary L. Rev. 517, 525–28 (2008) (discussing the history of sovereign immunity in American jurisprudence).

[60] 11 U.S. (7 Cranch) 366, 368–69 (1813).

> act, or was employed in his capacity as a public agent to do the act or make the declaration for the government.[61]

The government subsequently objected to statements offered as "binding admission[s] on the Government on the very question which is being tried by the jury."[62] For the Second Circuit, the argument likely continued that the government should not be required to even acknowledge the unwanted statements of an agent or employee, regardless of their binding consequences.

It is important to note, however, that the foregoing authority is derived entirely from civil cases. The issue of binding the sovereign most often arose in attempts to estop the government from claiming that a contract or assessment was void for lack of authority on behalf of the relevant government actor.[63] These statements were offered, not as substantive evidence, but rather as verbal acts to bind the government to an otherwise unenforceable position. Even if such statements were an accurate rendition of the events reported, they were legally irrelevant because the respective government actors were not authorized to incur the associated liability. These cases do not address the use of evidence for persuasive purposes as a "statement made by a party to the action," even though some courts specifically distinguished this possibility.[64] Notably,

[61] 93 U.S. 247, 256–57 (1876); cf. City of Baltimore v. Eschbach, 18 Md. 276, 282–83 (1862) ("A municipal corporation cannot be held liable for the unauthorised acts of its agents, although done *officii colore*, without some corporate act of ratification or adoption; and, from considerations of public policy, it seems more reasonable that an individual should occasionally suffer from the mistakes of public agents or officers, than to adopt a rule, which, through improper combinations and collusion, might be turned to the detriment and injury of the public."); Joseph Story, Commentaries on the Law of Agency § 307(a), at 366–67 (6th ed. 1863) (stating the same proposition).

[62] Ramming Real Estate Co. v. United States, 122 F.2d 892, 893 (8th Cir. 1941); see United States v. Foster, 131 F.2d 3, 7 (8th Cir. 1942) (excluding evidence offered to bind the government to a valuation of land as previously determined by the Secretary of War).

[63] See, e.g., *Whiteside*, 93 U.S. at 256–58 (holding that a contract promising interest in abandoned or captured property was beyond the scope of the government agent's authority and not binding); *Lee*, 11 U.S. (7 Cranch) at 368–70 (holding that the mistaken statements of an agent could not bind the government to forgive a lien on land); *Eschbach*, 18 Md. at 282–83 (holding that a municipal government was not liable for payment on a contract entered into by the mayor in excess of his authority).

[64] See *Ramming Real Estate Co.*, 122 F.2d at 893; see also City of Chicago v. Greer, 76 U.S. (9 Wall.) 726, 732–33 (1869) (holding that the statement of a fire commissioner concerning the purchase and use of a fire hose was admissible as probative evidence that a contract had been entered and fulfilled); Edmund M. Morgan, The Rationale of Vicarious Admissions, 42 Harv. L. Rev. 461, 462 (1929) (distinguishing between statements that affect legal relations and statements introduced for their assertive value). In *Ramming Real Estate*

these cases also concede that the government can indeed be bound when an agent is authorized or the relevant statements are otherwise adopted.[65]

In *Falter v. United States*, Judge Learned Hand was actually presented with the question of whether government admissions can be offered as substantive evidence in criminal proceedings.[66] However, he never reached the issue because the relevant statement was not made by an agent of the United States and therefore could not be attributed to the government.[67] In *State v. Smith*, the Supreme Court of Wisconsin was presented with an analogous question, but likewise never reached the issue after determining there was insufficient evidence to show that the declarant was an agent of the state and also had authority to speak on the subject.[68] Poulin suggests that courts often construed the admissions doctrine narrowly in this manner to avoid confronting the acceptable use of government admissions in criminal proceedings.[69] This might explain the lack of pre-*Santos* authority on the issue.

D. Importance of Government Admissions

The importance of government admissions in criminal proceedings is difficult to overstate. Government admissions provide a particularly convenient—and sometimes the only—avenue to effectively utilize statements attributable to the government. A criminal prosecution has singularly significant consequences, and other alternative means of introducing evidence might be severely limited. Moreover, the government frequently exercises significant control over its agents and employees, influencing both the availability and cooperative nature of their testimony at trial. This includes the potential to conceal the identity of certain informants or other potential witnesses, rendering it impossible

Co., the statements at issue were also offered, and received without objection, to prove the relevant date that property was taken by the government, suggesting that it was permissible to use the evidence for its probative value. See 122 F.2d at 893.

[65] See, e.g., *Whiteside*, 93 U.S. at 256–58; United States v. Foster, 131 F.2d 3, 7 (1942) ("If these declarations by the Secretary of War were made in the performance of his duty and within the scope of his authority, it may well be that the Government would be bound." (citing City of Chicago v. Greer, 76 U.S. (9 Wall.) 726 (1869))).

[66] 23 F.2d 420, 425 (2d Cir. 1928).

[67] Id.

[68] 153 N.W.2d 538, 542–43 (Wis. 1967).

[69] See Poulin, supra note 1, at 412.

to ask these declarants to testify at all.[70] In addition, the prosecuting attorney frequently cannot be called as a witness, effectively immunizing the government from his or her previous statements as well.[71]

Government admissions also provide a vehicle for introducing substantive testimony void of personal knowledge that might otherwise be excluded under Rule 602.[72] Government actors often rely on secondhand information when submitting an affidavit in pursuit of a warrant or indictment. The statements in these affidavits either lack personal knowledge or might be further excluded as hearsay unless they qualify as government admissions, even though the government previously considered the same statements sufficient to justify an investigation or prosecution.

Even though previous statements by government agents or employees can be used for impeachment,[73] this does not compensate for the loss of substantive evidence that is otherwise available under Rule 801(d)(2).[74] Impeachment-only evidence usually carries little weight in a motion for acquittal or a new trial[75] and cannot be argued to a jury for the truth of the matter asserted.[76] Using an admission to cross-examine a witness

[70] See, e.g., State v. Brown, 784 A.2d 1244, 1250, 1254–55 (N.J. 2001) (rejecting the defendant's claim that statements by an informant were adoptive government admissions and simultaneously refusing to compel disclosure of the informant's identity so that the defendant could otherwise obtain the evidence).

[71] See Restatement (Third) of the Law Governing Lawyers § 108(4) (Am. Law. Inst. 2000) ("A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony."); see also, e.g., United States v. Schwartzbaum, 527 F.2d 249, 253 (2d Cir. 1975) ("Nor was any reason shown to permit the defendant to call government counsel as a witness. Such a procedure, inevitably confusing the distinctions between advocate and witness, argument and testimony, is acceptable only if required by a compelling and legitimate need.").

[72] See sources cited supra note 31 and accompanying text; cf. Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

[73] 2 McCormick, supra note 12, § 249, at 195; see, e.g., *Santos*, 372 F.2d at 180 (explaining that admissions can be used for impeachment).

[74] See Poulin, supra note 1, at 404–05.

[75] See, e.g., United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992) ("Ordinarily, evidence impeaching a witness will not be material . . . because it will not refute an essential element of the government's case." (citation omitted)). But see id. ("[I]mpeachment evidence may be so powerful that, if it were to be believed by the trier of fact, it could render the witness' testimony totally incredible. In such a case, if the witness' testimony were uncorroborated and provided the only evidence of an essential element of the government's case, the impeachment evidence would be 'material' . . . .").

[76] 1 McCormick, supra note 12, § 34, at 207–08 ("The trial judge informs the jury that although they consider the statement for whatever light it sheds on the witness's credibility,

might indirectly bring a previous statement to the jury's attention, but this remains categorically less influential than presenting direct evidence that a government actor espoused a position or admitted a particular fact.[77] As Judge Richard Posner points out, "The argument overlooks the independent evidentiary significance of the [government]'s statements of *mea culpa*."[78]

Finally, even impeachment may be circumscribed. Impeachment-only evidence is entirely dependent on the government calling a witness against whom the evidence is relevant.[79] Some courts further refuse to consider government admissions as a foundation for cross-examination, greatly limiting the manner in which other witnesses, or even the original declarant, can be questioned.[80] This leaves a defendant with nothing more than a meager opportunity to facially discredit witnesses rather than pursue a pointed line of inquiry, present conflicting evidence, or articulate a substantiated alternative theory.[81] Rule 801(d)(2) therefore provides a potentially invaluable vehicle to introduce highly relevant and generally persuasive evidence against the government.

II. THE CIRCUIT SPLIT

The circuits split on the use of government admissions in criminal proceedings shortly after the enactment of the Federal Rules. The D.C. Circuit was first to confront the issue in this new context, followed shortly thereafter by the Seventh Circuit.[82] The remaining circuits even-

they may not treat the statement as substantive evidence of the facts asserted in the statement.").

[77] See Poulin, supra note 1, at 404–05.

[78] Murrey v. United States, 73 F.3d 1448, 1456 (7th Cir. 1996).

[79] See Poulin, supra note 1, at 404–05 ("Of course, the opportunity to cross-examine or impeach with the statement will arise only if the prosecution calls as a witness the person who made the statement; if the prosecution knows the statement exists, it may choose not to call the witness at all."); Younger, supra note 12, at 114 (describing a situation where a government admission could not be used for impeachment due to lack of an appropriate witness); cf. United States v. Rogers, 549 F.2d 490, 497 (8th Cir. 1976) ("Courts must be watchful that impeachment is not used as a subterfuge to place otherwise inadmissible hearsay before the jury.").

[80] See United States v. Morgan, 581 F.2d 933, 935 n.5 (D.C. Cir. 1978); see also infra text accompanying notes 90–91.

[81] See Poulin, supra note 1, at 404–05.

[82] The Sixth Circuit decided *United States v. Pandilidis* in the same year that the Federal Rules were enacted. 524 F.2d 644, 650 (6th Cir. 1975). However, it does not appear that the Sixth Circuit considered the new Federal Rules when deciding the case. See id. (citing common law precedent but failing to mention the newly enacted Federal Rules); see also *Mor-*

tually developed varying positions on the use of government admissions in criminal proceedings, entrenching a disagreement in jurisprudence that spans the various provisions of Rule 801(d)(2). Some courts allowed or disallowed government admissions generally, while others distinguished between the individual provisions of Rule 801(d)(2) within their own jurisprudence. A splintered array of authority developed.

A. District of Columbia Circuit

In *United States v. Morgan*, the D.C. Circuit held that an affidavit signed by a police officer and submitted to a magistrate judge could be introduced against the government in a criminal proceeding as an adoptive admission under Rule 801(d)(2)(B).[83] Detective Mathis had learned from a "reliable informant" that a young male known as "Timmy" was selling drugs from a neighborhood home.[84] Police officers found William Morgan at the specified location and arrested him for possession of phenmetrazine with intent to distribute.[85] At trial, Morgan produced Mathis's affidavit and claimed that the pills seized during the subsequent police search belonged to the homeowner's son, Timmy.[86] The district court excluded the evidence as hearsay and Morgan was convicted.[87]

The decision of the district court had consequences far beyond the mere loss of a critical piece of evidence. The district court refused to even recognize the affidavit as a foundation to cross-examine and impeach adverse witnesses.[88] When Timmy's mother testified that only Morgan could be responsible for the phenmetrazine found in her home, Morgan was prohibited from asking whether she had considered that her resident son was a known drug dealer.[89] When an expert witness testified about the likelihood that Morgan was a phenmetrazine distributor based on the large quantity of pills confiscated by the police, Morgan was again prohibited from asking how knowledge that Timmy was allegedly

gan, 581 F.2d at 937–38 (noting that *Pandilidis* did not discuss the Federal Rules). The Sixth Circuit has since allowed government admissions in criminal proceedings under Rule 801(d)(2)(D). See United States v. Reed, 167 F.3d 984, 987–89 (6th Cir. 1999); United States v. Branham, 97 F.3d 835, 850–51 (6th Cir. 1996).

[83] 581 F.2d at 937–38.

[84] Id. at 935.

[85] Id. at 934.

[86] Id. at 935–36.

[87] Id.

[88] Id. at 935 n.5.

[89] Id.

selling drugs from the same location might influence this conclusion.[90] Morgan was even prohibited from questioning Mathis about his own affidavit, which identified a different potential defendant than the one he later testified against in court.[91]

The D.C. Circuit reversed the decision of the district court and remanded the case for a new trial.[92] The D.C. Circuit reasoned that Rule 801(d)(2)(B) "plainly applie[d]" because the government adopted the statements of the informant when Mathis signed an affidavit manifesting belief in their truthfulness, referring to the statements as "reliable" and submitting them to a magistrate judge.[93] Rejecting the government's appeal to *United States v. Santos* and its progeny, the court explained that "there is nothing in the history of the Rules generally or in Rule 801(d)(2)(B) particularly to suggest that it does not apply to the prosecution in criminal cases."[94] The court stated:

> We note that the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases, and specifically provide that in certain circumstances statements made by government agents are admissible against the government as substantive evidence.[95]

The D.C. Circuit further distinguished *Santos* as pertaining to government admissions by an agent or employee, but nonetheless continued:

> Rule 801(d)(2)(D) provides that statements made by an "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship" shall be treated as admissions by his principal. As in the case of Rule 801(d)(2)(B), there is no indication in the history of the Rules

[90] Id. Specifically, the defendant wished to ask the expert witness if being "told that somebody else who did live in that house was distributing phenmetrazine" would influence his conclusion that the drugs belonged to Morgan. Id.

