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"Waters of the United States" and the Void-for-Vagueness Doctrine

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KEY TAKEAWAYS

The Void-for-Vagueness Doctrine bars using a criminal law to enforce a statute that no reasonable person can understand or apply.

The term "waters of the United States" is unconstitutionally vague, and federal rules only aggravate the problem.

One way for the Supreme Court to remedy this error is by foreclosing criminal prosecutions.

Congress passed the Federal Water Pollution Control Act Amendments of 1972—colloquially known as the Clean Water Act (CWA)—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] To do so, the CWA requires parties to obtain a permit before discharging a pollutant into "navigable waters."[2] The CWA defines the term "navigable waters" as "the waters of the United States."[3] Unpermitted discharges are subject to administrative and civil penalties as well as criminal punishments.[4]

Congress's decision to use the term "the waters of the United States" to define the reach of the CWA has led to confusion about precisely which bodies of water qualify. The Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Army Corps) attempted to clarify the meaning of that term through rulemaking. In 2015, they adopted a regulation known

as the "Waters of the United States" or WOTUS Rule, but that will not remedy the problem. The reason why is threefold: (1) principles of statutory interpretation require that an act of Congress receive a uniform interpretation, regardless of whether the law is invoked in an administrative, civil, or criminal case; (2) the Void-for-Vagueness Doctrine bars the government from prosecuting someone for violating a law the terms of which are so indistinct that no reasonable person could understand what is forbidden; and (3) while it is doubtful that an agency can remedy an unconstitutionally vague law through rulemaking, the WOTUS Rule definition of "waters of the United States" makes it impossible for the average person to understand precisely what that term means.

This *Legal Memorandum* will explain why each proposition is true and will offer several remedies that do not require that the CWA be held unconstitutional in its entirety.[5]

The Proper Interpretation of a Statute That Can Be Enforced by an Administrative or Civil Action and a Criminal Prosecution

Contemporary statutes like the CWA offer the government different enforcement options, including criminal prosecution, and the U.S. Department of Justice has been quite willing to bring criminal charges against anyone who violates the CWA.[6] The possibility that a person can be charged with a crime has two implications for statutory interpretation.

The first one follows from the well-settled canon of construction known as the Rule of Lenity. That canon requires courts strictly to construe the terms of a criminal law to avoid creating traps for law-abiding parties.[7] Borrowing from the rules of baseball, the Rule of Lenity demands that courts must give an accused the benefit of the doubt whenever the meaning of a criminal statute is in equipoise.[8] In baseball, a tie goes to the runner; here, it goes to the public.

The second consequence is that, to ensure that a statute is given a consistent interpretation of its provisions regardless of the relief sought, courts must give that law the same construction in civil and criminal cases, a canon that I have referred to as the Rule of Consistency.[9] Under that rule, "courts cannot create one law for Athens (civil cases) and another one for Rome (criminal cases)."[10] As Justice Antonin Scalia put it, "the lowest common denominator, as it were, must govern."[11] Or, as Justice Neil Gorsuch put it more recently, "the rule of lenity, not to mention a dose of common sense, favors a strict construction."[12]

Unfortunately, the Supreme Court of the United States has never recognized that those rules apply to the CWA just as they apply to other regulatory schemes that can be enforced through criminal prosecutions. *Rapanos v. United States* is the most important decision in that regard.[13] Justice Scalia defined "waters of the United States" as referring only to relatively permanent standing or flowing bodies of water,[14] to include "wetlands"—viz., adjacent, flooded, but non-navigable water bodies—only if they have a continuous surface connection to traditional "waters of the United States."[15] That reading is narrower than the act's broad purposes would allow but not as narrow as required by the Rules of Lenity and Consistency. In any event, Justice Scalia's opinion garnered only three other votes.

Justice Anthony Kennedy provided the fifth vote necessary for a majority, but he only concurred in the judgment because he disagreed with the plurality's construction of the term "waters of the United States." In his view, the issue whether a particular body of water or parcel of land qualifies turns on whether there is a "significant nexus" between it and a traditional navigable water.[16] He found support for that test in two of the Court's CWA precedents,[17] which he said implicitly or explicitly adverted to a "substantial nexus" test.[18] Yet neither of those decisions was a criminal prosecution, and neither one discussed how the Rules of Lenity and Consistency apply to the CWA.[19] In fact, one of those cases, *Riverside Bayview Homes*, could not have addressed the Rule of Consistency because the Court did not first clearly articulate that rule until seven years *after* it had decided *Riverside Bayview Homes*. The result was that *Rapanos* brought only confusion to the meaning of "waters of the United States."[20]

Fortunately, the Supreme Court now has an opportunity to remedy this problem. The Court granted certiorari in *Sackett v. EPA* to decide how to interpret the term "waters of the United States."[21] We might have a decision before the Court recesses this summer.

Yet there is a closely related issue that, hopefully, the Supreme Court will also address: namely, whether the statutory definition of "navigable waters" as "waters of the United States" is so amorphous as to defy any reasonable attempt either to understand its contours or to apply it when the issue arises not in a classroom or courtroom, but in the real world when people must decide whether they are breaking the law. In that regard, there is another body of law that is critical to understanding how a statute like the CWA should be written: the Void-for Vagueness Doctrine.

The Void-for-Vagueness Doctrine

Language uses words rather than mathematical symbols to convey ideas or commands, so there is an inevitable risk of uncertainty in what either one can mean. Words generally have a core, readily distinct dictionary meaning capable of common understanding. That is why we start any exercise in statutory interpretation by focusing on the text of a written law,[22] using the presumption that words in a statute mean what they ordinarily mean to the average person—that is, how they are defined in an English-language dictionary.[23] Once we attempt to expand a term beyond its average, everyday meaning, however, as government sometimes is wont to do, the risk of uncertainly expands geometrically.[24] That almost always is the case when we decide "to boldly go" where no reasonable person has gone before.[25]

In criminal cases, we limit that risk through judicious application of the canon of construction known as the Rule of Lenity, a directive to courts to eschew imaginative readings of criminal statutes just to snare tawdry conduct. The goal is to force Congress to use words with precision; the hope is to avoid tripping up morally innocent parties. Those purposes are especially important when the criminal law provides the hammer for breaking a rule. The injunction to "do the right thing" might be a valuable ethical precept, but it can't be adopted as a legal command, enforced by the criminal law. The reason is that the variety of interpretations that such an exhortation can have today in our contemporary, heterogenous society—some interpretations "woke," others reasonable—which lacks a commonly held set of moral virtues makes it impossible for a person to know with certainty just what "right thing" the law commands him to do. The different possible interpretations of that injunction render it little better than advice. It certainly is not adequate to serve as a command backed by the possibility of imprisonment for noncompliance.

