



INTERNATIONAL CALLING CARD – THE QUESTION

What is the name of the person who carries the card pictured above, what office does he hold, and what committee does he serve on? The first ten people to give us the correct answers will receive a small gift from the *Green Bag*. Please go to www.greenbag.org, scroll to the bottom of the page, and click on “contact us” to reach our message page.

Need a clue? Visit www.uscourts.gov/judconf_jurisdictions.htm#ijr, and scroll down.

Look for the answers in the *Ex Ante* section of our next issue.

CLEAR SNOWFLAKES

Toby Dorsey works in the Office of the Legislative Counsel of the U.S. House of Representatives, where he sees many laws, and even more bills. Over the years, he has developed views on what a well-crafted bill looks like, and a complementary sense of the terrain that a law must traverse if it is to survive judicial review and interpretation in something close to the form intended by those who enacted it. Much of that thinking is now available in print in Dorsey’s *Legislative Drafter’s Deskbook*, from which the following is drawn:

§ 3.52 *When the Court Requires Clear Statements*

There are certain matters that the [Supreme] Court treats with great delicacy. When Congress legislates in a way that may encroach on those matters, the Court requires that Congress be extremely precise. It is not enough, in these cases, for Congress to be plain; Congress must be more than plain.

When constitutional or other sensitive matters are at stake, the Court generally presumes that Congress does not intend to disturb the status quo. To overcome that presumption, Congress must state precisely its intention to do so. This is known as a “clear statement” rule. *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 108-109 (1991).

Clear statement rules apply only when “weighty and constant” values are at stake. The purpose is to ensure that Congress “has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *United States v. Bass*, 404 U.S. 336, 349 (1971).

For example, a clear statement rule generally applies when a law would interfere in some way with state sovereignty, such as when it would abrogate the sovereign immunity of a state under the Eleventh Amendment (*Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985)), allow a state to be sued for damages (*Will v. Michigan*, 491 U.S. 58 (1989)), tell a state how to hire its judges (*Gregory v. Ashcroft*, 501 U.S. 452 (1991)), or impose a condition on the state’s receipt of a federal grant (*South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

Similarly, the Court expects that Congress does not intend to preempt state law; the Court will not interpret a law in a way that preempts state law unless Congress makes the intent to preempt “clear and manifest.” *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991). Likewise, when Congress does not intend to preempt state law and provides a clear statement to that effect, the Court will apply that statement.

Ex Ante

A clear statement rule also applies when a law would waive the sovereign immunity of the United States. *United States v. Mitchell*, 445 U.S. 535, 537 (1980).

A clear statement rule applies when Congress intends for a law to apply outside the United States (*EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)), to apply retroactively (*Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991)), or to apply without the possibility of judicial review or habeas review (*Demore v. Kim*, 538 U.S. 510 (2003)).

And a clear statement rule applies when a law that does not expressly apply to the President would, if applied to the President, pose a significant question regarding the President's constitutional functions. See *Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992) (Court would require an express statement by Congress before assuming presidential actions could be reviewed for abuse of discretion under the Administrative Procedure Act); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 fn 27 (1982) (Court would require an explicit statement by Congress before assuming President could be sued for damages).

Clear statement rules are like snowflakes – no two are exactly alike. One rule might require a “plain statement” of legislative intent; another might require that Congress make its intention “unmistakably clear in the language of the statute”; a third might require “express words to that effect.” The basic message is the same: If you want to achieve a particular result, use words that make it unmistakably clear.

Some clear statement rules are more important than others. As the Court has explained, some clear statement rules are ordinary rules of construction, not required by the Constitution, while others are rules derived from constitutional law. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 205-206 (1991). Allocating the various rules between these two categories is beyond the scope of this book.

● TOBIAS A. DORSEY, LEGISLATIVE DRAFTER'S DESKBOOK 91-92 (TheCapitol.Net 2006).