[91] Id.

[92] Id. at 938–39.

[93] Id. at 937. The D.C. Circuit was careful to note that an Assistant United States Attorney had approved the warrant application as well, although the importance of this observation was unclear. See id. at 937 n.10. However, the D.C. Circuit later held, without any mention of prosecutorial approval, that a police officer affidavit submitted to a magistrate judge could be introduced as an adoptive government admission, suggesting that the officer's signature alone was sufficient to qualify the evidence under Rule 801(d)(2)(B). See United States v. Warren, 42 F.3d 647, 655 (D.C. Cir. 1994).

[94] *Morgan*, 581 F.2d at 938.

[95] Id. at 937 n.10.

> that the draftsmen meant to except the government from operation of Rule 801(d)(2)(D) in criminal cases.[96]

The D.C. Circuit found support for its position in Rule 803(8), which allows public records to be introduced against the government.[97] This provision, the court reasoned, was proof that the Federal Rules did not intend to preserve any common law tradition of granting the government special immunity from the various hearsay-related rules.[98] Therefore, because the government adopted the informant's statements through Mathis's affidavit and application for a warrant, the evidence was admissible against the government as a statement by a party opponent.[99]

B. Seventh Circuit

The next year, the Seventh Circuit held in *United States v. Kampiles* that out-of-court statements by a CIA employee were properly excluded as hearsay when offered against the government in a criminal proceeding.[100] William Kampiles worked for the CIA when he was indicted for selling top secret intelligence about American satellites to a Soviet agent for a meager $3,000.[101] At trial, Kampiles produced the supposed statements of his supervisor, a senior watch officer, indicating that the allegedly sold satellite manual was still at CIA headquarters after the purported transaction.[102] Because the senior watch officer was not present to provide direct testimony, the district court excluded the evidence as hearsay and Kampiles was convicted.[103]

Citing the Second Circuit's decision in *Santos*, the Seventh Circuit affirmed:

> Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party.[104]

[96] Id. at 938 n.15.
[97] Id. at 937 n.10.
[98] Id.
[99] Id. at 938.
[100] 609 F.2d 1233, 1246 (7th Cir. 1979).
[101] Id. at 1236–37.
[102] Id. at 1245–46.
[103] Id. at 1246.
[104] Id. (citing United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967)).

The court explicitly rejected the defendant's appeal to both the decision of the D.C. Circuit in *Morgan* and the text of Rule 801(d)(2)(D).[105] The court instead premised its decision on the prior common law rationale and then dismissed the D.C. Circuit's analysis of the common law limitation as "tentative and . . . clearly dicta."[106] The Seventh Circuit explained:

> Prior to adoption of the [Federal Rules], admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule. . . . Nothing in the [Federal Rules] suggests an intention to alter the traditional rule . . . .[107]

The Seventh Circuit further disagreed with the D.C. Circuit about the implications of Rule 803(8), reasoning that the Federal Rules already provide for the use of select government statements and that Rule 803(8) would be superfluous if courts allowed government admissions generally.[108] The Seventh Circuit has consistently applied this broad and conclusive reasoning in subsequent criminal cases, excluding government admissions under the premise that the government is not a party opponent in criminal proceedings and that no individual can bind the sovereign.[109]

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[105] Id. at 1246 & n.16.

[106] Id.

[107] Id. at 1246.

[108] Id. at 1246 n.16.

[109] See United States v. Arroyo, 406 F.3d 881, 888 (7th Cir. 2005) ("This Court has held that government agents are not party-opponents for purposes of Rule 801(d)(2)."); United States v. Nubuor, 274 F.3d 435, 442 n.7 (7th Cir. 2001) ("We note that in several other contexts this court, in criminal cases, excludes the statements of government agents and officers from admission under Rule 801(d)(2). The theory behind these exclusions is that those government agents do not have the authority to bind the United States and are generally disinterested in the outcome of the trial."); United States v. Zizzo, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997) ("Based on the common law principle that no individual should be able to bind the sovereign, we generally decline to apply Rule 801(d)(2) to statements made by government employees in criminal cases."); United States v. Prevatte, 16 F.3d 767, 779 n.9 (7th Cir. 1994) ("However, courts faced with this issue have refused to apply this provision to government employees testifying in criminal trials based on the rationale that no individual can bind the sovereign. We see no reason to disturb this long-standing rule." (citations omitted)); accord *Kampiles*, 609 F.2d at 1246 ("Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party. Nothing in the Federal Rules of Evidence suggests an intention to alter the traditional rule and defendant has cited no truly contrary case indicating such a trend." (citation omitted)).

C. The Circuit Split

The Seventh and D.C. Circuits disagreed over the use of government admissions in criminal proceedings under Rule 801(d)(2), but they did so with regard to different provisions—adoptive admissions under Rule 801(d)(2)(B) compared to admissions by an agent or employee under Rule 801(d)(2)(D). The Seventh Circuit relied on this distinction to justify the apparent conflict, just as the D.C. Circuit nominally distinguished *Santos*, noting the different provisions and dismissing any broader reasoning of the D.C. Circuit as dicta.[110] This distinction, however, is nonetheless problematic. And in any event, the disagreement between the Seventh and D.C. Circuits was simply an overture for the sharp division that followed.

1. Problems Reconciling the Split

The Seventh Circuit's attempt to distinguish *Kampiles* from the D.C. Circuit's decision in *Morgan* runs into myriad problems. First, the repeated and unqualified language of the Seventh Circuit suggests the broader holding that government admissions are entirely prohibited in criminal proceedings.[111] If the government is not a party opponent in a criminal case, then the type of admission is irrelevant. If all admissions are introduced as substantive evidence and thus are equally binding, then the type of admission is irrelevant. Conversely, if the Federal Rules displaced or foreclosed the common law limitation, then the type of admission is irrelevant. The Seventh and D.C. Circuits disagree on each of these fundamental issues.

Second, as discussed below, categorizing admissions is often ambiguous or arbitrary, undermining attempts to differentiate decisions or justify distinguishing between the various provisions of Rule 801(d)(2). Statements are often amenable to categorization as any one of multiple types of admissions, and courts are inconsistent in their subsequent designations. For example, the statements in both *Santos* and *Morgan* were submitted to a court in an affidavit by a government agent, either in support of a complaint or in pursuit of a warrant.[112] The government demon-

[110] *Kampiles*, 609 F.2d at 1246 n.16.

[111] See sources cited supra note 109.

[112] See United States v. Santos, 372 F.2d 177, 179 (2d Cir. 1967); *Morgan*, 581 F.2d at 937; see also Poulin, supra note 1, at 412–23 (acknowledging that the affidavit in *Santos* was filed with a court); cf. Fed. R. Crim. P. 3 ("The complaint is a written statement of the essen-

strated equal confidence in both affidavits by submitting them to a court, yet the Second Circuit excluded the statement in *Santos* as an admission by an agent or employee under the common law analogue to Rule 801(d)(2)(D), while the D.C. Circuit allowed the statements in *Morgan* as adoptive admissions under Rule 801(d)(2)(B). Ironically, the affidavit in *Morgan* had an additional layer of hearsay and was further removed from the government because the relevant information originated with an informant, but still it was that affidavit that was ultimately admissible. The Seventh Circuit then cited *Santos* yet espoused no conflict with *Morgan*, despite the comparable facts in those two cases.

Third, the distinctions drawn by the Seventh Circuit were insufficient to prevent further development of a circuit split. In *United States v. Barile*, for example, the Fourth Circuit held that statements made by an FDA employee could be introduced against the government in a criminal proceeding under Rule 801(d)(2)(D).[113] Michael Barile was indicted for making materially false representations to the FDA concerning the safety and performance of certain cardiac monitors.[114] At trial, Barile produced both an FDA Memorandum of Meeting and FDA Report of Investigation containing statements by Marian Kroen, an employee in the FDA Office of Device Evaluation.[115] Kroen there conceded that Barile tested his cardiac monitors according to accepted FDA practice and, therefore, his representations were not materially false.[116] However, Kroen offered conflicting testimony against Barile at trial.[117] The district court excluded the memoranda as hearsay and Barile was convicted.[118]

The Fourth Circuit reversed the decision of the district court, reasoning that Kroen's previous statements were "admissible over any hearsay objection because Kroen made them in her capacity as a government official on matters within the scope of her employment . . . . See

tial facts constituting the offense charged. . . . [I]t must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer."); id. at 4 ("If the complaint or one or more affidavits filed with the complaint establish probable cause . . . .").

[113] 286 F.3d 749, 758 (4th Cir. 2002).

[114] Id. at 752–53.

[115] Id. at 753–55. The memoranda were initially introduced for the purpose of impeachment, although the Fourth Circuit eventually reached a decision relying on Rule 801(d)(2)(D). Id. at 757–58.

[116] Id. at 753–55.

[117] Id.

[118] Id. at 752.

[Rule] 801(d)(2)(D)."[119] The holding of the Fourth Circuit in *Barile* is in direct disagreement with the holding of the Seventh Circuit in *Kampiles*.

2. Survey of Authority

The cases discussed above represent opposing views on the use of government admissions in criminal proceedings and the continuing viability of the associated common law limitation. They are joined in varying degrees by the remaining circuits, some of which have limited their holdings to specific categories of admissions or fragmented their jurisprudence to treat government admissions differently across the various provisions of Rule 801(d)(2). The Second Circuit, for example, allows adoptive government admissions in criminal proceedings under Rule 801(d)(2)(B)[120] but excludes statements by government agents or employees under Rule 801(d)(2)(D).[121] In addition, the use of government admissions in criminal proceedings has not been directly addressed in the context of authorized admissions under Rule 801(d)(2)(C) or admissions by a co-conspirator under Rule 801(d)(2)(E). A number of cases have presented the opportunity but were instead resolved under alternative provisions.[122] A subsection-by-subsection analysis reveals the state of disarray.[123]

Rule 801(d)(2)(A): Direct Admissions. The government is not a natural person and cannot make direct admissions. In other words, the government cannot act or make statements *except* through agents.[124] Rule 801(d)(2)(A) is therefore immaterial against the government.[125]

[119] Id. at 758 (emphasis omitted).

[120] United States v. GAF Corp., 928 F.2d 1253, 1258–62 (2d Cir. 1991).

[121] United States v. Yildiz, 355 F.3d 80, 82 (2d Cir. 2004).

[122] See infra notes 125–39, 143–53 and accompanying text.

[123] See 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7023, at 252 & n.11 (collecting cases); 6 Graham, Handbook of Federal Evidence, supra note 12, § 801:23, at 439–43 & nn.11–12 (same); 2 McCormick, supra note 12, § 259, at 295–96 & nn.71–76 (same); 4 Mueller & Kirkpatrick, supra note 12, § 8:56, at 479–82 & nn.1–9 (same); 5 Weinstein & Berger, supra note 12, § 801.33[3], at 801-98–801-100 & nn.31–34 (same).

[124] See Poulin, supra note 1, at 404 ("Like a corporation, the government speaks and acts only through its agents.").

[125] But see United States v. Kattar, 840 F.2d 118, 131 n.9 (1st Cir. 1988) ("Indeed, because the prior assertions were made by representatives of the specific party-opponent (the Justice Department) itself, they might be admissible as the party's own statements under Rule 801(d)(2)(A).").

Rule 801(d)(2)(B): Adoptive Admissions. The First,[126] Second,[127] and D.C. Circuits[128] permit adoptive government admissions in criminal proceedings.[129] As explained by the First Circuit, "We can find no authority to the contrary or reason to think otherwise."[130] In each corresponding case, the admissions were sworn before a judicial officer in an affidavit, bill of particulars, or other comparable court filing, thus providing a sufficient indication that the government had adopted the relevant statements. These decisions are in tension with courts like the Seventh Circuit that propound the common law limitation and assert that the government is not a party opponent in criminal proceedings and cannot be bound by an individual, even if they reach this holding in the context of other provisions of Rule 801(d)(2).[131]

Statements by Prosecutors. The Second Circuit has developed a sui generis test, articulated in *United States v. Salerno*, for introducing previous statements made by a prosecutor under Rules 801(d)(2)(B), (C), and/or (D).[132] The test attempts to balance the probative value of each

[126] Id. at 131.

[127] United States v. GAF Corp., 928 F.2d 1253, 1258–62 (2d. Cir. 1991); see also United States v. Ramirez, 894 F.2d 565, 570–71 (2d Cir. 1990) (suggesting that two affidavits submitted to a judge by a government agent in pursuit of a search warrant might qualify as adoptive admissions under Rule 801(d)(2)(B), as later recognized by *GAF Corp.*); United States v. Woo, 917 F.2d 96, 98 (2d Cir. 1990) (accepting the possibility of adoptive government admissions but affirming the lower court decision to exclude statements under Rule 403).

[128] United States v. Warren, 42 F.3d 647, 655 (D.C. Cir. 1994); *Morgan*, 581 F.2d at 937 n.10.

[129] The Fifth Circuit also had the opportunity to address adoptive government admissions in *United States v. Garza*, but instead upheld the lower court decision to exclude the evidence because the statements were not adequately adopted rather than opine on the use of adoptive government admissions generally. 448 F.3d 294, 298–99 (5th Cir. 2006). Although reaching the question of actual adoption may suggest that the use of adoptive government admissions would be otherwise permissible, additional recitation of common law rationale accompanying further discussion of government admissions by an agent or employee suggests that this might not be a foregone conclusion. See id.