Here is where the Constitution comes into play. The Due Process Clauses forbid the federal and state governments from punishing someone without first affording him or her "due process *of law*,"[26] and, as Justice Neil Gorsuch explained in *United States v. Davis*, "[in] our constitutional order, a vague law is no law at all."[27] To condemn and punish conduct as criminal, a statute must afford "ordinary people"[28] fair notice of what the law makes a crime.[29] A criminal law falls short of that standard when its text "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"[30] or its "mandates are so uncertain that they will reasonably admit of different constructions."[31] Those are fatal flaws in any criminal law.

The terms "ordinary people," people of "common intelligence,"[32] people of "ordinary intelligence,"[33] or "'the common world'"[34] are critical in this regard. They define what hurdle the law must satisfy to be sufficiently understandable to constitute a predicate for criminal liability and how we decide where that hurdle should be placed. The standard should focus the inquiry on how the average *lay person* would read a statute—*not* the average *expert*, whether that individual be a hydrologist, botanist, geologist, lawyer, or specialist in some other field. Why? The standard reflects both the moral judgment that the criminal law should not favor the illuminati and the empirical fact that few people qualify as members of the intelligentsia.

In the United States, a majority of the nation—"ordinary people" or people of "common intelligence"—have only a high school diploma, not the advanced, specialized education and training that the above experts possess.[35] Physicians and nurses know more about medicine than medics or EMTs, and textbooks are written with those different audiences in mind. Statutes, however, must focus on the last two groups as well as people who don't even know basic first-aid. Otherwise, we have made it a crime not to have an MD, PhD, JD, or some other letters followed by a D after one's name.[36] Demographics therefore matter when deciding whether a law is sufficiently clear that it may be enforced through a criminal prosecution.

The Fatal Indeterminacy of the Meaning of "Waters of the United States"

Recognizing that the term "waters of the United States" needed to be clarified, the EPA and Army Corps adopted the WOTUS Rule in 2015 in the stated hope of "providing simpler, clearer, and more consistent approaches for identifying the geographic scope of the CWA."[37] Relying on the "significant nexus" test that Justice Kennedy proposed in his separate opinion in *Rapanos*,[38] the agencies concluded that the CWA embraced any body of water, regardless of its usefulness for navigation, that could "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[39] EPA and the Army Corps concluded that "[t]his final rule interprets the CWA to cover those waters that require protection in order to restore and maintain the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, and the territorial seas."[40]

Despite the fact that the text of the CWA is limited to "navigable waters," throughout their WOTUS Rule, the agencies focused on the possibility of pollution rather than the actuality of navigability. That mistaken emphasis

is fatal if the question is whether individuals of "common intelligence" can understand the law and science and apply the rule to whatever body of water or parcel of land is in front of them. The WOTUS Rule is therefore unconstitutionally vague.

First, it is highly dubious that an agency, through rulemaking, can cure an unconstitutionally vague statute.[41] In *Whitman v. American Trucking Association*, the Supreme Court held that for delegation purposes, an agency cannot by rule "cure an unconstitutionally standardless delegation of power by declining to exercise some of" it.[42] In *United States v. Davis*, the Court emphasized that from "the twin constitutional pillars of due process and separation of powers," it follows that "[o]nly the people's representatives in Congress have the power to write new federal criminal laws."[43] Accordingly, the burden of providing clarity falls to Congress: "*it* has to write statutes that give ordinary people fair warning about what the law demands of them."[44] *American Trucking* and *Davis* could and should bar Congress from punting to an agency the task of curing a vague criminal law.[45] The Supreme Court should leave to Congress the responsibility to correct its own mistakes.[46]

Second, in any event, the EPA–Army Corps Rule further complicates the already vague meaning of "waters of the United States."

The EPA and Army Corps acknowledged that under *Rapanos*, almost any body of water and any parcel of land could qualify as a "water of the United States" if it is wet at some time.[47] To clarify that term while protecting against pollution, the agencies relied on "the best available peer-reviewed science" to define its breadth, despite the difficulty that even scientific experts might have deciding, for example, what is a "wetland."[48] The agencies listed certain conclusions that "play[ed] a critical role in informing" their interpretation of the CWA:

> Waters are connected in myriad ways, including physical connections and the hydrologic cycle; however, connections occur on a continuum or gradient from highly connected to highly isolated.
>
> These variations in the degree of connectivity are a critical consideration in assessing the ecological integrity and sustainability of downstream waters.
>
> The critical contribution of upstream waters to the chemical, physical, and biological integrity of downstream waters results from the accumulative contribution of similar waters in the same watershed and in the context of their functions considered over time.[49]

The agencies then offered a lengthy discussion of the "substantial nexus" test. They explained at length why various water bodies—tributaries, streams, "adjacent" waters, waters within the once-in-a-century floodplain of a navigable water, and so forth—were "navigable waters." Some characteristics of water—or land, like "wetlands," which are flooded plains—make them "navigable waters" as a matter of law, while others might be so classified based on a host of different factors in each case.[50] In addition, interruptions caused by natural or man-made breaks[51] do not necessarily exempt a water or land body from the WOTUS Rule.[52] Also, no one location can be examined in isolation. An entire watershed must be considered because, regardless of one location's size, each river or stream can affect every other one in a watershed.[53] Finally, because the boundaries of a watershed can vary from year to year, the agencies' finding that a particular body of water or parcel of land is covered or not by the CWA also can change over time.[54] Ordinarily, a private party is entitled to rely on regulations as a basis for learning what the government deems lawful versus illegal conduct and cannot be prosecuted for past actions if the government later changes its mind. The Fifth Amendment Due Process Clause guarantees a right to such reliance,[55] and the EPA and Army Corps apparently decided to exempt themselves from that demand.

The uncertainty built into the WOTUS Rule, along with the agencies' explanation with respect to why they adopted that rule and what it means, is enough to make the average person throw up his hands at the impossibility of ever understanding what it means. (Perhaps that was part of the reason why the agencies wrote that rule and its justifications.) But there is more.

To complicate the matter further, the Army Corps has a *Wetlands Delineation Manual*, containing "over 100 pages of technical guidance for Corps' officers."[56] Not to be outdone, to assist in the 2015 rulemaking, EPA published its own report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*,[57] a document of more than 400 pages prepared by "27 technical experts in an array of relevant fields, including hydrology, wetland and stream ecology, biology, geomorphology, biogeochemistry, and freshwater science," that analyzed "more than 1,200 peer-reviewed publications" and "[o]ver 133,000 public comments."[58] That's a lot of material not found in the text of the statute that someone must find, read, digest, understand, and apply correctly to avoid being charged with a crime.

Are we done yet? No. There's more.

