

were to review every case in which I was on the panel, I would confront thousands of opinions. I haven't even attempted to do that, and this decision by Judge Henderson is not now in the front of my mind. I will be glad to refresh my recollection and attempt to answer any questions you have about it. But when one is a concurring judge and doesn't do the actual writing, the—

Senator PRESSLER. OK, good. I will ask you about that in a future round of questions, because the small-business community feels that is an important case from their point of view, and there are two or three other questions about it which I will give to you in writing, and I will try to ask them in a later round.

Judge GINSBURG. Now that I have the case, I will certainly read it and refresh my recollection.

Senator PRESSLER. My time is up.

The CHAIRMAN. Thank you very much.

Now, Judge Ginsburg, one of the few things you have not done in your career is serve in an elected capacity. Now you know how we feel when we are debating in the middle of a campaign, after having cast literally 18,000 votes and a press person or an opponent says, "What did you mean when you cast the vote on S. 274 in 1968?" And so we can sympathize with your inability to remember every single solitary decision. I am amazed you remember as many as you do. If we remembered that many votes we had cast, we would all be better for it.

Judge GINSBURG. I recall that a lawyer once asked me, "But, Judge Ginsburg, in the such-and-such case in which you concurred, footnote 83"—and it really was footnote 83—"said * * *. Are you backing away from footnote 83?" At that moment I decided that I don't concur in footnotes, especially when they get up over 50. [Laughter.]

The CHAIRMAN. Believe me, I share your concern, your position.

Senator Feinstein, thank you for waiting.

Senator FEINSTEIN. Thank you, Mr. Chairman. You have now turned to the equal protection side of the table. We appreciate it very much.

The CHAIRMAN. I want to explain, by the way, for all who are watching, if the Senator will yield. The two women on the committee are sitting at the end of the platform. That is not because they are women; it is because they are the most junior members of the Senate on the Democratic side. And so I just want to—I was thinking about that today. As we are going through all this discussion of the equal protection clause and women's rights, as we should, I kept thinking, but they are probably home saying why don't they let the women ask any questions? It is purely because of seniority, a rule that when I arrived here as No. 100 in seniority I thought was horrible, and I now think has merit. [Laughter.]

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Judge Ginsburg, not only have I found you a scholar, but you have also got incredible stamina. And I might say that one of the special things for me today has been to sit here and watch you, because I am not a lawyer, reduce things to kind of their basic, simple element and explain them so that they were much more easily

understood. I think that is a very special teaching talent, and it is very clear to me that you have it.

I want to talk to you about four subjects, if I may today. They are guns, choice, capital punishment, and quotas. And I don't know whether I will end up just thrusting and you will parry, but I want to do it as someone whose experience is that of a former mayor of a big city and also as a grandmother. And I am hopeful that we might just have a conversation with a few people listening on the side.

Let me begin with the second amendment. I first became concerned about what the second amendment means with respect to guns in 1962 when President Kennedy was assassinated, and then with Martin Luther King and Bobby Kennedy. And then I watched the evolution of serial murders in this country and then the growth of assault weapons and their prevalence on our streets.

We said we shared the same age, and on my birthday a gunman walked into a swimming pool and shot at six youngsters. And then I went home on our break, and I went to one of San Francisco's premier office buildings, and someone had just walked in and wounded six, killed eight, and shot himself.

Then I picked up a newspaper where a 3-year-old had pulled a loaded assault weapon from under a bed and fired three bullets into his sister.

And so I went back to the second amendment, and I read it again, and it said, "A well-regulated Militia"—capital M—"being necessary to the security of a free State"—capital S—"the right of the people to keep and bear Arms"—capital A—"shall not be infringed."

And then I understand that in 1939 in a decision called *United States v. Miller*, the Supreme Court held that the obvious purpose of the second amendment is to protect the viability of the organized State militia. Since *Miller*, the lower Federal courts unanimously have held that the second amendment protects the people's right to keep and bear arms only in connection with service in the organized militia, today's National Guard.

Now, as a mayor, I tried to do something about it through the law, found that the State had preempted the area of licensing, registration, and when we tried possession, the Supreme Court of the State of California said the State also controls the area of possession. This very committee—Senator DeConcini, Senator Metzbaum—has legislation that aims to deal with assault weapons, and the chairman of this committee, very shortly, has consented to allow there to be a hearing, for which I am very grateful because several victims would like to testify.

And so I am somewhat puzzled, and let me ask this question: If the Federal courts, as I believe they have, have unanimously held that the second amendment protects the right of the people to keep and bear arms only in connection with service in the organized militia, today's National Guard, do you agree with this consensus judicial interpretation of the second amendment?

Judge GINSBURG. Senator Feinstein, I can say on the second amendment only what I said earlier. The Court has held that it is not incorporated in the 14th amendment; it does not apply to the States. What it means is a controversial question. The last time the

Supreme Court spoke to the issue was in 1939. You summarized that decision, and you also summarized the state of law in the lower courts. The matter may well be before the Court again. All I can do is to acknowledge what I understand to be the current case law, that the second amendment is not binding on the States. Given my current situation, it would be inappropriate for me to say anything more than that. I would have to consider, as I have said many times today, the specific case, the record, briefs, and arguments presented. It would be injudicious for me to say anything more than that with respect to the second amendment.

Senator FEINSTEIN. Thank you.

Mr. Chairman, my understanding is that a 15-minute rollcall vote has just been called.

The CHAIRMAN. Thank you. Yes, it has. I suggest maybe, Senator, you decide whether it is best to break now in your line of questioning or continue to the next line and then break when we receive the halfway—but it is up to you.

Senator FEINSTEIN. You are not going to recess so we are just going to keep going?

The CHAIRMAN. No. I will recess because there are few of us here now, and I will recess so we can all go and come back, because I am anxious to hear what you have to ask as well.

Senator FEINSTEIN. All right. Maybe it might be appropriate to go and vote and then come back, if that is agreeable with you.

The CHAIRMAN. All right. We will recess for the approximately 10 to 12 minutes it takes us to get over there and vote, and then we will come back, OK?

Senator FEINSTEIN. Thank you.

[A short recess was taken.]

The CHAIRMAN. The hearing will come to order.

As I said, Judge, we had two votes. They threatened we may have one more vote. Hopefully it will not occur before we finish the questioning tonight, but we will finish tonight on the first round.

The floor is yours, Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Just to try to pursue that a little bit further, Judge Ginsburg, could you talk at all about the methodology you might apply, what factors you might look at in discussing second amendment cases should Congress, say, pass a ban on assault weapons?

Judge GINSBURG. I wish I could, Senator, but all I can tell you is that this is an amendment that has not been looked at by the Supreme Court since 1939. And apart from the specific context, I really can't expound on it. It is an area in which my court has had no business, and one with which I had no acquaintance as a law teacher. So I am not equipped to enlarge my response. If the Court takes a case involving the second amendment, I would proceed with the care that I give to any serious constitutional question.

Senator FEINSTEIN. Fair enough. Let's go on, then, to the next topic.

I was very interested in your discussion with Senator Brown, particularly—this is the issue of choice—because you began to touch on the *Casey* case, and then somehow got a little distracted.

If I understand what you are saying—correct me if I am wrong—you are saying that *Roe* could have been decided on equal protec-