[130] *Kattar*, 840 F.2d at 130.

[131] See supra Section II.B.

[132] 937 F.2d 797, 810–12 (2d Cir. 1991), rev'd on other grounds, 505 U.S. 317 (1992). *Salerno* adapted the test from a previous civil case, *United States v. McKeon*, which relied on both Rules 801(d)(2)(B) and (C) to admit previous statements made by a defense attorney. 738 F.2d 26, 34 (2d Cir. 1984). Although *Salerno* did not identify a specific provision of Rule 801(d)(2) as applicable to statements by prosecutors, it adopted the *McKeon* test and thus arguably invoked both Rules 801(d)(2)(B) and (C) by implication. See *Salerno*, 937 F.2d at 810–12; see also Poulin, supra note 1, at 432–42 (discussing the *McKeon-Salerno*

statement, the need to deter sharp practices by prosecutors, and the risk of unfair prejudice to the government.[133] It requires showing that "the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial," that "'the statements of counsel were such as to be the equivalent of testimonial statements' made by the client," and that "the inference that the proponent of the statements wishes to draw 'is a fair one.'"[134] This test is also utilized by the Fourth[135] and Eleventh Circuits.[136]

Although allowing previous statements by prosecutors tacitly concedes at least selective use of government admissions in criminal proceedings, some cases are unclear whether they endorse government admissions generally, or if they limit admissibility to the statements of prosecutors. And even in this small niche there is additional disagreement. The First[137] and D.C. Circuits,[138] while permitting the use of statements by prosecutors, do not seem to require these added hurdles.[139]

Rule 801(d)(2)(C): Authorized Admissions. The various circuits have not directly addressed the use of authorized government admissions in criminal proceedings, although allowing for statements by prosecutors

test). The Second Circuit later applied the *Salerno* test to prosecutor statements considered under Rule 801(d)(2)(D). United States v. Ford, 435 F.3d 204, 215 (2d Cir. 2006).

[133] *Salerno*, 937 F.2d at 811; see also United States v. James, 712 F.3d 79, 102 (2d Cir. 2013) (applying the *McKeon* factors to statements made by a prosecutor).

[134] *Salerno*, 937 F.2d at 811 (quoting *McKeon*, 738 F.2d at 33).

[135] United States v. Blood, 806 F.2d 1218, 1221 (4th Cir. 1986) (adopting the reasoning in *McKeon*).

[136] Although the Eleventh Circuit insists it "did not expressly adopt" the *Salerno* test, it nonetheless repeatedly invokes it. See, e.g., United States v. Kendrick, 682 F.3d 974, 986–88 (11th Cir. 2012); United States v. DeLoach, 34 F.3d 1001, 1005–06 (11th Cir. 1994).

[137] United States v. Kattar, 840 F.2d 118, 130–31 (1st Cir. 1988).

[138] United States v. Bailey, 159 F.3d 637, at *1 (D.C. Cir. 1998) (unpublished).

[139] See Poulin, supra note 1, 442–43 (arguing against the *McKeon/Salerno* test). The U.S. District Court for the Central District of California has also written a thorough and frequently-cited opinion discussing government admissions as a whole and rejecting the *McKeon/Salerno* test in the process of admitting former statements by a prosecuting attorney. United States v. Bakshinian, 65 F. Supp. 2d 1104, 1105–09 (C.D. Cal. 1999); see, e.g., Johnson v. United States, 860 F. Supp. 2d 663, 829–36 (N.D. Iowa 2012) (citing *Bakshinian*); United States v. Ganadonegro, 854 F. Supp. 2d 1088, 1106–07 (D.N.M. 2012) (same). But see United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1564 (E.D. Tex. 1986), aff'd, 829 F.2d 532 (5th Cir. 1987) ("Government attorneys in criminal cases are exempt from [Rule 801(d)(2)(D)], since they supposedly are uninterested in the outcome of the trial. In civil cases, however, where the adversarial process insures trustworthiness, statements by government attorneys are admissible."). For further discussion of admissions by prosecutors, see Andrew S. Pollis, Trying the Trial, 84 Geo. Wash. L. Rev. 55, 79–92 (2016).

might necessarily indicate a permissive disposition.[140] Given the significant flexibility that exists when categorizing admissions[141] and that authorized statements are often equally probative as verbal acts and not offered for the truth of the matter asserted,[142] authorized admissions are infrequent.

Rule 801(d)(2)(D): Admissions by Agents or Employees. The First,[143] Fourth,[144] Sixth,[145] and Ninth Circuits[146] permit government admissions by agents or employees in criminal proceedings. The Eighth Circuit has also addressed this provision without mention of the common law limitation, although it excluded the relevant evidence on other grounds.[147] Meanwhile, the Tenth Circuit has noted the split and assumed without deciding that government admissions can be received into evidence in criminal cases.[148] The Second,[149] Third,[150] Fifth,[151] and Seventh Cir-

[140] See supra notes 132–139 and accompanying text.

[141] See infra Section III.E.

[142] 4 Mueller & Kirkpatrick, supra note 12, § 8:50, at 430.

[143] United States v. Kattar, 840 F.2d 118, 130–31 (1st Cir. 1988) (dicta).

[144] *Barile*, 286 F.3d at 758.

[145] United States v. Reed, 167 F.3d 984, 989 (6th Cir. 1999) (recognizing the use of government admissions in criminal proceedings under Rule 801(d)(2)(D) but holding that the defendants failed to introduce the evidence at trial and thus forfeited the opportunity); United States v. Branham, 97 F.3d 835, 850–51 (6th Cir. 1996).

[146] United States v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989); see also United States v. Doe, 655 F.2d 920, 924 (9th Cir. 1980) ("While there may be merit in appellant's contention that [statements by a Drug Enforcement Agency officer were] admissible as an exception to the hearsay rule under Federal Rule of Evidence 801(d)(2)(D) . . . we cannot agree with appellant that he was prejudiced by the exclusion . . . .").

[147] United States v. Santisteban, 501 F.3d 873, 878–79 (8th Cir. 2007); United States v. Sparkman, 500 F.3d 678, 683 (8th Cir. 2007).

[148] In re Antrobus, 563 F.3d 1092, 1099 & n.3 (10th Cir. 2009).

[149] United States v. Yildiz, 355 F.3d 80, 82 (2d Cir. 2004) ("[W]e hold that Rule 801(d)(2)(D) does not abrogate the common law rule articulated in *Santos*. And we hold, following *Santos*, that the out-of-court statements of a government informant are not admissible in a criminal trial pursuant to Rule 801(d)(2)(D) as admissions by the agent of a party opponent.").

[150] United States v. Booker, 375 F. App'x 225, 230–31 (3d Cir. 2010) (unpublished) (dicta).

[151] United States v. Martinez-Saavedra, 372 F. App'x 463, 464–65 (5th Cir. 2010) (unpublished) ("We have previously declined to apply Rule 801(d)(2)(D) to a statement made by a government agent because the statements of individual agents do not bind the sovereign except in rare circumstances."); United States v. Garza, 448 F.3d 294, 298–99 & nn.14–16 (5th Cir. 2006) ("[O]ther circuits have declined to extend Rule 801(d)(2)(D) to statements made by government agents, especially in criminal trials. . . . It hardly seems within the spirit of Rule 801(d)(2)(D) to admit [an investigative report] as an admission by the Government.").

cuits[152] disagree, citing the common law limitation to conclude that the government is not a party opponent for purposes of Rule 801(d)(2) and that no individual can bind the sovereign. This is a shift in position for the Second Circuit when compared with its approach to adoptive government admissions under Rule 801(d)(2)(B). Emphasizing the lack of express intent in Rule 801(d)(2) to abrogate the common law limitation, and the tenuous relationship of the government with some declarants, the Second Circuit explains, "There is good reason . . . to distinguish sworn statements submitted to a judicial officer, which the government might be said to have adopted, and those that are not submitted to a court and, consequently, not adopted, for example, statements contained in an arrest warrant and an informant's remarks."[153]

Rule 801(d)(2)(E): Admissions by Co-conspirators. This provision is not directly implicated in the circuit split.[154] Numerous courts and commentators have dismissed the notion that the government can be a party to a conspiracy within the scope of Rule 801(d)(2)(E),[155] although the theoretical possibility may exist given the broad definition of the term.[156]

[152] See sources cited supra note 109.

[153] *Yildiz*, 355 F.3d at 82 (citations omitted); see United States v. Warren, 42 F.3d 647, 655–56 (D.C. Cir. 1994) ("[S]tatements made by police officers on arrest reports are not sworn before a judicial officer. Thus, the Government cannot be said to have manifested a belief in their truth so as to bring the statements within the non-hearsay classification of Rule 801(d)(2)(B).").

[154] Although the Third Circuit states in *United States v. Mack* that "Rule 801(d)(2)(E) does not allow the use of co-conspirator statements to be used against the Government in a criminal trial," 629 F. App'x 443, 447 (3d Cir. 2015) (unpublished), cert. denied, 136 S. Ct. 2037 (2016), and cert. denied, 136 S. Ct. 2426 (2016), this is likely in reference to the defendant's attempt to introduce the evidence using his own conspiracy rather than the conspiracy of an opposing party as Rule 801(d)(2)(E) requires. This distinction was important in *United States v. Kapp*, where the Third Circuit likewise reasoned that certain statements "were inadmissible because they were not offered 'against a party' as is explicitly required for admissibility under Rule 801(d)(2)." 781 F.2d 1008, 1014 (3d Cir. 1986).

[155] See, e.g., 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7025, at 277 n.1 (collecting cases) ("The government is not a party-opponent against whom statements of a co-conspirator can be offered under Rule 801(d)(2)(E)."); Poulin, supra note 1, at 414 n.76 ("Rule 801(d)(2)(E) admits statements of co-conspirators against one who is a member of a conspiracy. It would not operate against the government in a criminal case."). But see Robert B. Humphreys, In Search of the Reliable Conspirator: A Proposed Amendment to Federal Rule of Evidence 801(d)(2)(E), 30 Am. Crim. L. Rev. 337, 352 n.84 (1993) (arguing as a matter of statutory interpretation that admissions by co-conspirators can be introduced against the government).

[156] Cf. United States v. El-Mezain, 664 F.3d 467, 502–03, 507 (5th Cir. 2011) ("[W]e have recognized that admissibility under Rule 801(d)(2)(E) does not turn on the criminal nature of

State Courts. Many states have implemented rules of evidence parallel to or premised on the Federal Rules,[157] and frequently cite the Federal Rules as precedent to guide subsequent interpretation.[158] It is not, therefore, surprising that state courts are heavily divided on the use of government admissions in criminal proceedings as well.[159]

D. Civil Proceedings

Interestingly, there is no circuit split on the use of government admissions in civil proceedings, and there was no readily apparent limitation on their use as substantive evidence at common law.[160] As explained

the endeavor. . . . Moreover, we are not alone in our construction of Rule 801(d)(2)(E), as our sister circuits have also held that statements made in furtherance of a lawful common enterprise are admissible. . . . In sum, we conclude that the lawful joint venture theory is a viable theory of admissibility under Rule 801(d)(2)(E) . . . ."); United States v. Gewin, 471 F.3d 197, 201 (D.C. Cir. 2006) (defining conspiracy broadly as "when two or more individuals are acting in concert toward a common goal"); United States v. Richardson, 130 F.3d 765, 772 (7th Cir. 1997), vacated on other grounds, 526 U.S. 813 (1999) (defining conspiracy broadly as "a combination of two or more persons joined to further a common purpose or design"); 4 Mueller & Kirkpatrick, supra note 12, at § 8:59, at 497–98 ("[T]he exception can apply if people act together by mutual understanding in pursuit of a common purpose . . . even if the proponent does not show that the venture is unlawful . . . .").

[157] See Stonefield, supra note 25, at 53 & n.202 ("[A]s of August 2010, forty-four states have adopted some version of the Federal Rules.").

[158] See, e.g., Marron v. Stromstad, 123 P.3d 992, 1004 (Alaska 2005) ("Alaska's rules of evidence are similar to, and were modeled after the Federal Rules of Evidence. This gives the evidentiary decisions of federal courts, particularly the United States Supreme Court, considerable persuasive weight." (footnote omitted)); Parker v. State, 769 S.E.2d 329, 333 (Ga. 2015) ("Our new Evidence Code was based in large part on the Federal Rules of Evidence. And where the new Georgia rules mirror their federal counterparts, it is clear that the General Assembly intended for Georgia courts to look to the federal rules and how federal appellate courts have interpreted those rules for guidance." (citation omitted)); Griffith v. State, 31 N.E.3d 965, 969 (Ind. 2015) ("[D]ue to the similarity between the Indiana Rules of Evidence and the Federal Rules of Evidence, 'federal case law interpreting the Federal Rules of Evidence may be of some utility . . . .'" (quoting Doe v. Shults-Lewis Child & Family Servs., 718 N.E.2d 738, 751 (Ind. 1999)).

[159] See 6 Graham, Handbook of Federal Evidence, supra note 12, § 801:23, at 451–58 (collecting sources).