In a manner akin to shooting the survivors—that is, to confuse anyone who is able to understand what all of the above means and how to apply

it—the government has further obfuscated the definition of "waters of the United States" in the manner by which it has applied its "significant nexus" test. The agencies "utilize many tools and many sources of information to help make jurisdictional determinations," such as "U.S. Geological Survey (USGS) and state and local topographic maps, aerial photography, soil surveys, watershed studies, scientific literature and references, and field work."[59] The agencies did not explain what percentage of the public has that evidence available to it—that material is not exactly what anyone would find on the average sports page—or, even if it were readily available, how many average people can understand what it means. But no matter. The government is unwilling to be forthright about the matter (perhaps because of the consequences of any such admission), but it clearly believes that only experts can find that material and discern its meaning and significance.

How is that? When someone winds up in court charged with a crime, the Department of Justice relies heavily on the opinions of subject-matter experts. They testify about a host of different considerations, such as the physical, hydrological, and chemical analyses of upstream and downstream water bodies; the role that a particular area might play in filtering pollutants or providing a hospitable ecosystem for plants, fish, and invertebrates; nearby natural botanical features; and any disturbances in the terrain, such as a "ditch."[60] At one time, the government even relied on the transient presence of migratory birds as a qualifying factor, at least until the Supreme Court held that factor insufficient.[61] It is no overstatement to say that, given the government's interpretation of the CWA, federal criminal prosecutions have more closely resembled postgraduate environmental science conferences than what the public expects to see in an ordinary criminal case.[62] In short, the agencies failed miserably at their attempt to clarify "waters of the United States" for the average person.

Even academics have difficulty applying that term. One has noted that "[s]ome common wetland types in North America include" the following: "salt marsh, freshwater marsh, tidal marsh, alkali marsh, fen, wet meadow, wet prairie, alkali meadow, shrub swamp, wooded swamp, bog, muskeg, wet tundra, pocosin, mire, pothole, playa, salina, salt flat, tidal flat, vernal pool, bottomland hardwood swamp, river bottom, lowland, mangrove forest, and floodplain swamp."[63] How many "ordinary people" could define what those terms mean? Consider "wetlands." Even if you limit that term to its "common conception" of swamps, marshes, bogs, and similar areas,[64] you are still left with the problem of identifying what particular water body or parcel of land is and is not a "wetland."[65] Consider how two other scholars have described that difficulty:

> Although water is present for at least part of the time, the depth and duration of flooding varies considerably from wetland to wetland and from year to year.
>
> Wetlands are often located at the margins between deep water and terrestrial uplands and are influenced by both systems.
>
> Wetland species (plants, animals, and microbes) range from those that have adapted to live in either wet or dry conditions (facultative), which makes difficult their use as wetland indicators, to those that adapted to only a wet environment (obligate).
>
> Wetlands vary widely in size, ranging from small prairie potholes of a few hectares in size to large expanses of wetlands several hundreds of square kilometers in area.
>
> Wetland location can vary greatly, from inland to coastal wetlands and from rural to urban regions.
>
> Wetland condition, or the degree to which a wetland has been modified by humans, varies greatly from region to region and from wetland to wetland.[66]

As one scholar concluded: "You could not take this [1977] definition out to the field and use it with any confidence to identify the dividing line between a wetland and an adjacent upland."[67] "Memorizing the definition of a 'wetland' might earn you an 'A' on an exam in school, but that is worth little to someone who can't use the definition to identify a 'wetland' in a real-life field."[68]

Judges have noticed that problem too. Judge Jane Kelly of the U.S. Court of Appeals for the Eighth Circuit has written that "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."[69] Justice Samuel Alito also has recognized that "[t]he reach of the Clean Water Act is notoriously unclear."[70]

If judges cannot determine how far "waters of the United States" reaches, what chance does a person of "ordinary intelligence" have? As I have written elsewhere:

> Put yourself in the shoes of a member of the public. Assume that he read the *Federal Register*, understood what its terms meant because he was a hydrologist, and knew the law because he was also an attorney. Even then, that person could not by sight alone determine whether a particular small body of water (to say nothing of dry land) is covered by the CWA—even though that is what the Void-for-Vagueness Doctrine demands. According to the agencies, a "significant

> nexus" exists whenever a body of water, including a wetland, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a navigable water. (Put aside the fact that the Rule tautologically requires that there be a "significant" effect for there to be a "significant" nexus.) No particular body of water can be examined on its own; each one must be considered "in combination with" every other "similarly situated" body of water (whatever that undefined term means) in the region (however broadly that term is construed). Plus, tools and evidence that the average person will not have at hand, and even the average expert might not possess, can be necessary to make the determination: Remote sensing mapping information, "USGS topographic data, the USGS National Hydrography Dataset (NHD), Natural Resources Conservation Service (NRCS) Soil Surveys, and State or local stream maps" (including "aerial photographs"); "light detection and ranging" (also known as LIDAR) data; and "desktop tools that provide for the hydrologic estimation of a discharge sufficient to create an ordinary high water mark, such as a regional regression analysis or hydrologic modeling." Agency personnel have access to them, along with "other methods for estimating ordinary high water mark, including, but not limited to, lake and stream gage data, flood predictions, historic records of water flow, and statistical evidence," and "a regional regression analysis and the Hydrologic Modeling System (HEC-HMS)," to make a "hydrologic estimation of stream discharge sufficient to create an ordinary high water mark in tributaries under regional conditions." The bottom line is a simple one: No one armed with either "common" or "uncommon intelligence" can know with any certainty whether the puddle or ditch in front of him is a "water of the United States" simply by looking at it.[71]

The result is this: The question is not whether the statutory term "waters of the United States" is unconstitutionally vague; it is. The question is: What should the Supreme Court do about that problem? If you're scared by the prospect that everyone will land in the hoosegow for making a reasonable mistake about the application of the CWA, fear not. It turns out that hope doesn't just spring eternal;[72] it's at hand. There are some options short of holding the entire CWA unconstitutional.

Available Remedies for the CWA's Unconstitutional Vagueness

The term "waters of the United States" is the linchpin for the entire CWA permitting scheme, so holding it unconstitutional would erase the entire act and force Congress to return to the drawing board. Were the Supreme

Court to do so, some would rejoice, saying that the Supreme Court has saved thousands from an unjustified criminal prosecution, while others would go positively nuclear, claiming that the Court had stopped the government from preventing unscrupulous, rich, profit-seeking companies from poisoning our water supply in order to avoid paying a few shekels to comply with an eminently sensible and critically necessary public health law. The Supreme Court might not pay attention to the election returns, but it also might be unwilling to get that far out in front of media that have already condemned six of them for, as the media see it, selling women into slavery by overturning *Roe v. Wade*.

