

ANSWERS TO QUESTIONS FROM SENATOR HEPLIN

1. Judge Kennedy, would you please elaborate on your views of the incorporation doctrine? Do you believe that the authors of the due process clause intended to apply the Bill of Rights against the states, as well as the Federal government? Do you accept the Supreme Court's rulings in this area as settled law?

In 1925, in Gitlow v. New York, 268 U.S. 652 (1925), the Supreme Court announced that it would assume that the First Amendment right of free speech was encompassed within the word "liberty" of the due process clause of the Fourteenth Amendment. The Supreme Court has since held that many of the provisions of the Bill of Rights apply to the states by incorporation through the Fourteenth Amendment. In so doing, the Court has been careful to reject the argument, made most notably by the late Justice Black, that the Bill of Rights is applicable in its entirety to the states. I have not formed any conclusive views on this point; and the question whether certain provisions should be applied to the states (the civil jury trial guarantee of the Seventh Amendment, for example) may still come before the Court. Accordingly, while the incorporation doctrine is a central tenet of constitutional law, its application in discrete instances is still open to explanation and refinement.

2. Judge Kennedy, as you know, Section 2 of Article III refers to the appellate jurisdiction of the United States Supreme Court, and has the exceptions and regulations clause contained therein. Would you set forth your views on whether Congress could strip the Supreme Court or the lower federal courts of jurisdiction pertaining to a particular subject matter such as school prayer?

The scope of congressional power under the exceptions and regulations clause has been a subject of debate since the inception of the federal judicial system under the Constitution. While the power conferred in Congress is undoubtedly significant, its limits must await a case by case determination.

As a general matter, it appears to me that there are serious questions whether Congress is authorized to constrain the jurisdiction of the Supreme Court to determine issues of federal law or constitutional rights. Under the tripartite scheme of government established by the Constitution, the Supreme Court is generally regarded as the ultimate arbiter of the meaning of federal law and rights conferred on individuals by the Constitution. There would be grave constitutional questions concerning whether the exceptions and regulations clause gives

Congress the power to divest the Supreme Court of jurisdiction to hear cases involving school prayer if the effect were to strip the Court of jurisdiction to determine rights under the First Amendment.

This is a distinct question from the power of Congress to alter the diversity jurisdiction of the federal courts. I have suggested that in order to reduce the heavy caseload of the federal courts, Congress may wish to consider excluding certain classes of diversity cases, such as auto accident cases.

Please refer also to my answers to Senator Simon's written questions on this point.