[160] George Blum et al., 29A Am. Jur. 2d Evidence § 833 (2008 & 2016 supp.) ("[S]tatements of government agents or employees may be introduced as substantive evidence in civil actions as party-admissions of the United States government . . . ."); Younger, supra note 12, at 109–10 ("In civil cases, the statement of a government agent, if authorized by the government, adopted by the government, or touching a matter within the scope of the agent's authority and made during the life of the agency relationship, is admissible against the government as an admission." (citing Massman Constr. Co. v. City Council, 147 F.2d 925, 928 (5th Cir. 1945)); Geiger, supra note 12, at 410 & n.70 (collecting cases) ("[I]n civil

above, some courts refused to allow previous statements by government actors to estop or otherwise bind the government to a certain position, but similar evidence was frequently admitted for the truth of the matter asserted.[161] Even *Santos* conceded that the statements at issue were admissible in an analogous civil proceeding.[162] Moreover, every circuit confronted with the issue after the Federal Rules were enacted, including the Seventh Circuit, has allowed the use of government admissions in civil cases.

In *Murrey v. United States*, for example, the Seventh Circuit concluded that public statements by the Secretary of Veterans Affairs and private statements made to the plaintiff by other representatives from the Department of Veterans Affairs could be introduced as government admissions under Rule 801(d)(2)(D) in a wrongful death lawsuit.[163] After a significant discourse on the difference between offering substantive evidence and estopping the government, Judge Posner apparently did not see the need to even question whether the government was a party opponent for purposes of Rule 801(d)(2).[164] The Fifth,[165] Ninth,[166] D.C.,[167] and Federal Circuits,[168] as well as the Court of Federal Claims,[169] likewise allow government admissions in the context of civil proceedings, while the Third Circuit proffers hesitant approval without expressly adopting a position.[170]

cases, the government is responsible for statements of its agents."); cf. United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967) ("The course defendant did adopt would have been successful if it had been attempted other than in a criminal prosecution.").

[161] See supra Section I.C.

[162] *Santos*, 372 F.2d at 180.

[163] 73 F.3d 1448, 1455 (7th Cir. 1996).

[164] See id. at 1455–56.

[165] United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1564 (E.D. Tex. 1986), aff'd, 829 F.2d 532 (5th Cir. 1987).

[166] Hoptowit v. Ray, 682 F.2d 1237, 1262 (9th Cir. 1982), abrogated on other grounds by Sandin v. Conner, 515 U.S. 472 (1995); see also Huber v. United States, 838 F.2d 398, 401–03 (9th Cir. 1988) (holding that government admissions introduced under Rule 801(d)(2) might be excluded as evidence by other statutes or regulations).

[167] English v. District of Columbia, 651 F.3d 1, 7 (D.C. Cir. 2011); Talavera v. Shah, 638 F.3d 303, 309–10 (D.C. Cir. 2011).

[168] Skaw v. United States, 740 F.2d 932, 937 (Fed. Cir. 1984).

[169] E.g., PR Contractors, Inc. v. United States, 69 Fed. Cl. 468, 473–74 (2006); Long Island Sav. Bank, F.S.B. v. United States, 63 Fed. Cl. 157, 163–65 (2004); Globe Sav. Bank, F.S.B. v. United States, 61 Fed. Cl. 91, 96–97 (2004); Myers Investigative & Sec. Servs. v. United States, 47 Fed. Cl. 288, 295 (2000); Clark v. United States, 8 Cl. Ct. 649, 651 n.1 (1985); Butkin Precision Mfg. Corp. v. United States, 544 F.2d 499, 506 (Ct. Cl. 1976).

[170] Lippay v. Christos, 996 F.2d 1490, 1499 (3d Cir. 1993).

III. ANALYSIS

Underlying these divergent approaches to government admissions in criminal proceedings is disagreement over the merits and continuing viability of the common law limitation.[171] The following analysis synthesizes and expands upon existing literature to conclude that the common law limitation is inadequately supported by the proffered rationale and, in any event, did not survive the enactment of the Federal Rules.

A. Government as a Disinterested Party

The common law limitation on government admissions in criminal proceedings is premised on the notion that the government is not a party opponent in criminal cases.[172] Rather, the government represents the collective will of the people in an objective pursuit of truth.[173] The purpose of a prosecutor is not to win a case but rather "to promote the cause of justice."[174]

While this may be theoretically accurate, it does not negate the overarching adversarial orientation of the American legal system. As an initial matter, prosecutors literally mobilize the coercive power of the state against an individual to deprive him or her of life, liberty, and/or property. It is difficult to imagine a situation that might be considered more adversarial, particularly from the perspective of a defendant. American judicial proceedings intentionally place two parties in direct opposition to each other to expose the truth.[175] It is entirely irrelevant if individual government actors, like many agents or employees, have no personal interest in the outcome of a proceeding.[176] The very name of a case indicates that the government occupies an adversarial position "v." an op-

[171] See supra Part II.

[172] See supra Subsection I.C.1.

[173] See United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967).

[174] Bennett L. Gershman, Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality, 9 Lewis & Clark L. Rev. 559, 563 (2005).

[175] Robert A. Kagan, Adversarial Legalism: The American Way of Law 61 (2001) ("Procedurally, American criminal justice is structured and pervaded by adversarial legalism . . . ."); 1 Wayne R. LaFave et al., Criminal Procedure § 1.5(c), at 222 (4th ed. 2015) ("[T]he American criminal justice process remains sufficiently adversarial in its overall character to stand in sharp contrast to the 'inquisitorial' or 'nonadversary' system that prevails in continental Europe." (footnote omitted)).

[176] See Younger, supra note 12, at 113 ("That the government's agents 'are supposedly uninterested personally in the outcome of the trial' has singularly little to do with the admissibility of an agent's statement against the principal as an admission.").

posing party. Even *United States v. Santos*, the foundational opinion for excluding government admissions in criminal proceedings, fully concedes that "a government prosecution is an exemplification of the adversary process."[177]

This conclusion is further supported by the behavior of the government during prosecutions. The government routinely invokes Rule 801(d)(2) to introduce statements attributable to the defendant, identifying him or her as a party opponent. This designation raises the question of who the defendant is an opponent to—an opponent needs a party with whom to be in opposition—and implicitly concedes that the government is an adversary.

Government prosecutors may have certain obligations that constrain their conduct,[178] but this does not negate the adversarial status of the government. Some authors even argue that these constraints are more perceived than real,[179] or that the obligations of a prosecutor do not deviate in a meaningful way from those of other attorneys.[180] Lawyers generally, along with their respective clients, cannot knowingly present false testimony[181] or pursue frivolous claims.[182] They are also obligated to comply with lawful subpoenas or requests for disclosure, and thus potentially provide even damaging evidence.[183] In any event, just because a prosecutor is not at liberty to pursue a case without restraint does not somehow abrogate the nature of the proceeding. As long as a prosecutor is seeking conviction, the government remains in an adversarial posture.

[177] *Santos*, 372 F.2d at 180; see also, e.g., United States v. Gossett, 877 F.2d 901, 906 (11th Cir. 1989) ("The Government is the party opponent of both defendants."); United States v. Harwood, 998 F.2d 91, 97 (2d Cir. 1993) (quoting *Gossett*).

[178] See supra Subsection I.C.1.

[179] See, e.g., Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. Ill. L. Rev. 1573 (arguing that current rules governing prosecutorial conduct are inadequate).

[180] See, e.g., Kevin C. McMunigal, Are Prosecutorial Ethics Standards Different?, 68 Fordham L. Rev. 1453, 1453 (2000) ("[I]n many, perhaps most, instances the standard of conduct for the prosecutor is identical to the standard for the criminal defense lawyer and the civil advocate. . . . [W]hen prosecutorial standards of conduct do differ from those for criminal defense lawyers and civil advocates, they typically differ in degree rather than in kind, in shades of gray rather than in black and white.").

[181] Model Rules of Prof'l Conduct r. 3.3(a)(3) (Am. Bar Ass'n 2016).

[182] Id. r. 3.1, 3.4, 4.4; see Fed. R. Civ. P. 11.

[183] Model Rules of Prof'l Conduct r. 3.4 (Am. Bar Ass'n 2016); see Fed. R. Crim. P. 16, 26.2. This obligation is mitigated to some degree for criminal defendants by the Fifth Amendment. See McMunigal, supra note 180, at 1462 ("Because of the Fifth Amendment, criminal defense lawyers have no general duty to disclose inculpatory information reciprocal to the prosecutor's duty to disclose exculpatory information.").

The Seventh Circuit has since expanded on the common law rationale, reasoning further that government admissions "seem less the *product* of the adversary process and hence less appropriately described as admissions of a party."[184] Put another way, government admissions are often made outside the adversarial process or long before an adversarial relationship develops. These statements consequently lack the traditional guarantee of trustworthiness that parties do not make untrue damaging statements when they know such statements might be used against them.[185]

This argument both misconstrues and is specifically disclaimed for Rule 801(d)(2).[186] Admissions are not premised on indicia of reliability pertaining to the circumstances under which they are *made*.[187] Though some government admissions may not be initially uttered in an adversarial setting, that fact is inapposite.[188] Rather, statements by a party opponent can be made at any point and under any circumstance if later *introduced* in an adversarial proceeding against that party.[189] While the government may be held to higher standards when pursuing a prosecution and may even represent the collective will of the public, the government is still an opposing party.

B. Inability to Bind the Sovereign

The common law doctrine that no individual can bind the sovereign is a foundational legal principle interwoven through many areas of American jurisprudence. As an initial matter, however, this argument is misplaced here.[190] There is nothing preclusive or conclusory about govern-

[184] United States v. Prevatte, 16 F.3d 767, 779 n.9 (7th Cir. 1994) (emphasis added) (quoting United States v. Kampiles, 609 F.2d 1233, 1246 (7th Cir. 1979)).

[185] Cf. Fed. R. Evid. 804(b)(3) advisory committee's notes to 1972 proposed rules ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.").

[186] Fed. R. Evid. 801(d)(2) advisory committee's notes to 1972 proposed rules.

[187] See Poulin, supra note 1, at 417–18.

[188] See id. ("Nothing in Rule 801(d)(2) requires that a party admission be generated as part of the adversarial process. The rule turns only on the adversarial way in which the statements are used at trial. Party admissions are often made before litigation is even a prospect. . . . There is clearly no requirement that the declarant have perceived the statement to be against her own interest or that of the principal for whom she spoke or worked.").

[189] See supra Section I.B; Poulin, supra note 1, at 417–18.

[190] See 4 Mueller & Kirkpatrick, supra note 12, § 8:56, at 480 ("The question worth asking is not whether an agent can bind the government, but whether what an agent of the govern-

ment admissions that necessarily binds the sovereign.[191] These statements are merely introduced as substantive evidence, leaving the government with every opportunity to explain discrepancies or persuade the factfinder that an admission should not be given probative weight.[192] Courts recognized this distinction long before the Federal Rules were enacted.[193]

It is again important to note that no circuit, including the Seventh Circuit, extends the common law limitation to civil proceedings.[194] It is difficult to argue that the federal government is any less sovereign in that context. Indeed, given the significant amount of money often at issue in civil cases and the subsequent potential to affect the public treasury, it would seem that the implications of sovereign immunity would be even more pronounced.[195] If the government is subject to Rule 801(d)(2) in civil proceedings, it is hard to justify a change in position for criminal proceedings.

Early commentators equated statements by a party opponent with formal judicial admissions that could actually bind and prevent a party from taking a different position at trial.[196] Admissions by agents or em-

ment says can be admitted against the government."); Poulin, supra note 1, at 408–09, 422 n.119; Younger, supra note 12, at 113; Geiger, supra note 12, at 409–10.

[191] Poulin, supra note 1, at 408–09; Geiger, supra note 12, at 409–10.

[192] Murrey v. United States, 73 F.3d 1448, 1455–56 (7th Cir. 1996) ("People sometimes do make mistaken admissions, which is why an extrajudicial admission, not being made with the same deliberateness as a judicial admission, is not conclusive on the issue admitted. But it is evidence."); Poulin, supra note 1, at 404 ("Party admissions do not bind the government, but they are powerful evidence."); Geiger, supra note 12, at 409–10 ("The limited ability of an agent to bind the government is unrelated to the admissibility of an agent's statement against the government. . . . The government is not bound by the admission; it must merely rebut the agent's out-of-court statement." (footnote omitted)).

[193] See, e.g., sources cited supra note 64 and accompanying text.

[194] See supra Section II.D.

[195] Cf. Geiger, supra note 12, at 410–11 ("[T]he policies underlying the concept of sovereign immunity are not served by exempting the government from vicarious admissions. Requiring the government to rebut statements of its agents does not affect the public treasury . . . .").