Fortunately, there are three remedies that do not require such a bold step. Each one would solve the vagueness problem without condemning the entire statute.[73]

Remedy 1: Prohibit only criminal CWA prosecutions. The first remedy would be to bar only criminal prosecutions under the CWA until Congress deals with the vagueness in the term "waters of the United States."[74] That remedy would eliminate the void-for-vagueness objection to the statute while allowing the government (and private parties) to pursue administrative and civil remedies for unlawful actions. That option also places the responsibility for lawmaking where it belongs: in Congress's hands, not because Congress is any good at it (I'm not Pollyannish), but because agencies and courts have no constitutional warrant for deciding what conduct should be made a crime. As I have explained elsewhere:

> There is more going on here than Congress's decision to pass an indecipherable statute (along with its subsequent refusal to shoulder the burden of clarifying it) and the Executive's attempt to use it to reach "270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States." For the last 50 years, we have become accustomed to reflexively using the criminal law as our go-to regulatory device without stopping to ask whether it should be used to tamp down every type of conduct we dislike. As the result, we have created a forest of criminal laws when only a copse might be necessary, making it impossible for anyone to know everything that is forbidden. We also have forgotten to consider the potential limits that the Constitution imposes on using criminal law as a fire extinguisher. Could Congress require every interstate traveler to know how to perform CPR or to carry aspirin in case a fellow traveler has a heart attack? Perhaps, though it would take some explaining. Could Congress require everyone to know how to perform a tracheostomy or to, better yet, remember the contents of a medical school pharmacology text? No, not unless Congress can make it a crime to flunk

> organic chemistry. Granted, the USACE *Wetlands Delineation Manual* contains only 100-plus pages, while medical school pharmacology textbooks are ten times as long, so committing the former to heart is not as big a lift as memorizing the latter. But there is a limit on what a legislature can demand that an average person know, or else the notice requirement enforced by the Void-for-Vagueness Doctrine is not even worth the label of a legal fiction. And if that is true, then the Supreme Court owes it to the public to admit as much, or else it is just as guilty as Congress and the Executive Branch for the lie that the criminal law is not Shirley Jackson's lottery.[75]

Remedy 2: Construe the CWA to be limited to certain waterborne conveyances. A second remedy would be to construe that act so that it applies only to those bodies of water that a reasonable person would know allow conveyances such as a canoe or raft to go from one state to another.[76] The Void-for-Vagueness Doctrine is focused on the need for Congress to be precise, or at least to enact reasonably understandable legislation, when it desires to use the criminal law as an enforcement mechanism. That could be done here. In 1787, transportation by water was common because there were few roads and existing ones made difficult the carriage of heavy, bulky items.[77] That is what the Framers had in mind when they passed the Commerce Clause to protect navigation by water.[78] That understanding of the Commerce Clause also provides a test that the average person could apply when looking at a particular body of water or parcel of land.[79]

Remedy #3: Recognize a Mistake of Law Defense. The third remedy would be to recognize a Mistake of Law Defense.[80] Such a defense would exculpate anyone who reasonably believed that he had complied with the law. A Mistake of Law Defense allows for criminal enforcement of the CWA, and it does not require the Supreme Court to reinterpret the act. It also is not a "Get Out of Jail Free" card. As a practical matter, in many, if not most, cases it would force a defendant to take the stand to deny any knowledge of illegality. That outcome not only allows the prosecution to cross-examine the accused about what he knew,[81] but also has the practical effect of reducing the government's burden of proof from the beyond-a-reasonable-doubt standard to merely the preponderance standard. Why? Because, as a practical matter, once a defendant takes the stand, the jury will convict or acquit him based on its conclusion whether he lied, a conclusion that the jury makes under the preponderance standard, not beyond a reasonable doubt.[82] In any event, a Mistake of Law Defense would greatly reduce the risk of convicting a morally innocent party. That is a grave risk in CWA prosecutions today, and the perfect should not be the enemy of the good.

To be sure, historically, the Supreme Court has repeatedly endorsed the inverse common law maxim that ignorance of the law is no excuse.[83] But the Court's decisions have merely repeated in dicta what former Justice Stephen Breyer once described as a "legal cliché."[84] The Court has never undertaken the responsibility of asking whether, as Justice Oliver Wendell Holmes would have put it, it makes sense reflexively to apply that cliché given the massive size of our federal criminal code and breathtakingly wide and heterogeneous community values.[85] It is time for the Supreme Court to consider whether its oft-repeated dicta still make sense. The *Sackett* case might force the Court's hand.[86]

Conclusion

The apparent simplicity of the term "waters of the United States" likely beguiled Congress into believing that no further elaboration of its reach was necessary either because the average person could readily understand its meaning or because the EPA and Army Corps could flesh out its content. If so, that assumption was grossly mistaken. The term "waters of the United States" cries out for a limiting construction that "ordinary people" can understand. Agency officials, federal judges, lawyers, private scientific and technical experts, and average, everyday people acting in good faith could readily differ over how to apply that term to the various bodies of water and parcels of land that the EPA and Army Corps claim are covered by the CWA. No one—particularly no one lacking education and training in a relevant legal or scientific field—should be at risk of criminal prosecution for mistakenly deciding that a particular geographic site meets the agencies' possibly ever-changing definition.

The Supreme Court has several options regarding how to ensure that the average person does not wind up imprisoned for making a reasonable mistake. The Court should endorse one of them in the *Sackett* case.