[196] Morgan, supra note 23, at 181–82 ("In Greenleaf's first edition, he adopted the dictum of Mascardus that an admission is not evidence but a substitute for proof. . . . [I]t would seem to mean that an extra-judicial admission stands on the same basis as an admission made in the pleadings or by stipulation in open court: if it once be established that the admission was made, then the matter admitted is beyond the realm of dispute in the case."); Poulin, supra note 1, at 408 ("The origin of the rule admitting party admissions lies in the doctrine estopping a party from asserting in court a position inconsistent with a position previously advanced in a formal setting, as in the pleadings or in a stipulation."); cf. 6 Graham, Handbook of Federal Evidence, supra note 12, § 801:26, at 539–58, (distinguishing

ployees in particular were also justified as *res gestae* or an extension of vicarious liability, tracking express authority to speak on behalf of the principal and thereby incur binding legal obligations.[197] In this context, the argument that no individual can bind the sovereign has its greatest force. However, these theories ran their course in the early twentieth century,[198] and the Federal Rules impose no such preclusive consequences. The Advisory Committee Notes explicitly untether admissions from the strict laws of agency and vicarious liability,[199] leaving a party free to take a position inconsistent with previous assertions.[200] Admissions in no way bind the government, they simply introduce evidence of an inconsistency requiring explanation or provide the defendant with substantive evidence upon which to build a persuasive narrative.[201]

Even if admissions were binding on the government, individuals acting in an official capacity bind the sovereign all the time. These agents

judicial and evidentiary admissions); Note, Judicial Admissions, 64 Colum. L. Rev. 1121 (1964) (discussing judicial admissions).

[197] 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7023, at 236 ("Prior to Rule 801(d)(2)(D) courts applied the traditional agency test in determining admissibility of statements by agents or employees, i.e., whether the particular statement was authorized by the principal."); 2 McCormick, supra note 12, § 259, at 277–79 & n.4 (collecting sources) ("The early texts and cases used as analogies the doctrine of the master's substantive responsibility for the acts of the agent and the notion then prevalent in evidence law that words accompanying a relevant act were admissible as part of the *res gestae*. . . . A later theory that gained currency was that the admissibility of the agent's statements as admissions of the principal was measured by precisely the same tests as the principal's substantive responsibility for the conduct of the agent . . . ."); Morgan, supra note 23, at 181–82, 192 ("Of course, the ordinary principles of the law of agency apply to narrative utterances as well as to words and nonverbal acts which have an operative effect."); Morgan, supra note 64, at 461–63 ("When, however, the extra-judicial declarations of another are proffered against him, he is entitled to the benefits of the ordinary safeguards against hearsay, unless some doctrine of vicarious responsibility intervenes. . . . [I]t is sometimes asserted that only the substantive law is concerned with the problem whether the verbal conduct of *A* is to be treated as if it were the verbal conduct of *B*. This is certainly so where the question concerns not the truth of *A's* utterance but its effect upon *B's* legal relations. It may have some degree of validity even where *A's* statement is tendered for its assertive value.").

[198] 2 McCormick, supra note 12, § 259, at 277–79 (describing the evolution of theories justifying vicarious admissions); Morgan, supra note 23, at 181–82 (same).

[199] Fed. R. Evid. 801(d)(2) advisory committee's notes to 1972 proposed rules; see sources cited supra notes 32–36 and accompanying text.

[200] See 2 McCormick, supra note 12, § 254, at 262 ("[A]n evidentiary admission is not conclusive but is subject to contradiction or explanation.").

[201] See id.; Poulin, supra note 1, at 404 ("Party admissions do not bind the government, but they are powerful evidence.").

effectively wield sovereign power and the proverbial sovereign seal.[202] Prosecutors provide the most relevant example, frequently entering pretrial stipulations or plea agreements binding on future government action.[203] Reaffirming this point, the Supreme Court has held that the government is bound by a promise made by a prosecutor, explaining, "The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."[204] This is true even when the prosecutor is not authorized to make the particular promise.[205]

In fact, the Constitution provides for "Officers of the United States,"[206] which, according to the Office of Legal Counsel, receive "power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit."[207] Assistant United States Attorneys, heads of executive departments and agencies, military officials, and a large number of other appointed government actors are constitutional officers possessing "delegated sovereign authority."[208] Acknowledging this reality, courts then issue injunctive decrees against these individuals in their official capacity, using them to bind the government.[209] The Constitution thus arguably concedes that specified individuals can bind the sovereign.

[202] Cf. 1 William Blackstone, Commentaries *463 ("Members may express their private consents to any act, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which . . . makes one joint assent of the whole.").

[203] See, e.g., United States v. Benchimol, 471 U.S. 453, 456 (1985); Santobello v. New York, 404 U.S. 257, 261–63 (1971); United States v. Clark, 55 F.3d 9, 12 (1st Cir. 1995); see also Poulin, supra note 1, at 430–31 ("Not only are prosecutors authorized to speak for the government in criminal cases, but they can also unquestionably bind the government on a range of legal matters through, for example, stipulations and plea agreements.").

[204] Giglio v. United States, 405 U.S. 150, 154 (1972) (citing Restatement (Second) of Agency § 272 (Am. Law Inst. 1958)).

[205] Id.

[206] U.S. Const. art. II, § 2, cl. 2.

[207] Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 87 (2007).

[208] Id. at 78–93; see generally Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (establishing criteria for constitutional officers). Unsurprisingly, it was this concession that led multiple courts to begin admitting previous statements by prosecutors. See, e.g., United States v. Garza, 448 F.3d 294, 298 n.14 (5th Cir. 2006) (collecting cases) ("There are circuits, however, that have held that statements made by a prosecutor, rather than some other government employee, are admissible against the Government as a party admission under 801(d)(2)(D) because prosecutors have the power to bind the sovereign.").

[209] See, e.g., Hafer v. Melo, 502 U.S. 21, 25 (1991).

The existence of constitutional officers might suggest that government admissions should be limited to statements made by deputized agents wielding sovereign power. This seems at least an intuitive consideration for adoptive government admissions under Rule 801(d)(2)(B) or authorized government admissions under Rule 801(d)(2)(C). It would also explain why the most direct disagreement between the various circuits appears elsewhere. However, even before the Federal Rules were enacted, the justification for admissions by agents or employees was slowly diverging from the strict laws of agency and vicarious liability that would require the declarant to possess binding authority or actual authorization to speak. Rule 801(d)(2)(D) in particular clearly contemplates nonbinding unauthorized statements made by mere employees when touching upon some matter within the scope of their agency or employment relationship. The point here is that some individuals can bind the sovereign even though Rule 801(d)(2) imposes no such requirement. Admissions under Rule 801(d)(2) are only introduced as substantive evidence and are no more binding than any other testimony offered at trial.

C. Rule 801(d)(2)

The Federal Rules were heavily influenced by the Model Code of Evidence of 1942, the Uniform Rules of Evidence of 1954, and the California Evidence Code of 1964.[210] The language of Rule 801(d)(2) was adopted from these predecessor publications and circulated to the Advisory Committee with extensive commentary in an internal document referred to as Memorandum No. 19.[211] After only minor stylistic adjust-

[210] Advisory Comm. on Rules of Evidence, Minutes (June 18, 1965), at 5–6, http://www.uscourts.gov/sites/default/files/fr_import/EV06-1965-min.pdf [https://perma.cc/WAJ3-EUQY]; Stonefield, supra note 25, at 24–25 ("A major evidence code was drafted in each of the three decades prior to the enactment of the Federal Rules of Evidence. . . . Each code influenced its successor, and all of them strongly influenced the shape and content of the Federal Rules of Evidence.").

[211] Advisory Comm. on Rules of Evidence, Memorandum No. 19: Article VIII. Hearsay: Preliminary Note on Hearsay 86–103, *microformed on* CIS Nos. EV-120-05 to EV-127-018 (Cong. Info. Serv.) [hereinafter Memorandum No. 19]; Edward W. Cleary, The Plan for the Adoption of Rules of Evidence for United States District Courts, 25 Rec. Ass'n B. City N.Y. 142, 147 (1970) ("The pattern of language, and hence of thought, thus indicated and generally followed was that of the Model Code and Uniform Rules of Evidence, and most of the proposed rules are so cast."); Stonefield, supra note 25, at 24–25; cf. Advisory Comm. on Rules of Evidence, Minutes (Oct. 14–16, 1965), at 2–3, http://www.uscourts.gov/sites/default/files/fr_import/EV10-1965-min.pdf [https://perma.cc/HX2C-NNDC] ("Professor

ments, the text of Rule 801(d)(2) was enacted by Congress in 1975.[212] Aside from explicitly nonsubstantive changes[213] and one addition not relevant here,[214] Rule 801(d)(2) has remained unchanged since that time. It reads:

> Rule 801(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> . . . .
>
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and:
>
> (A) was made by the party in an individual or representative capacity;
>
> (B) is one the party manifested that it adopted or believed to be true;
>
> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

Cleary stated that in preparing the proposed rules he had consulted the Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws, and the California Code."). Compare Memorandum No. 19, supra, at 43 (draft provisions on statements by an opposing party for the Federal Rules), with Cal. Evid. Code §§ 1220–23 (1965) (provisions on statements by an opposing party in the California Evidence Code), Unif. R. Evid. 63(7)–(9) (Nat'l Conf. of Comm'rs on Unif. State Laws 1953) (provisions on statements by an opposing party in the Uniform Rules of Evidence), and Model Code of Evid. r. 506–08 (Am. Law Inst. 1942) (provisions on statements by an opposing party in the Model Code of Evidence).

[212] Compare Memorandum No. 19, supra note 211, at 43 (draft provisions on statements by an opposing party for the Federal Rules), with Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1938–39 (1975) (provisions on statements by an opposing party in the Federal Rules).

[213] See Fed. R. Evid. 801(d)(2) advisory committee's notes to 1987 and 2011 proposed amendments.

[214] Rule 801(d)(2) was amended in response to *Bourjaily v. United States*, 483 U.S. 171 (1987). See Fed. R. Evid. 801(d)(2) advisory committee's notes to 1997 proposed amendments. That change addressed whether a statement might provide its own foundation for admissibility, the substance of which is not relevant here.

> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.[215]

1. Plain Language

While the Supreme Court has not interpreted Rule 801(d)(2) with regard to government admissions, it has addressed interpretation of the Federal Rules more generally. Shortly after their enactment, the Supreme Court endorsed a plain language reading of the Federal Rules. In *Bourjaily v. United States*, the Supreme Court decided whether disputed evidence could lay its own foundation for admissibility under Rule 801(d)(2), otherwise known as "bootstrapping."[216] Referring consistently to "the [r]ule on its face" and the "plain meaning" of the statute, the Supreme Court departed from long-standing common law practice and allowed the statement of a co-conspirator to help establish the very conspiracy necessary to qualify the evidence as a co-conspirator admission.[217] The Supreme Court concluded, "Silence is at best ambiguous, and we decline the invitation to rely on speculation to import ambiguity into what is otherwise a clear rule."[218] The dissent explicitly criticized the majority for sacrificing other interpretive canons to follow a "'plain meaning' approach."[219]

Concerning this decision, Professor Randolph Jonakait comments:

> Although the Court could have interpreted the legislative history in a manner that preserved [common law] that had been in effect before the Rules were adopted, the Court instead simply chose to follow the literal words . . . . [T]he plain language of the Rule prevailed even though the contrary practice had been long and widely accepted and even though nothing in the legislative history showed any intention to change that practice. Plain meaning won out over both evidentiary history and legislative silence.[220]

[215] Fed. R. Evid. 801(d)(2).
[216] 483 U.S. 171, 175–78 (1987).
[217] Id. at 178–79; see also Jonakait, supra note 12, at 749–52 (citing *Bourjaily* as a departure from long-standing common law due to the plain language of the Federal Rules).
[218] *Bourjaily*, 483 U.S. at 179 n.2.
[219] Id. at 196 (Blackmun, J., dissenting).
[220] Jonakait, supra note 12, at 752 (footnote omitted).

Numerous scholars have catalogued the Supreme Court's pronounced reliance on the text of the Federal Rules and argued the merits of such an interpretive approach,[221] although the issue is disputed.[222]

The plain language of Rule 801(d)(2) does not distinguish between the government and private parties,[223] or between civil and criminal pro-

[221] See, e.g., Edward J. Imwinkelried, A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence, 27 Ind. L. Rev. 267, 270 (1993) ("[T]he Justices otherwise have invoked a generally textualist approach to interpretation. The lead opinion in each of the Supreme Court's opinions construing the Federal Rules of Evidence uses the expression 'plain' meaning. The majority has said in so many words that the Rules should be interpreted according to their plain meaning unless a literal construction would result in an absurd, perhaps unconstitutional, result. In short, the presumption is that statutory language is to be given its plain meaning." (footnotes omitted)); Edward J. Imwinkelried, Whether the Federal Rules of Evidence Should Be Conceived as a Perpetual Index Code: Blindness Is Worse than Myopia, 40 Wm. & Mary L. Rev. 1595, 1596 (1999) ("In most of the cases construing the Federal Rules of Evidence, a majority of the justices have adopted a moderate textualist approach."); Jonakait, supra note 12, at 749–62 (collecting sources and examples); Eileen A. Scallen, Classical Rhetoric, Practical Reasoning, and the Law of Evidence, 44 Am. U. L. Rev. 1717, 1759 (1995) ("The Court consistently has held that only a 'plain meaning,' textualist approach to interpretation is appropriate for evidentiary rules.").

[222] See, e.g., Glen Weissenberger, Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law, 40 Wm. & Mary L. Rev. 1539, 1541 & n.7 (1999) [hereinafter Weissenberger, Evidence Myopia] (collecting sources) ("[E]vidence scholars have noted a remarkable inconsistency in the way in which the Court actually interprets the Federal Rules of Evidence."); Glen Weissenberger, The Proper Interpretation of the Federal Rules of Evidence: Insights from Article VI, 30 Cardozo L. Rev. 1615, 1616 (2009) [hereinafter Weissenberger, Proper Interpretation] ("Other commentators . . . contend that the Federal Rules of Evidence are a codification of the antecedent common law, and, consequently, are subject to unique hermeneutics unrelated to such principles of statutory construction as 'plain meaning,' 'legislative intent,' and 'legislative deference.'"). Professor Glen Weissenberger argues further that the Federal Rules permit, and even invite, deviation from the text of the statute. He views the Federal Rules as a "perpetual index code," thereby granting courts "dynamic authority to expand the law of evidence consistent with the values articulated in Rule 102." Glen Weissenberger, The Elusive Identity of the Federal Rules of Evidence, 40 Wm. & Mary L. Rev. 1613, 1614 (1999) [hereinafter Weissenberger, Elusive Identity]; see Weissenberger, Evidence Myopia, supra, at 1546, 1556–76 (explaining the significance of "perpetual index code" and the "creation of the Rules as a process of codifying the common law"); Weissenberger, Proper Interpretation, supra, at 1617 ("[T]he Federal Rules of Evidence are properly viewed as a codification of the common law, and not as an ordinary statute . . . ."); cf. Fed. R. Evid. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

[223] See 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7023, at 252 n.11 ("There exists pre Federal Rules of Evidence authority that statements of agents of the government made during the existence of the relationship were not admissible against the government in a criminal case even though concerning a matter within the scope of employ-

ceedings,[224] even though such distinctions exist elsewhere in the Federal Rules.[225] Rule 801(d)(2) does not contain a special definition for what constitutes an opposing party, nor is there additional explication of the term in the Advisory Committee Notes to suggest it means anything other than the intuitive assumption of one named in the caption of the lawsuit.[226] Moreover, nothing indicates that "opposing party" should be interpreted differently for each individual provision. The requirement that a statement must be "offered against an opposing party" is not unique to each type of admission, but rather precedes subsections (A) through (E) collectively. This suggests that the definition of "opposing party" should remain uniform throughout Rule 801(d)(2).[227] If the government is a party opponent for one category of admission, or in civil cases, it should be a party opponent for all categories of admissions in all cases. Nothing in Rule 801(d)(2) indicates that it does not apply against the government in criminal proceedings.

ment. However given the clear language of Rule 801(d)(2)(D), one could certainly question whether such cases continue to be good law." (citations omitted)); Jonakait, supra note 12, at 775–76 ("[T]he literal words of Rule 801(d)(2)(D) classify the statements of Government employees as vicarious admissions. . . . Under the plain-meaning standard, if the Government is a party, then a criminal defendant may introduce the relevant statements of the Government's agents or servants."); 2 McCormick, supra note 12, § 259, at 296 ("While Federal Rule 801(d)(2) does not specifically address the question, it is very hard to find any support in its language or structure for a blanket exclusion of statements by government agents."); 4 Mueller & Kirkpatrick, supra note 12, § 8:56, at 479 ("Nothing on the face or in the history of Rule 801(d)(2) suggests the admissions doctrine does not reach statements by government agents."); Poulin, supra note 1, at 415 ("Rule 801(d)(2) itself provides no support for the argument that party admissions operate differently against the government; it contains no language whatsoever that targets statements made or adopted by government agents."); Paul R. Rice, Evidence: Common Law and Federal Rules of Evidence § 5.02, at 461 (Donald R.C. Pongrace ed., 2d ed. 1990) ("In light of the unqualified language of this Rule, why wouldn't it be more reasonable to interpret it as applying to government employees, absent some indication in the Rule's history that the drafters intended that the Government be excepted from it in criminal cases?").

[224] See Jonakait, supra note 12, at 778 ("Nothing in the language of Rule 801(d)(2)(D) makes any distinction between civil and criminal actions."); see also, e.g., United States v. Yildiz, 355 F.3d 80, 81 (2d Cir. 2004) ("No distinction is made between the civil and criminal context, the government and other parties, or the government's attorneys and its other law enforcement agents.").

[225] See, e.g., Fed. R. Evid. 803(8) discussed infra Section III.D.

[226] See Fed. R. Evid. 801(d)(2) & advisory committee's notes to 1972 proposed rules.

[227] Cf. United States v. Rivera-Hernandez, 497 F.3d 71, 82 n.5 (1st Cir. 2007) ("Because the requirement that the statement be made against the party precedes all of Rule 801(d)(2)'s sub-sections, we think it logical to apply the same meaning to all sub-sections.").

2. Asymmetrical Application

When the Supreme Court has departed from the plain language of the Federal Rules, it has done so in pursuit of equity, not to actively promote an uneven application of the law. In *Green v. Bock Laundry Machine Co.*, the Supreme Court declined to adopt the natural reading of Rule 609(a)(1) in an effort to equalize the rights of opposing civil litigants.[228] Rule 609(a)(1) originally provided that evidence of prior felony convictions "shall be admitted" to impeach the character of a witness so long as, inter alia, "the probative value of admitting this evidence outweighs its prejudicial effect *to the defendant*."[229] Interpreted literally, evidence of prior convictions was always admissible against a plaintiff or plaintiff's witness because Rule 609(a)(1) spoke in compulsory terms and provided an exception only for unfair prejudice to the defendant.[230]

Discussing the discriminatory effect of the provision, the Supreme Court explained, "[W]e cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant."[231] The Supreme Court then construed Rule 609(a)(1) to forgo the prejudice inquiry for impeachment by felony conviction of all witnesses in civil cases.[232] Justice Antonin Scalia went so far as to suggest that the statute, "if interpreted literally, produces an absurd, and perhaps unconstitutional, result."[233] Motivated by notions of equity, the Supreme Court thus refused to accept the plain language of the Federal Rules when it seemed so blatantly asymmetrical.[234]

The Supreme Court's holding in *Green* went further. Citing the Fifth and Sixth Amendments, the Supreme Court reasoned that asymmetrical protection against unfair prejudice could still apply in favor of the defendant in a criminal case.[235] Scalia concurred that this "is consistent

[228] 490 U.S. 504, 527 (1989).

[229] Fed. R. Evid. 609(a)(1) (1987) (amended 2011) (emphasis added) ("General Rule.–For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if . . . the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . .").

[230] *Green*, 490 U.S. at 509–11 (recognizing that "under this [strict] construction of the Rule, impeachment detrimental to a civil plaintiff always would have to be admitted").

[231] Id. at 510.

[232] Id. at 527.

[233] Id. (Scalia, J., concurring).

[234] Rule 609 was later revised by Congress to reflect this interpretation. See Fed. R. Evid. 609(a)(1).

[235] *Green*, 490 U.S. at 510.

with the policy of the law in general and the Rules of Evidence in particular of providing special protection to defendants in criminal cases."[236] In other words, the Federal Rules actually favor additional protections for criminal defendants.

Excluding government admissions in criminal proceedings is in direct conflict with the aforementioned principles. There is nothing in Rule 801(d)(2) to suggest that it serves as a one-way street, allowing the government to utilize admissions while remaining immune from the application of the same evidentiary rule.[237] The government invokes Rule 801(d)(2) frequently, particularly against criminal defendants, and avidly argues for a sweeping interpretation of each provision.[238] If *Green* can serve as any indication, excluding government admissions in criminal proceedings violates the general policy of providing additional protections to criminal defendants and might raise further constitutional red flags. Professor Edward Imwinkelried has analyzed Rule 801(d)(2) from this perspective, arguing that the common law limitation on government admissions violates the constitutional guarantee of equal protection.[239]

[236] Id. at 529 (Scalia, J., concurring).

[237] See supra Subsection III.C.1.

[238] See, e.g., Poulin, supra note 1, at 406 ("Indeed, the expansive prosecutorial use of the exception for co-conspirators' statements, a form of party admission, has been well documented and critiqued.").

[239] Imwinkelried, supra note 12, at 273; id. at 313–14 ("Even if so limited, the [equal protection] guarantee still can be used to strike down the evidentiary classifications that are the most antithetical to the adversary system. . . . [A] key tenet of the adversary system is that both litigants must stand on equal footing before the judge. If the adversaries realize that they stand on equal footing, all sides have the same incentive to collect evidence before trial and to attempt to introduce the evidence at trial. Equalizing the incentive level for all the litigants ideally results in the fullest factual record at trial and the most thorough airing of the issues in the case. Professor Younger captured an essential characteristic of the adversary system when he stated that at trial, 'the rules of the game [should] be the same for both.' The equal protection doctrine can be a powerful weapon against evidentiary doctrines that, like the *Santos* rule, introduce asymmetries into the adversary system." (internal quotation altered in original) (footnotes omitted) (quoting Younger, Sovereign Admissions: A Comment on United States v. Santos, 43 N.Y.U. L. Rev. 108 (1968)). The Fifth Amendment Due Process Clause has an equal protection component applicable against the federal government, see Bolling v. Sharpe, 347 U.S. 497, 499 (1954), bringing it in line with Fourteenth Amendment equal protection jurisprudence. Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

3. Common Law Incorporation

Some scholars emphasize that the Federal Rules must be interpreted against the background of preexisting common law.[240] They often cite a statement by a plurality of the Supreme Court explaining, "The [Advisory Committee] Notes disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary."[241] Yet although such an interpretive approach may suggest limiting government admissions in criminal proceedings, this particular incorporation of the common law is unsound.

The material language of Rule 801(d)(2), derived from its predecessor publications, predates the development of the common law limitation in *Santos*.[242] A restriction on government admissions in criminal proceedings does not appear in the Model Code of Evidence of 1942,[243] the Uniform Rules of Evidence of 1954,[244] the California Evidence Code of 1964,[245] or any of their accompanying comments.[246] It is difficult to conceive that the common law limitation was somehow incorporated as an implicit exception to what became Rule 801(d)(2) before that limitation was itself articulated.

Despite an extensive discussion of admissions, Memorandum No. 19 does not acknowledge the common law limitation in any way.[247] There is likewise no discussion in the Advisory Committee Notes or Minutes acknowledging *Santos* or suggesting that government admissions should

[240] See, e.g., 21 Graham, Federal Practice and Procedure: Evidence, supra note 12, § 5027, at 524 ("[T]he text of the Rule cannot be understood without appreciating the common law background from which the Evidence Rules emerged."); Weissenberger, Evidence Myopia, supra note 222, at 1563 ("Beyond the structure of the text of the Rules, the Advisory Committee Notes demonstrate that the Rules are the culmination and index of antecedent common law."); Weissenberger, Proper Interpretation, supra note 222, at 1620 ("The text of the Rules clarify certain areas, adopt new rules in other areas, and provide general provisions to be used by reference to the antecedent common law.").

[241] Tome v. United States, 513 U.S. 150, 160–61 (1995) (plurality opinion).

[242] See Section III.C. Santos was decided in 1967.

[243] Model Code of Evid. r. 506–08 (Am. Law Inst. 1942).

[244] Unif. R. Evid. 63(7)–(9) (Nat'l Conf. of Comm'rs on Unif. State Laws 1953).

[245] Cal. Evid. Code §§ 1220–23 (1965).

[246] Model Code of Evid. r. 506–08, at 249–55; Unif. R. Evid. 63(7)–(9), at 201–02; Cal. Evid. Code §§ 1220–23, at 1222–24 (1965); Cal. Law Revision Comm'n, Pub. 59, Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence: Article VIII. Hearsay Evidence 320–23 (1962).

[247] Memorandum No. 19, supra note 211, at 86–103.

be excluded in criminal cases.[248] Instead, the Advisory Committee demonstrated a strong aversion to treating hearsay-related rules differently in civil and criminal proceedings,[249] and actually eschewed an alternate general approach to hearsay in part because "it would require different rules for civil and criminal cases."[250] The Advisory Committee was well aware that a hearsay rule applying in criminal proceedings "may be used against as well as for an accused,"[251] and was generally sensitive to "whether there ought to be a special provision made in the criminal case."[252] In fact, the Advisory Committee actually considered how provisions of Rule 801(d)(2) might apply differently in civil and criminal proceedings and specified potential differences without ever mentioning the common law limitation on government admissions.[253]

Furthermore, *Santos* was only referenced in two additional circuit decisions before the Federal Rules were enacted,[254] one of which actually accepted and relied on three government admissions despite specific appeal to *Santos* by the dissent.[255] The D.C. Circuit then rejected the com-

[248] See Fed. R. Evid. 801(d)(2) advisory committee's notes to 1972 proposed rules; Advisory Comm. on Rules of Evidence, Minutes (Dec. 14–15, 1967), at 2–8, [hereinafter Advisory Comm. Minutes Dec. 14–15] http://federalevidence.com/pdf/FRE_Amendments/Pre1975/EV12-1967-min.pdf [https://perma.cc/Y4JZ-RGYN]; Advisory Comm. on Rules of Evidence, Minutes (Oct. 9–11, 1967) at 54, [hereinafter Advisory Comm. Minutes Oct. 9–11] http://federalevidence.com/pdf/FRE_Amendments/Pre1975/EV10-1967-min.pdf [https://perma.cc/5R6B-3UR3].

[249] Memorandum No. 19, supra note 211, at 21–23 ("[T]he pattern of Committee thinking up to now has been one of making no distinction between civil and criminal cases as such. Rather impressive arguments may be made against a departure from this position . . . .").