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Endnotes

1. 33 U.S.C. § 1251(a) (2018).
2. 33 U.S.C. §§ 1311(a), 1344(a); U.S. Army Corps of Engineers v. Hawkes Co., 578 U.S. 590, 594 (2016). The National Pollutant Discharge Elimination System (NPDES) program authorizes the EPA or an approved state agency to issue a pollution-discharge permit. 33 U.S.C. §§ 1342(a)(1), (b). PDES permits address point-source discharges (e.g., pipes) by defining permissible rates, concentrations, and quantities of specified pollutants, as well as other appropriate limitations and conditions. 33 U.S.C. § 1342(a)(1)–(2); 40 C.F.R. §§ 122, 125 (2016).
3. 33 U.S.C. § 1362(7).
4. 33 U.S.C. §§ 1319(b), 1319(c), 1319(g).
5. A related question is whether the courts should defer to a government agency's interpretation of a statute with criminal applications. In a line of cases beginning with *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court has held that an agency's construction is entitled to considerable deference if the court cannot itself decide what the statute means. The *Chevron* Doctrine has been the subject of considerable debate within the academy with numerous commentators arguing that *Chevron* was wrongly decided and should be overturned. *See*, *e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2016); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 Admin. L. Rev. 197, 206 (1991). More important, several Supreme Court justices appear to hold the same view or are willing to reconsider the legitimacy of the *Chevron* Doctrine. *See*, *e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring in part); *id.* at 2432–41 (Gorsuch, J., joined by Thomas, Kavanaugh & Alito, JJ., concurring in the judgment); *id.* at 2448–49 (Kavanaugh, J., joined by Alito, J., concurring in the judgment); Michigan v. EPA, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring). That issue is beyond the scope of this *Legal Memorandum*, but I have previously argued that an agency's interpretation of a statute or one of its own rules should be subject to de novo review in the courts. The courts should afford an agency's interpretation the same respect that a court would afford the views of a scholar such as John Henry Wigmore or Arthur Corbin, but a court must nevertheless independently decide whether an agency's interpretation is the correct one. *See* Paul J. Larkin, Jr., *Agency Deference After* Kisor v. Wilkie, 18 Geo. J.L. & Pub. Pol'y 105 (2020). I have also maintained that in any event, an agency's interpretation of a criminal statute—like the CWA—is entitled to no deference whatsoever in any circumstance. *See id.* at 131–40; Paul J. Larkin, Jr., Chevron *and Federal Criminal Law*, 32 J.L. & Pol. 211 (2017). In fact, the Supreme Court has already adopted that rule, albeit without expressly kicking *Chevron* to the curb by name. *See* Abramski v. United States, 573 U.S. 169, 191 (2014); United States v. Apel, 571 U.S. 359, 368–69 (2014); Crandon v. United States, 494 U.S. 152, 168–84 (1990) (Scalia, J., concurring in the judgment); *see also* Whitman v. United States, 574 U.S. 1003, 1003 (2014) (Statement of Scalia, J., joined by Thomas, J., respecting the denial of certiorari).
6. For a sample of such prosecutions, see United States v. Caldwell, 626 F. App'x 683 (9th Cir. 2015); United States v. Wilmoth, 476 F. App'x 448 (11th Cir. 2012); United States v. Long, 450 F. App'x 457 (6th Cir. 2011); United States v. Panyard, 403 F. App'x 17 (6th Cir. 2010); United States v. Agosto-Vega, 617 F.3d 541 (1st Cir. 2010); United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999); United States v. Patrick, No. 16-CR-20390, 2016 WL 6610983 (E.D. Mich. Nov. 9, 2016); United States v. Giles, No. 3:16-CR-0004-GFVT-REW, 2016 WL 5867421 (E.D. Ky. Oct. 6, 2016); United States v. Kaluza, No. CR 12-265, 2016 WL 740328 (E.D. La. Feb. 24, 2016); United States v. Hubenka, No. 10-CV-93-J, 2014 WL 12634287 (D. Wyo. Oct. 22, 2014); United States v. Acquest Dev., LLC, 932 F. Supp. 2d 453 (W.D.N.Y. 2013).
7. *See* United States v. Wiltberger, 18 U.S. 76, 95 (1820) (Marshall, C.J.) (articulating the common-law "Rule of Lenity").
8. *See*, *e.g.*, Shular v. United States, 140 S. Ct. 779, 787 (2020); Ocasio v. United States, 578 U.S. 282, 295 n.8 (2016).
9. *See* Clark v. Martinez, 543 U.S. 371, 380 (2005); Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); United States v. Thompson/Center Arms Co., 504 U.S. 505, 517–18 (1992) (plurality opinion) (applying the rule of lenity to a tax statute litigated in a civil setting because the act had criminal applications); *id.* at 519 (Scalia, J., concurring in the judgment).
10. Paul J. Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 Geo. J.L. & Pub. Pol'y 639, 642 (2022) [hereafter, Larkin, *CWA and Vagueness*].
11. *Clark*, 543 U.S. at 380.
12. Bittner v. United States, No. 21-1195, slip op. 16 (U.S. Feb. 28, 2023) (Gorsuch, J., joined by Jackson, J.).
13. 547 U.S. 715 (2006).
14. *Id.* at 730–39 (plurality opinion).
15. *Id.* at 739–42.
16. *Id.* at 779–80 (Kennedy, J., concurring in the judgment) ("[J]urisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense…[which] must be assessed in terms of the statute's goals and purposes. … [W] etlands possess the requisite nexus…if [they] either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'") (citations omitted; emphasis added).

17. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), and Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
18. *Rapanos*, 547 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").
19. Early in the plurality opinion in *Rapanos*, Justice Scalia adverted to the fact that the Clean Water Act "imposes criminal liability, as well as steep civil fines, on a broad range of ordinary industrial and commercial activities." *Rapanos*, 547 U.S. at 721 (plurality opinion) (punctuation omitted). But that comment appeared in the context of a discussion of the cost of obtaining a permit. He did not refer to the possibility of a criminal prosecution or the Rule of Consistency when discussing how the CWA should be read. *Id.* at 730–57 (plurality opinion). Justice Kennedy did not address either subject. *Id.* at 759–87 (Kennedy, J., concurring in the judgment).
20. The confusion regarding the meaning of "waters of the United States" has remained to this day. Lower courts cannot rewrite Supreme Court opinions, and since *Rapanos*, the federal circuit courts of appeals have expressed bewilderment (and exasperation) over the task of construing that decision. They have decided that the CWA reaches any body of water satisfying either the plurality's or Kennedy's test. Those courts, however, have also failed to construe the CWA with an eye to criminal prosecution. *See*, *e.g.*, United States v. Donovan, 661 F.3d 174, 180–84 (3d Cir. 2011); United States v. Bailey, 571 F.3d 791, 798–99 (8th Cir. 2009); United States v. Robison, 505 F.3d 1208, 1221–22 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999 (9th Cir. 2007); United States v. Johnson, 467 F.3d 56, 64–66 (1st Cir. 2006); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006).
21. Sackett v. EPA, No. 21-454, 2022 WL 199378 (Jan. 24, 2022) (*Sackett II*) ("[The] petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit [is] granted limited to the following question: Whether the Ninth Circuit set forth the proper test for determining whether wetlands are 'waters of the United States' under the Clean Water Act, 33 U. S. C. § 1362(7)."). The *Sackett* case was previously before the Court a decade ago. *See* Sackett v. EPA, 566 U.S. 120 (2012) (*Sackett I*) (holding that the Sacketts' claim was judicially reviewable).
22. *See*, *e.g.*, BedRoc Ltd. LLC v. United States, 541 U.S. 176, 183 (2004) (noting that because "the preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there…our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (citation and punctuation omitted); *see also*, *e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 60 (1988) ("Statutes are not exercises in private language. They should be read, like a contractual offer, to find their reasonable import. They are public documents, negotiated and approved by many parties in addition to those who write the legislative history and speak on the floor. The words of the statute, and not the intent of the drafters, are the 'law.'").
23. *See*, *e.g.*, Esquivel-Quintana v. Sessions, 581 U.S. 385, 391–92 (2017) ("The everyday understanding of the term used in § 1101 should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant.") (citation and punctuation omitted).
24. *See*, *e.g.*, Utility Air Reg'y Group v. EPA, 570 U.S. 302 (2014); King v. Burwell, 576 U.S. 473, 484–86 (2015); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Ludwig Wittgenstein, Philosophical Investigations §§ 65–71 (4th ed. G.E.M. Anscombe transl. 1998) (1953) (explaining the difficulty of nailing down the term "game" once we move beyond its core understanding to the periphery of possible additional interpretations).
25. Which the federal government has done often recently. *See*, *e.g.*, West Va. v. EPA, 142 S. Ct. 2587 (2022); Nat'l Ass'n of Indep. Business v. OSHA, 142 S. Ct. 661 (2022); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021).
26. U.S. Const. amends. V & XIV.
27. United States v. Davis, 139 S. Ct. 2319, 2323 (2019).
28. *Id.*
29. *See* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 Liberty U. L. Rev. 335, 343–45 & n.35 (2018) (collecting cases) [hereafter, Larkin, *Folly*].
30. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).
31. *Id.* at 393; *see also*, *e.g.*, *Davis*, 139 S. Ct. at 2325.
32. *Connally*, 269 U.S. at 391.
33. Harriss v. United States, 347 U.S. 612, 617 (1954).
34. Bittner v. United States, No. 21-1195, slip op. 15 (U.S. Feb. 28, 2023) (Gorsuch, J., joined by Jackson, J.) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.).
35. Census Bureau statistics reveal that in the United States, the average person has only a high school diploma—*not* a college degree, let alone a professional degree in law or a graduate degree in science. Only 17 percent of U.S. residents hold a bachelor's degree (56 million out of 331 million people) and only 10 percent hold an advanced degree (32 million). U.S. Census Bureau, Educational Attainment in the United States: 2020 (Oct. 8, 2021), https://www.census.gov/data/tables/2020/demo/educational-attainment/cps-detailed-tables.html [https://perma.cc/RN89-677V]. (The above numbers are approximations.) The American Bar Association reports that practicing attorneys (roughly 1.3 million lawyers) account for less than 0.3 percent of the population. *See* Am. Bar Ass'n, Profile of the Legal Profession 22 (July 2022); Am. Bar Ass'n, Profile of the Legal Profession 10 (July 2021).