[250] Id. at 21; see Cleary, supra note 211, at 147 ("[T]o the extent possible the same rules should apply in both civil and criminal cases."); cf. Geiger, supra note 12, at 411 & n.73 (collecting common law precedent holding that "barring constitutional constraints, the laws of evidence apply equally in civil and criminal cases." (footnote omitted)).

[251] See Memorandum No. 19, supra note 211, at 40 (recognizing "the possibility that expanding declarations against interest to include penal interests may be used against as well as for an accused").

[252] See Advisory Comm. Minutes Oct. 9–11, supra note 248, at 2.

[253] See Advisory Comm. Minutes Dec. 14–15, supra note 248, at 3–4; Memorandum No. 19, supra note 211, at 96.

[254] See United States v. Falk, 479 F.2d 616, 633–34 & n.12 (7th Cir. 1973) (Cummings, J., dissenting); United States v. Powers, 467 F.2d 1089, 1095 (7th Cir. 1972). The Sixth Circuit also adopted the common law limitation shortly after the Federal Rules were enacted but without acknowledging the new provisions. See supra note 82.

[255] *Falk*, 479 F.2d at 623 (relying on "the admission of the Assistant United States Attorney and the two published statements by the Selective Service" despite argument and citation to *Santos* by the dissent that government admissions should be excluded in criminal proceedings).

mon law limitation at least in part almost immediately afterward.[256] It is difficult to argue that the common law was deeply committed to immunizing the government from unwanted admissions in criminal proceedings, or that the limitation was ubiquitous or even widely known. As the D.C. Circuit concluded, "[T]here is no indication in the history of the Rules that the draftsmen meant to except the government from operation of [Rule 801(d)(2)] in criminal cases."[257]

D. Rule 803(8)

The common law limitation on government admissions in criminal proceedings is further undermined elsewhere in the Federal Rules. For example, Rule 803(8) explicitly contemplates the admissibility of government statements offered against the government by way of public documents and records.[258] Rule 803(8) was cited by both the Seventh[259] and D.C. Circuits[260] as support for their conflicting positions on government admissions and is thus worthy of discussion. It reads:

> Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> . . . .
>
> (8) Public Records. A record or statement of a public office if:
>
> (A) it sets out:
>
> (i) the office's activities;
>
> (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

[256] See supra Section II.A.

[257] United States v. Morgan, 581 F.2d 933, 937–38 & n.15 (D.C. Cir. 1978); see 4 Mueller & Kirkpatrick, supra note 12, § 8:56, at 479 ("Nothing on the face or in the history of Rule 801(d)(2) suggests the admissions doctrine does not reach statements by government agents.").

[258] Fed. R. Evid. 803(8).

[259] United States v. Kampiles, 609 F.2d 1233, 1246 n.16 (7th Cir. 1979).

[260] *Morgan*, 581 F.2d at 937 n.10. But see id. at 938 n.15.

> (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
>
> (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.[261]

The D.C. Circuit cited Rule 803(8) for the proposition that "the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases, and specifically provide that in certain circumstances statements made by government agents are admissible against the government as substantive evidence."[262] Rule 803(8)(A)(iii) in particular provides that the statements of a public office can be asserted "against the government in a criminal case" even though they may not necessarily be admissible against the defendant.[263] The D.C. Circuit viewed this as an indication that the government is not entirely immune from adverse statements made by its agents or employees.[264] The Seventh Circuit disagreed, arguing that the provisions of Rule 803(8) pertaining to statements by law enforcement personnel would be superfluous if government admissions were already permitted.[265] The Seventh Circuit viewed this as support for the common law limitation because the Federal Rules already provide for government admissions in a limited alternative setting.[266]

To begin, the Seventh Circuit ignores that government admissions are not excluded in civil proceedings even though they render Rule 803(8) superfluous to the same extent as would government admissions in criminal proceedings. Memorandum No. 19 specifically acknowledged that there would be substantial areas of overlap between admissions and other Federal Rules, but explained that the possibility "an item of evidence may have more than one door available should be viewed as an advantage rather than otherwise."[267]

Additionally, Rules 801(d)(2) and 803(8) are neither completely interchangeable nor mutually exclusive.[268] Rule 801(d)(2) is premised on the adversarial nature of litigation and requires that statements be some-

[261] Fed. R. Evid. 803(8).
[262] *Morgan*, 581 F.2d at 937 n.10.
[263] Fed. R. Evid. 803(8)(A)(iii).
[264] *Morgan*, 581 F.2d at 937 n.10.
[265] United States v. Kampiles, 609 F.2d 1233, 1246 n.16 (7th Cir. 1979).
[266] Id.
[267] Memorandum No. 19, supra note 211, at 90–91.
[268] See Poulin, supra note 1, at 417 n.92; Geiger, supra note 12, at 420–22.

how attributable to and introduced against an opposing party.[269] In contrast, Rule 803(8) is premised on indicia of reliability and the notion that public employees are obliged to report truthfully.[270] The Advisory Committee Notes explain that Rule 803 "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available."[271] This rationale is specifically disclaimed for Rule 801(d)(2).[272] Rule 803(8) is then explicitly restricted by an objection for "lack of trustworthiness,"[273] which does not apply to Rule 801(d)(2).[274] Rule 803(8) is also available in a much broader range of proceedings and is not limited to when the statement can be attributed to an opposing party.[275] Government statements qualifying under Rule 803(8) can be introduced even when the government is not present and can sometimes be offered by the government itself. Rules 801(d)(2) and 803(8) are therefore supported by different justifications, subject to different limitations, and admissible in different settings and against different parties.

It is remotely possible to read Rule 803(8)(A)(ii) as an implied limitation on government admissions so as to prohibit, "in a criminal case, a matter observed by law-enforcement personnel."[276] This would not undermine government admissions in criminal proceedings generally, but could nonetheless qualify Rule 801(d)(2) in corresponding circumstances.[277] The relevant language of Rule 803(8)(A)(ii), however, was specifically added by Congress to protect the confrontation rights of criminal defendants.[278] Congress was concerned that the use of police reports by the government might circumvent the need to make an officer available

[269] See supra Section I.B.

[270] Fed. R. Evid. 803(8) advisory committee's notes to 1972 proposed rules.

[271] Fed. R. Evid. 803 advisory committee's notes to 1972 proposed rules.

[272] Fed. R. Evid. 801(d)(2) advisory committee's notes to 1972 proposed rules; see sources cited supra note 30 and accompanying text.

[273] Fed. R. Evid. 803(8)(B).

[274] Cf. sources cited supra note 30 and accompanying text (explaining that Rule 801(d)(2) does not require the traditional indicia of reliability). Issues of trustworthiness may, however, be relevant under Rule 403. See infra Section IV.C.

[275] See Fed. R. Evid. 803(8)(B).

[276] Id. 803(8)(A)(ii); see United States v. Morgan, 581 F.2d 933, 938 n.15 (D.C. Cir. 1978); Poulin, supra note 1, at 417 n.92.

[277] See Poulin, supra note 1, at 417 n.92.

[278] 120 Cong. Rec. H2387–2389 (daily ed. Feb. 6, 1974).

at trial and subject to cross-examination.[279] There is no indication that Congress meant to limit the admissibility of observations by law enforcement personnel when introduced against the government by a defendant,[280] and courts have overwhelmingly accepted this interpretation.[281] Reading Rule 803(8)(A)(ii) as a limitation on Rule 801(d)(2) is therefore tenuous at best.[282]

The Seventh Circuit's argument that government admissions render provisions of Rule 803(8) superfluous has its greatest force with regard to Rule 803(8)(A)(iii). The use of government records containing "factual findings from a legally authorized investigation"[283] may initially appear to be entirely encompassed by the admissions doctrine. This provision, however, becomes independently relevant in at least two scenarios in addition to the general distinctions between Rules 801(d)(2) and 803(8) mentioned above. First, there may be occasions where the government authorizes a third-party investigation that is not conducted or adopted by government agents or employees. To the extent, moreover, that the government attempts to compartmentalize its various regions, departments, and agencies as separate "opposing parties" for purposes of Rule 801(d)(2),[284] Rule 803(8)(A)(iii) ensures that factual findings from authorized investigations are always admissible in civil proceedings and against the government in criminal proceedings. And second, inasmuch as factual findings from an investigation by law enforcement personnel are disallowed under Rule 803(8)(A)(ii) when introduced by the government, Rule 803(8)(A)(iii) clarifies that such evidence is still available to a criminal defendant against the government and forecloses any contrary implication.

Rule 803(8) therefore does not cast doubt on the overarching use of government admissions in criminal proceedings. If anything, it supports

[279] Id.; see 2 McCormick, supra note 12, § 296, at 467–68; Geiger, supra note 12, at 421 ("The legislative history . . . indicates that Congress was primarily concerned with preserving the defendant's confrontation rights.").

[280] 2 McCormick, supra note 12, § 296, at 468 ("[T]he language of [Rule 803(8)(A)(ii)] appears to prohibit the admission of all records of matters observed in criminal cases, which, if read literally, would exclude use by the defense as well as the prosecution. This meaning is not what Congress had in mind, and the cases have construed the provision to permit the defendant to introduce police reports under [Rule 803(8)(A)(ii)].").

[281] Id. § 296, at 468 n.22 (collecting cases).

[282] See Poulin, supra note 1, at 417 n.92 (reaching a similar conclusion); Geiger, supra note 12, at 421 (same).

[283] Fed. R. Evid. 803(8)(A)(iii).

[284] See infra Section IV.B.

the D.C. Circuit's conclusion that "the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases."[285]

E. Distinguishing Between Admissions

The Second Circuit distinguishes between government admissions under Rules 801(d)(2)(B) and (D), persuaded that such evidence is admissible only when the government adopts a particular statement.[286] Other courts permit government admissions under some provisions while reserving judgment on others, often emphasizing these distinctions in an attempt to reconcile the split in authority.[287] Indeed, the Seventh Circuit relied on this argument to avoid acknowledging direct disagreement with the D.C. Circuit.[288] As discussed previously, however, these distinctions are problematic.

Allowing some government admissions in some contexts undermines the justification to exclude government admissions in others. Rule 801(d)(2) provides no indication that government admissions should be treated differently across the various provisions of Rule 801(d)(2) or in civil proceedings, weakening any argument for a varied approach.[289] If the government is ever a party opponent for purposes of Rule 801(d)(2), it should be a party opponent in all proceedings under all provisions of Rule 801(d)(2).[290] And while the implications of sovereign immunity might vary for each type of admission, such as when the government officially adopts a position compared to the unauthorized statement of an agent or employee, this justification is largely inapposite in the context of substantive evidence and would again presumably apply with equal force to civil proceedings.[291]

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[285] United States v. Morgan, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978).

[286] United States v. Yildiz, 355 F.3d 80, 82 (2d Cir. 2004).

[287] See, e.g., Northern Mariana Islands v. Cepeda, No. 2011-SCC-0030-CRM, 2014 WL 5822660, at *5 (N. Mar. I. Nov. 7, 2014) (citing only three circuits and distinguishing the opinions using the subsections of Rule 801(d)(2)); U.S. ex rel. McDaniel v. Cooper, No. 97 C 3221, 1998 WL 673827, at *8 (N.D. Ill. Sept. 23, 1998) (refusing to admit statements made by an Assistant State Attorney and claiming there exists no authority that contradicts *Kampiles*).

[288] See United States v. Kampiles, 609 F.2d 1233, 1246 n.16 (7th Cir. 1979).

[289] See supra Subsection III.C.1.

[290] See supra Section III.A; Subsection III.C.1.

[291] See supra Section III.B.

Furthermore, although each category of admission is conceptually distinct, in practice they are often hard to distinguish. As Professor John Strahorn observed almost a century ago:

> A factor which emphasizes the desirability of a *single* theoretical explanation of the relation between all types of admissions and the hearsay rule is the ease with which one of these types shades off into another. It is frequently hard to draw sharp lines of distinction between neighboring types of admissions.[292]

Admissions are frequently amenable to categorization under multiple provisions of Rule 801(d)(2), especially when dealing with corporate entities that necessarily act entirely through agents or employees. The flexibility inherent in categorizing a particular statement weakens the justification for selectively allowing some types of government admissions while excluding others and provides at least a normative argument for treating all government admissions equally.

In *United States v. Kattar*, for example, the First Circuit held that statements by a prosecutor contained in a government brief were admissible under Rule 801(d)(2)(B) because "[t]he Justice Department here has, as clearly as possible, manifested its belief in the substance of the contested documents."[293] However, the First Circuit could have reached the same conclusion using three different provisions of Rule 801(d)(2), regardless of whether the statements were filed in a formal brief with a court.[294] Poulin argues persuasively that Rule 801(d)(2)(C) was a more appropriate avenue to introduce the evidence because prosecutors are authorized to represent the government and speak on its behalf in legal proceedings.[295] Other courts have held that prosecutors are agents of the government, and thus statements or court filings concerning a matter within the scope of that relationship are most appropriately categorized under Rule 801(d)(2)(D).[296] In *Kattar*, the First Circuit actually indicated

[292] Strahorn, supra note 29, at 570 (emphasis in original).

[293] 840 F.2d 118, 131 (1st Cir. 1988).

[294] See supra note 132 and accompanying text (demonstrating the flexibility in categorizing statements by prosecutors under Rule 801(d)(2)); Poulin, supra note 1, at 407 n.40 ("Even when courts recognize that prosecutors' statements may fall within Federal Rule of Evidence 801(d)(2), they do not appear to agree about which particular provision of the rule applies.").