36. "Who is the typical person of 'ordinary intelligence'? Like the 'reasonable person' used in tort law when defining negligence, a 'person of ordinary intelligence' is a legal construct, an ideal, not a particular individual. The Supreme Court has not defined the criteria that a court must use to identify that individual for vagueness purposes, but we can safely assume that, for the construct to make sense, it must correspond to reality. Just as someone need not be an Olympic athlete to be physically fit, a person need not be a Nobel laureate to possess 'ordinary intelligence.' That would set the bar so high that the extraordinary would become the ordinary. Language does not equate the two, so neither should the law. [¶] If that is true, actual population demographics matter." Larkin, *Folly*, *supra* note 29, at 344.
37. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,057 (June 29, 2015). The 2015 rule replaced a far shorter and simpler 1977 rule. *See* 33 C.F.R. § 323.2(c) (1978) ("The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."). The Trump Administration proposed a different interpretation of "waters of the United States." *See* 84 Fed. Reg. 56,625 (Oct. 22, 2019); 85 Fed. Reg. 22,250 (Apr. 21, 2020). On January 20, 2021, President Joe Biden ordered all federal agencies to reconsider federal regulations and other actions adopted during the Trump Administration. Exec. Order 13990 on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021), 86 Fed. Reg. 7037 (Jan. 25, 2021). On June 9, 2021, the EPA and Army Corps decided to revise or replace the Trump Administration rule. The agencies published a new final rule six months later. 88 Fed. Reg. 3004 (Jan. 18, 2023). The new rule does not render moot the *Sackett II* case because the case involves an interpretation of the reach of the CWA, not the earlier versions of the rule or the agencies' interpretation of them.
38. 80 Fed. Reg. at 37,060 ("The key to the agencies' interpretation of the CWA is the significant nexus standard, as established and refined in Supreme Court opinions: Waters are 'waters of the United States' if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas."); *see also*, *e.g.*, *id.* at 37,056, 37,0599, 37,061.
39. "Peer-reviewed science and practical experience demonstrate that upstream waters, including headwaters and wetlands, significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in controlling sediment, filtering pollutants, reducing flooding, providing habitat for fish and other aquatic wildlife, and many other vital chemical, physical, and biological processes." 80 Fed. Reg at 37,055–37,056.
40. *Id.* at 37,055.
41. In 1911, the Supreme Court held in *United States v. Grimaud*, 220 U.S. 506 (1911), that it does not violate the so-called Delegation Doctrine for Congress to authorize an agency to promulgate regulations whose violation can be punished as crimes. But the question whether Congress may conscript an agency to fill out a criminal statute is materially different from the question whether the average person can understand what those implementing rules demand. The *Grimaud* case is therefore inapposite.
42. 531 U.S. 457, 473 (2001).
43. 139 S. Ct. 2319, 2323, 2325 (2019).
44. *Id.* (emphasis added).
45. Permitting an agency to remedy Congress's mistakes also raises a host of follow-up questions. Among them are the following: Why is it reasonable to demand that the average person learn the Code of Federal Regulations and stay abreast of it as it expands in size? Is an agency's interpretation of its own rules entitled to any weight? What significance, if any, should be given to the fact that many agency rule interpretations are not publicly available? Why should an unelected government body be presumed to be able to decide what conduct the community deems immoral, a judgment that we normally leave to communities themselves? How could a private party—a person of "common intelligence"—possibly know all of the law and science that the rule demands and be able to apply it in the field? Larkin, *CWA and Vagueness*, *supra* note 10, at 652–654. Finally, it is no answer that the definition of "waters of the United States" is a scientific or technical issue best addressed by experts. The agencies admitted in their *Federal Register* notice that they did not make such judgment: "*Significant nexus is not a purely scientific determination*" because "science does not provide bright line boundaries with respect to where 'water ends' for purposes of the CWA." 80 Fed. Reg. at 37,060 (emphasis added).
46. Larkin, *CWA and Vagueness*, *supra* note 10, at 656 (emphasis in original; footnotes omitted): "The bottom line is this: Allowing an agency to make up for the shortcoming in a vague statute is a treacherous endeavor. There is no logical reason to stop at regulations issued pursuant to the Administrative Procedure Act's notice-and-comment rulemaking process. Agencies use numerous other documents to interpret—and, if courts give an agency's opinion deference, also *make*—the law. To be sure, the Supreme Court by fiat could slice off the latter like so much baloney, but doing so would be an exercise in legislative line-drawing instead of judicial decision-making. Doing so also would confuse scientific prowess with moral discernment. So, if a road takes you where you don't want to go, perhaps you shouldn't start down the path that leads you there. The Court could, and should, leave to Congress the task of fixing a vague criminal law."
47. 80 Fed. Reg. at 37,056 ("As a result of the ambiguity that exists under current regulations and practice following these recent decisions, almost all waters and wetlands across the country theoretically could be subject to a case-specific jurisdictional determination."); *see id.* at 37,055–37,127.
48. *Id.* at 37,057; *id.* at 37,061 ("While a significant nexus determination is primarily weighted in the scientific evidence and criteria, the agencies also consider the statutory language, the statute's goals, objectives and policies, the case law, and the agencies' technical expertise and experience when interpreting the terms of the CWA."); *id.* at 37,060.