[295] Poulin, supra note 1, at 427.

[296] See, e.g., United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1564 (E.D. Tex. 1986), judgment aff'd, 829 F.2d 532 (5th Cir. 1987) (reaffirming a decision admitting the

that this may be an alternative possibility but declined to analyze the agency relationship after deciding that the statements could be introduced as adoptive admissions.[297]

The same flexibility is apparent in the disparate categorization of the analogous affidavits, both of which were submitted to a court, in *Santos* and *Morgan*.[298] Likewise, in *United States v. Warren*, the court excluded statements by a government agent that fell squarely within the scope of his employment and could possibly have been introduced under Rule 801(d)(2)(D), instead reasoning that "the Government cannot be said to have manifested belief in their truth so as to bring the statements within . . . Rule 801(d)(2)(B)."[299] The delineation between provisions of Rule 801(d)(2) can be entirely arbitrary yet still dictate whether evidence is admissible under existing case law. In the Second Circuit especially, these distinctions are wholly dispositive and lead to opposite results.[300] Similar flexibility is possible across a multitude of government admissions, ranging from publications and reports to statements by other agents and informants.[301] This might explain why some courts fail to distinguish between provisions altogether and instead refer to Rule 801(d)(2) generally.[302]

The provisions of Rule 801(d)(2) might be understood as a series of overlapping circles, each provision largely expanding upon the one before. Specific factual circumstances may fit only certain categorizations under a more restrictive reading of each provision, although the vast majority of statements fall into common areas. Indeed, the Advisory Committee actually intended Rule 801(d)(2)(D) to encompass

statement of a government attorney into evidence under Rule 801(d)(2)(D)); 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7023, at 255–56 ("An attorney may, of course, act as an ordinary agent and as such make evidentiary admissions admissible against his principal, Rule 801(d)(2)(C) and (D).").

[297] *Kattar*, 840 F.2d at 130–31.

[298] See supra Subsection II.C.1.

[299] 42 F.3d 647, 656 (D.C. Cir. 1994). It is unclear whether the defendant failed to argue that the statements were admissible under Rule 801(d)(2)(D), whether the court implicitly rejected government admissions by an agent or employee as a general matter, or whether the court simply overlooked the argument.

[300] See supra Subection II.C.2.

[301] See, e.g., Poulin, supra note 1, at 426–28 (providing examples and explaining that courts are not always disciplined in categorizing government admissions).

[302] See, e.g., United States v. Santisteban, 501 F.3d 873, 878 (8th Cir. 2007); Murrey v. United States, 73 F.3d 1448, 1455 (7th Cir. 1996); United States v. DeLoach, 34 F.3d 1001, 1005 (11th Cir. 1994).

Rule 801(d)(2)(C) entirely and considered combining the two provisions.[303] The flexibility inherent in categorizing statements undermines the rationale for differentiating between provisions and adopting a fragmented approach to government admissions. Excusing the circuit split on these grounds or otherwise justifying disparate treatment of some government admissions fails to recognize that categorization can be entirely arbitrary, and that distinguishing between provisions, or between civil and criminal proceedings, lacks both legal and logical justification under the current Federal Rules.

IV. PRACTICAL CONSIDERATIONS

Broad application of Rule 801(d)(2) to the government raises practical concerns about the potentially prejudicial or paralyzing effect of allowing such a vast array of government admissions.[304] The federal government employs roughly 2.7 million civil servants alone.[305] Some authors suggest that these considerations might be a better justification for excluding government admissions in criminal proceedings.[306] Nevertheless, such concerns are likely overstated. The Federal Rules are also already equipped to address these issues.

A. General Observations

It is initially important to remember that concerns regarding the potential number of government admissions are no different than concerns faced by large corporations every day.[307] They are also the same con-

[303] Advisory Comm. Minutes Dec. 14–15, supra note 248, at 3–5.

[304] See Geiger, supra note 12, at 401 ("The government has a legitimate concern that it not be required to answer for all the statements of its many agents. Government agents far removed from the prosecutorial function of the government may lack the perspective to competently represent the government's position with respect to a particular case.").

[305] Robert Jesse Willhide, U.S. Census Bureau, Annual Survey of Public Employment and Payroll Summary Report: 2013, at 2 (Dec. 19, 2014), http://www2.census.gov/govs/apes/2013_summary_report.pdf [https://perma.cc/225Z-CVSB]; U.S. Office of Pers. Mgmt., Total Government Employment Since 1962, Table in Data, Analysis & Documentation: Federal Employment Reports, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962 [https://perma.cc/R4ZL-PKTP].

[306] See, e.g., 2 McCormick, supra note 12, § 259, at 295 ("A more plausible explanation is the desirability of affording the government a measure of protection against errors and indiscretions on the part of at least some of its many agents.").

[307] See United States v. Am. Tel. & Tel. Co., 498 F. Supp. 353, 358 (D.D.C. 1980) ("A second and related reason for rejecting the government's position is that its arguments would

cerns that the government already faces in civil proceedings. The sheer number of voluntary civil lawsuits filed by the government is independently sufficient to prove that Rule 801(d)(2) is not incapacitating.

It is also unrealistic to think that all admissions, particularly those made at some distance, will ever be relevant or even known to those actively participating in a prosecution. Even cursory observation of comparable private or civil litigation reveals that statements made by a corporate employee in Oregon are rarely introduced in a lawsuit over events that occurred at a related corporate location in Virginia. Treating the government as a party opponent does not mean that every statement of every government actor will automatically be introduced in future legal proceedings.[308]

B. Intrinsic Limitations

Rule 801(d)(2) provides that government admissions are circumscribed by the scope of the relationship between the government and a given declarant. It already anticipates that some agents may significantly overreach and thus limits unauthorized admissions by an agent or employee to statements related to the scope of his or her relationship with the government. Concern that the vast number of potential statements by government actors would be prohibitive in government litigation is likely misplaced given that agents or employees are limited to their area of competency and cannot simply make statements on any given subject.[309] Employees of the Securities and Exchange Commission, for example,

apply with equal force to any large organization with many individuals speaking and acting on its behalf. Were the Court to accept the government's reasoning, all such organizations would effectively have to be exempted from the purview of the rule on party-opponent admissions. The unambiguous language of Rule 801(d)(2) clearly does not contemplate such a result."); 4 Mueller & Kirkpatrick, supra note 12, § 8:56, at 479–80 ("Maybe the sheer size of government and protections accorded by civil service combine to dissociate any one agent from success or failure in any one case, but similar factors operate in private industry, which is subject to elaborate statutory regulation of employment and sometimes to restrictions in personal contracts and collective bargaining agreements."); Poulin, supra note 1, at 469 ("[T]he Executive Branch is no different in any relevant way from a large corporation with numerous agents operating in various aspects of the corporate business.").

[308] Cf. Fed. R. Evid. 402 ("Irrelevant evidence is not admissible.").

[309] Statements by state or local officers would likewise not be admissible in a federal prosecution unless there was sufficient evidence to demonstrate that such actors were operating in sufficient cooperation with the federal government. See Poulin, supra note 1, at 451–71 (examining the necessary agency relationship for government admissions under Rule 801(d)(2)(D)).

will likely have little to say in connection with their employment concerning violent crimes, although statements about a particular securities fraud case might be sufficiently related to the scope of their relationship with the government.

Drawing conclusions or offering opinions is also sufficiently beyond the job description of most regular employees, thereby drastically limiting application of Rule 801(d)(2) to simple statements of fact or to conclusions and opinions drawn by a limited circle of supervisors. These considerations alone greatly constrain the application of Rule 801(d)(2) to a limited sphere of statements made by persons whose agency or employment somehow overlaps with the allegations at issue.[310]

C. Rule 403

Rule 403 provides a powerful tool to exclude government admissions that have questionable probative value or otherwise present a risk of unfair prejudice that substantially outweighs any potential probative con-

[310] Some authors have suggested that the judicial, legislative, and executive branches of government should be treated as separate and distinct party opponents for purposes of Rule 801(d)(2). See, e.g., Poulin, supra note 1, at 467. While an intriguing argument, the realm of implicated admissions is extremely narrow. Such distant statements across branches will rarely be relevant or sufficiently related to the scope of the declarant's relationship with the government to qualify. And even if such statements could be introduced as government admissions, they would be subject to the limitations of Rule 403. See infra Section IV.C. The government has argued further that government admissions should be compartmentalized by individual agency within the executive branch or by various geographic districts spread across the country. See *Am. Tel. & Tel. Co.*, 498 F. Supp. at 356–58 & n.13 (acknowledging the issue and defining the government as "Executive Branch agencies, departments and subdivisions," but not "[i]ndependent commissions not subject to the control of the President"); United States v. Kattar, 840 F.2d 118, 130–31 (1st Cir. 1988) (acknowledging the issue and concluding that at least the Department of Justice should be considered a single entity). To the extent that Rule 801(d)(2) is premised on control over the declarant, it is difficult to argue that departments or agencies claiming insulated independence are somehow authorized representatives, agents, or employees of one another. In broad terms, the more that the government is conceived of as a compartmentalized entity rather than a cohesive whole, the weaker the justification for recognizing admissions under Rule 801(d)(2) from departments, agencies, or regions that are not parties to the immediate proceeding. Resolving these issues depends largely on broader questions of constitutional theory, administrative law, and the well-established principles of agency. See Poulin, supra note 1, at 467–69 (discussing, and ultimately rejecting, arguments for subdividing the executive branch); cf. Big Apple BMW v. BMW of N. Am., 974 F.2d 1358, 1373 (3d Cir. 1992) ("The statement of a subsidiary may be attributed to its corporate parent, consistent with agency theory, where the parent dominates the activities of the subsidiary.").

tribution.[311] Perhaps a low-level officer makes statements without a complete understanding of the facts, or perhaps a government agent knowingly makes false statements in a lawful attempt to deceive a defendant or witness during an interrogation.[312] A judge would have the discretion to weigh the probative value of any government admission against the risk of unfair prejudice and exclude evidence that might derail or undermine the integrity of a trial.

It is possible that judges might merely reject the majority of government admissions using this alternative method, effectively producing near-identical results to the common law limitation. Notwithstanding, there is a significant difference between a categorical bar on a particular type of evidence and a discretionary rule, and some government admissions have sufficient probative value to survive a Rule 403 motion.[313] The same is true on appeal, where circuit courts will have the opportunity to consider evidentiary decisions for abuse of discretion rather than

[311] 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7015, at 191 ("Admission of a party-opponent may be excluded upon application of Rule 403."); see, e.g., Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756, 763 (7th Cir. 2003) ("Rule 403 clearly applies to admissions, and a trial judge can exclude admission evidence if its probative value is substantially outweighed by the danger of unfair prejudice."); *Kattar*, 840 F.2d at 131 n.10 ("Of course, this sort of party-opponent admission is still subject to the trial court's balancing of its probative value against its prejudicial effect under Rule 403."); Kristine Cordier Karnezis, Annotation, Admissibility of Party's Own Statement Under Rule 801(d)(2)(A) of the Federal Rules of Evidence, 191 A.L.R. Fed. § 18, at 78–81 (2003) (collecting sources); cf. Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

[312] See 30B Graham, Federal Practice and Procedure: Evidence, supra note 12, § 7023, at 264 & n.11 ("Ordinarily with one key exception, Rules 801(d)(2)(C) and (D) should be applied to agents and employees of government in the same manner and to the same extent as agents and employees of other persons and entities. The single, but critical exception, is when a government agent or employee makes a statement in the course of conducting a criminal investigation to a witness or potential or actual suspect including but not limited to during an interview or interrogation. Under such circumstances the tactic of deception, legally employed, result in statements of alleged opinion or alleged fact that are known to be false for the purpose of facilitating the criminal investigation. . . . [W]hile the government agent or employee's statement would technically conform to Rule 801(d)(2)(C) or (D), application of Rule 403, particularly the concepts of 'misleading the jury', 'confusing the issues', and 'wasting time' require that such statements made during the course of a criminal investigation not be treated as admissions of a party opponent.").

[313] See, e.g., United States v. Barile, 286 F.3d 749, 756–58 (4th Cir. 2002) (holding that statements by a government agent were admissible under Rule 801(d)(2)(D) despite a Rule 403 objection).

prophylactically upholding them as an abstract matter of law. Finally, even if evidentiary decisions ultimately reach the same outcome regardless of the approach, the theoretical ability to introduce government admissions in criminal proceedings respects the language of Rule 801(d)(2). This alone is a sufficient justification for considering government admissions if only to then exclude the statements on other grounds.

CONCLUSION

Rule 801(d)(2) does not differentiate between the government and private parties, or between civil and criminal proceedings, instead dictating what appears to be a blanket means of introducing statements by a party opponent as substantive evidence. However, vestiges of the common law complicate the application of Rule 801(d)(2), leading to a deep divide in authority over the use of government admissions in criminal cases.

A thorough analysis of the common law limitation and Rule 801(d)(2) suggests that the proffered arguments for excluding government admissions in criminal proceedings are unpersuasive. In fact, it would appear that the common law limitation was not as widely recognized or deeply rooted a tradition as such designation normally indicates. Excluding government admissions in criminal proceedings therefore lacks sufficient justification under the current Federal Rules.