49. *Id.* at 37,057. The agencies added that additional scientific reports confirmed those points, *id.*: "Tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream waters, and influence the integrity of downstream waters. [¶] Wetlands and open waters in floodplains and riparian areas are chemically, physically, and biologically connected with downstream waters and influence the ecological integrity of such waters. [¶] Non-floodplain wetlands and open waters provide many functions that benefit downstream water quality and ecological integrity, but their effects on downstream waters are difficult to assess based solely on the available science."

50. 80 Fed. Reg. at 37,058–67. Among those factors are "sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering, and transport; retention and attenuation of floodwaters; runoff storage; contribution of flow; export of organic matter; export of food resources; and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area)"—essentially the entire cycle of life—for "species located in traditional navigable waters, interstate waters, or the territorial seas." *Id.* at 37,067; *see id.* at 37,067–68. As I have explained before: "That rule defined some bodies or parcels as 'waters of the United States' as a matter of law. They are (1) all waters that 'are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce'; (2) all interstate waters, including interstate wetlands; (3) the territorial seas; (4) all 'impoundments of waters' (i.e., waters created by dams that otherwise constitute 'waters of the United States'); (5) all tributaries of 'waters of the United States'; and (6) all waters 'adjacent to' any of the above waters. But there is more. Other waters can constitute the 'waters of the United States' if they are one of five types of water bodies: Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands—and, on 'a case-specific basis,' the agencies find them to have 'a significant nexus to' one of those categories. [¶] Again, what average person can either define what those terms mean, let alone apply them in the field? Yet, that is where the rubber meets the road for vagueness purposes." Larkin, *CWA and Vagueness*, *supra* note 10, at 658–59 (footnotes omitted).

51. Natural breaks would include "debris piles, boulder fields, or a stream that flows underground so long as a bed and banks and an ordinary high water mark can be identified upstream of the break." *Id.* at 37,078. Man-made breaks would include "bridges, culverts, pipes, dams, or waste treatment systems." *Id.* A man-made ditch with an "ephemeral flow" can still qualify under the rule if the waters above and below it do. *Id.*

52. *Id.*

53. *Id.* at 37,063–64 ("The incremental effects of individual streams and wetlands are cumulative across entire watersheds, and therefore, must be evaluated in context with other streams and wetlands. Downstream waters are the time-integrated result of all waters contributing to them.").

54. *Id.* at 37,063 ("Connectivity of streams and wetlands to downstream waters occurs along a gradient that can be described in terms of the frequency, duration, magnitude, timing, and rate of change of water, material, and biotic fluxes to downstream waters. These terms, which we refer to collectively as connectivity descriptors, characterize the range over which streams and wetlands vary and shift along the connectivity gradient in response to changes in natural and anthropogenic factors and, when considered in a watershed context, can be used to predict probable effects of different degrees of connectivity over time.").

55. *See* United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674 (1973) ("[T]o the extent that the regulations deprived [Pennsylvania Industrial Chemical Corp.] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.") (citations omitted); *see also, e.g.*, Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 Cath. U. L. Rev. 293, 309–10 (2016).

56. Rapanos v. United States, 547 U.S. 715, 761 (2006) (Kennedy, J., concurring in the judgment).

57. Office of Research & Dev., Nat'l Ctr. for Env't Assessment, U.S. Env't Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence: Final Report EPA/600/R–14/ 475F (2-15).

58. 80 Fed. Reg. at 37,057, 37,062.

59. *Id.* at 37,065; *id.* ("For example, USGS and state and local stream maps and datasets, aerial photography, gage data, watershed assessments, monitoring data, and field observations are often used to help assess the contributions of flow of tributary streams, including intermittent and ephemeral streams, to downstream traditional navigable waters, interstate waters or the territorial seas. Similarly, floodplain and topographic maps of federal, state and local agencies, modeling tools, and field observations can be used to assess how wetlands are trapping floodwaters that might otherwise affect downstream waters. Further, the agencies utilize the large body of scientific literature regarding the functions of tributaries, including tributaries with ephemeral, intermittent and perennial flow and of wetlands and open waters to inform their evaluations of significant nexus. In addition, the agencies have experience and expertise for decades prior to and since the *SWANCC* and *Rapanos* decisions with making jurisdictional determinations, and consider hydrology, ordinary high water mark, biota, and other technical factors in implementing Clean Water Act programs. This immersion in the science along with the practical expertise developed through case-specific determinations across the country and in diverse settings is reflected in the agencies' conclusions with respect to waters that have a significant nexus, as well as where the agencies have drawn boundaries demarking where 'waters of the United States' end.").

60. *See, e.g.*, United States v. Donovan, 661 F.3d 174, 177 (3d Cir. 2011) ("The Government submitted two expert reports based on extensive analysis and testing of Donovan's property between June 2009 and November 2009. Launay used a variety of methods to map stream channels on and around Donovan's property and to demonstrate that they were perennial. The Stroud scientists examined the physical, chemical, and biological connections between the wetlands on Donovan's property and downstream waters of the Sawmill Branch. The Stroud scientists analyzed, *inter alia*, the wetlands' hydrological connections to downstream waters, the wetlands' potential for filtering pollutants, and the wetlands' role in the aquatic ecosystem for fish and invertebrates."); United States v. Bailey, 571 F.3d 791, 800–01 (8th Cir. 2009) ("To determine whether an area is dominated by hydrophytic vegetation, the Corps establishes at least one sample point within each plant community and surveys the herbaceous vegetation within a five-foot radius and the woody

vegetation within a thirty-foot radius. The Corps consults a list of plant species published by the United States Fish and Wildlife Service, which assigns an indicator status to individual plant species reflecting their probability of occurrence in wetlands. Hydrophytic vegetation is present if greater than fifty percent of the dominant plant species are obligate wetland plants, facultative wetland plants, or facultative plants (excluding facultative negative). [¶] To determine whether the land has wetland hydrology, the Corps requires either one primary indicator, such as direct observation of soil saturation within twelve inches of the surface, or two secondary indicators, such as the FAC-neutral test and local soil survey data. The FAC-neutral test uses vegetation as a secondary indicator of hydrology. If obligate wetland plants and facultative wetland plants outnumber facultative upland plants and obligate upland plants, then the sample meets the FAC-neutral test and tests positive as a secondary indicator of hydrology. The rationale is that obligate wetland plants and facultative wetland plants occur in wetlands 67 to 99 percent of the time. Facultative plants, which occur in both wetlands and nonwetlands, are considered neutral."); Northern Calif. River Watch v. City of Healdsburg, 496 F.3d 993, 1000 (9th Cir. 2007) ("The water from the Pond seeps into the river through both the surface wetlands and the underground aquifer. The district court's findings of fact regarding this hydrological connection support the conclusion that Basalt Pond has a significant effect on 'the chemical, physical, and biological integrity' of the Russian River.").

61. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
62. In 2020, the Trump Administration adopted a new WOTUS Rule. 85 Fed. Reg. 22,250 (Apr. 21, 2020). On his first day in office the following year, President Joe Biden ordered that rule withdrawn as part of an initiative commanding all agency heads to "immediately review all existing regulations, orders, guidance documents, policies and any other similar agency action" that had been "promulgated, issued, or adopted" since January 20, 2017. Exec. Order No. 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (Jan. 20, 2021), 86 Fed. Reg. 7037 (Jan. 25, 2021). Late in 2021, the Biden Administration issued a notice of proposed rulemaking to redefine the "waters of the United States." 86 Fed. Reg. 69,372 (Dec. 7, 2021).
63. Ralph W. Tiner, Wetland Indicators 1 (1999). For the agencies' definitions of some of those terms, see 80 Fed. Reg. 37,054, 37,071–73 (June 29, 2015).
64. *See* William M. Lewis, Jr., Wetlands Explained: Wetlands, Science, Policy, and Politics in America 3 (2001) ("[T]hose portions of a landscape that are not permanently inundated under deep water, but are still too wet most years to be used for the cultivation of upland crops such as corn or soybeans. Wetlands, in other words, coincide pretty well with the common conception of swamps, marshes, and bogs."). Here, too, the author discusses the simpler 1977 rule.
65. Royal C. Gardner, Lawyers, Swamps, and Money: U.S. Wetland Law, Policy, and Politics 36–37 (2011). Again, the author discusses the simpler 1977 rule.
66. William J. Mitsch & James G. Gosselink, Wetlands 31–32 (5th ed. 2015).
67. *Id.*
68. Larkin, *CWA and Vagueness*, *supra* note 10, at 658.
69. Hawkes Co. v. U.S. Army Corps of Engineers, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring), *aff'd*, 578 U.S. 590, 594 (2016).
70. *Sacket I*, 566 U.S. 120, 133 (2012): "Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the Agency thinks possesses the requisite wetness, the property owners are at the Agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a Nation that values due process, not to mention private property, such treatment is unthinkable."
71. Larkin, *CWA and Vagueness*, *supra* note 10, at 661–62 (footnotes omitted).
72. Alexander Pope, *An Essay on Man* (1733–1734) ("Hope springs eternal in the human breast; Man never Is, but always To be blest. The soul, uneasy, and confin'd from home, Rests and expatiates in a life to come.").
73. *See* Larkin, *CWA and Vagueness*, *supra* note 10, at 663–68.
74. *Id.* at 663–66.
75. *Id.* at 665–66 (footnotes omitted).
76. *Id.* at 666–67.
77. *See*, *e.g.*, Earl E. Brown, Commerce on Early American Waterways 7 (2010) ("Early colonists moving inland in the early 1700s had no highways, railroads or other means of conveyance to move their household goods and tools. The only mode of transportation to and from the frontier was by pack animals, or by using canoes on the rivers and creeks like we use highways today."); *id.* at 1, 3–4, 7–9, 33, App'x 193–217; Douglass C. North, The Economic Growth of the United States, 1790–1860, at 18 (1966); Larkin, *CWA and Vagueness*, *supra* note 10, at 666 & n.157.
78. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190–92, 193–94 (1824) (ruling that the Commerce Clause "comprehends navigation in the word commerce" and reaches "every species of commercial intercourse"); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 124 (2001) ("[I]f anyone in the Constitutional Convention or the state ratification conventions used the term 'commerce' to refer to something more comprehensive than 'trade' or 'exchange,' they either failed to make explicit that meaning or their comments were not recorded for posterity."); Larkin, *CWA and Vagueness*, *supra* note 10, at 666–67.

79. Larkin, *CWA and Vagueness*, *supra* note 10, at 667 ("If someone can use a canoe to go from one water body (*Water Body A*) to another (*Water Body B*) and the latter clearly is a 'water of the United States' (or a settlement or port en route), then the former also qualifies as one under the CWA, because the average person could readily understand it as a navigable water. Accordingly, what I will call the 'Canoe Rule' (since canoes were then and are still smaller than arks or similar boats) would be a two-fer: It would provide a useful go-by for an average person to identify a navigable water, while also respecting what the Framers understood to fall within federal regulatory authority.").
80. *Id*. at 668. I have often argued that a Mistake of Law Defense is necessary in the case of non–common law crimes, like CWA violations. *See*, *e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J.L. & Pub. Pol'y 715, 777–81 (2013); Paul J. Larkin Jr., *Taking Mistakes Seriously*, 28 BYU J. Pub. L. 71, 100–15 (2013) [hereafter Larkin, *Taking Mistakes Seriously*]; Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. Crim. L. & Criminology 725, 726–27, n.14 (2012).
81. Larkin, *Taking Mistakes Seriously*, supra note 80, at 109 ("As a practical matter, a defendant will need to testify at trial in order to persuade the jury that he did not know that his conduct was prohibited. A defendant could try to support that defense in other ways, but it would be difficult to make a convincing case that he lacked knowledge of the law without testifying to that fact. Once the defendant takes the stand, he is subject to cross-examination. The prosecution, therefore, will have ample opportunity to demonstrate that the defendant is a liar, and [the] jury will be able to decide whether the defendant is telling the truth by what he says and how he says it.") (footnotes omitted).
82. Paul J. Larkin, Ruan v. United States: *An Important Ruling or Merely "Sound and Fury"?*, 21 Geo. J.L. & Pub. Pol'y (forthcoming 2023) (manuscript 8–14) (SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187971) ("[W]hat is certain to happen if a physician-defendant—or any other defendant for that matter—testifies is this: as a practical matter, the prosecution's obligation to prove the defendant's guilt beyond a reasonable doubt goes out the window. Regardless of what they are told about the government's burden to establish the defendant's guilt beyond a reasonable doubt, the jury will decide whether the defendant is telling the truth by a preponderance of the evidence, and once the jury makes that decision, the verdict of 'Guilty' or 'Not guilty' follows ineluctably. Defendants don't like that phenomenon, but it is a fact of life in criminal cases, and it is not a constitutional defect in the trial process. Different rules govern the judge's decision whether to admit evidence and the jury's decision whether to convict. The upshot is this: A defendant has a right to testify or not at his trial, but if he does, the benefits of the reasonable doubt standard largely disappear.") (footnotes omitted).
83. *See* Larkin, *CWA and Vagueness*, *supra* note 10, at 652 n.82, and Meese & Larkin, *supra* note 80, at 727 n.14 (collecting cases).
84. Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009).
85. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").
86. *See supra* note 80.