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 Metzenbaum—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-

tion grounds rather than the fundamental right to privacy. And I think you noted that *Struck* could have served as a bridge linking reproductive choice to the disadvantageous treatment of women on the basis of their sex. Is that fair so far?

Judge GINSBURG. Yes, Senator, except in one respect. I never made it an either/or choice. That has been said in some accounts of my lectures. It is incorrect. I have always said both, that the equal protection strand should join together with the autonomy of decisionmaking strand, so that it wasn't a matter of equal protection or personal autonomy, it was both.

Senator FEINSTEIN. I see.

Judge GINSBURG. I would have had added another underpinning, one I thought was at least as strong, indeed, stronger. But my argument was never equal protection rather than personal autonomy. It was both. I used the *Struck* case as an example, because it was the first time I fully expressed myself on this subject. I urged that it was a woman's choice either way—her choice to bear or not to bear a child. So the only amendment I would make in what you said is that it was never either/or; it was both.

Senator FEINSTEIN. So, in essence, there are two tests out there that could be used. One is equal protection, and the other is the right to privacy. Is that——

Judge GINSBURG. I would put it in terms of principles on which the decision could rest rather than tests to apply, but principles.

Senator FEINSTEIN. Right.

Judge GINSBURG. One of the underlying principles is the autonomy of the individual, the other is the equal dignity of the woman.

Senator FEINSTEIN. Right. Let's proceed on.

Then in 1992, in *Planned Parenthood* v. *Casey,* it was enunciated a new test, and as I understood it, the Court upheld various limitations on abortion because they did not unduly burden women seeking such services. And as I heard you earlier, statutes which limit fundamental rights get strict scrutiny by the Court. Statutes which classify on the basis of gender receive heightened or intermediate scrutiny.

My question is: Did the Court in *Casey* explicitly erode the protections previously afforded women under *Thornburgh* v. *American College of Obstetricians?*

Judge GINSBURG. I have two responses. One is, as I said before, that heightened scrutiny for sex classifications remains an open question. Justice O'Connor made that clear in the *Mississippi University for Women* (1982) case. Sex as a suspect classification remains open. It wasn't necessary for the Court to go that far in that case. The Court struck down the gender-based classification. So it is not settled that sex classifications will be subject to a lower degree of scrutiny than limitations on fundamental rights. It is just that the Court has left the question open, and it may some day say more.

If you are inquiring about the specific rulings in *Thornburgh* (1986) as against the rulings in *Casey* (1992), yes, I think there are respects in which *Casey* is in tension with *Thornburgh.* Restrictions rejected in *Thornburgh* were accepted in *Casey.* So I must say yes, the two decisions are in tension, and I expect that the tension is going to be resolved sooner or later. Similar issues are likely to

come before the Court again, so I can't say more than yes, the two decisions are in tension; that is where we are at the moment.

Senator FEINSTEIN. You said that they are in contention? Would you say that *Casey* is as reasoned as *Thornburgh*?

Judge GINSBURG. What I would say is that the two decisions are in tension, not in contention, because to some extent they overlap. These are decisions that are rather dense. I mean this—there are numerous opinions, and it is difficult to work through them all. The one thing I do sense is that this is a matter likely to come up again, so I believe it would be inappropriate for me to say anything more than what I have already acknowledged. There was no majority opinion in the *Casey* (1992) case. I think that is about what I can say.

Senator FEINSTEIN. Thank you very much. That was a help, and I thank you for that.

Let me turn to capital punishment, and let me speak as a Californian. I believe the people of California voted in 1978 overwhelmingly to reinstitute the death penalty. Since that time, there has been a very long delay before its carrying out.

It was recently carried out in one case, the case of Robert Alton Harris, which is a rather notorious case, and brings up the whole habeas corpus discussion.

I believe Harris had 6 Federal habeas petitions and 10 State habeas petitions. It is my understanding that the delay was due in large part because the ninth circuit took a while to decide.

Earlier in these discussions, you discussed the finality versus the fairness of habeas, and I think, if I understood you correctly, you said that you believed, yes, it was right to think that things had to be brought to a logical conclusion within finality.

If laws are going to work in this country, they have to have some finality to them. And the older I get, the more clearly I see that.

One of the biggest concerns that people have is that justice no longer seems just because it never happens, or it takes a long time for it to happen.

You also raised the fairness, which I guess is the competence of counsel issue. Would that be fair to assume?

Judge GINSBURG. That's a large part of it, yes.

Senator FEINSTEIN. With over 300 cases on death row, do you have concern that there is a lack of finality, because of Federal habeas review? Could you be more specific at all, when you speak of finality? It is interesting to me, because of the crime bill, major discussion on habeas, what is fair in terms of a wait. Is it 6 months? Is it 1 year? Is it 18 months?

The Attorney General testified before us earlier, she said as long as there was competency of counsel, she believed, too, that there had to be finality and, therefore—I am paraphrasing her, but I think I am accurate, and, Mr. Chairman, correct me if you think I am wrong—she said whether it is 6 months or 1 year or 18 months, really is not consequential, as long as there is competency of counsel.

The CHAIRMAN. That is correct, that is my recollection, as well, Senator.

Senator FEINSTEIN. Would you concur in that?

Judge GINSBURG. I do not know what her testimony was. I do know that Congress has before it Justice Powell's report, and that the first action to be taken with respect to this fairness/finality balance is going to come from Congress, based on Congress' study of that Powell Commission Report.

The CHAIRMAN. If the Senator will yield to me on that point——

Senator FEINSTEIN. Of course.

The CHAIRMAN [continuing]. The Judge is absolutely correct. As a matter of fact, I think we will be able to announce in the next day or so that, after literally 5 months—it is going to sound like an exaggeration—of close to around-the-clock negotiations with the Attorneys General and the District Attorneys Association, we have reached a compromise. So I hope with the support of the Senator from California, who has been deeply interested in this issue, we will be able, Judge, to pass a piece of legislation that gives some life to the thrust of the Powell Commission Report.

Senator FEINSTEIN. The reason I am asking this, as a nonlawyer, a former mayor who has a great deal of interest in the crime bill, as the chairman correctly stated, is because the issue of habeas is so very complicated, and any insight that you might have with respect to both fairness and finality, I would certainly appreciate hearing.

Judge GINSBURG. Senator Feinstein, I commented before that I realize this area is very complex. We don't have that kind of review in this district, because, unlike the State of California, the District of Columbia is not a State for this purpose. The District of Columbia has local courts created by Congress, and Congress has provided a postconviction remedy that is just like the Federal remedy, so if you are convicted in the District of Columbia courts, there is no habeas review in our court.

If I am confirmed, this is going to be altogether new business for me. I haven't had experience with habeas petitions and I haven't had experience with death cases, either. I know what the history is in California. Your State supreme court held that the death penalty was unconstitutional under the State constitution. That judgment, made in *People* v. *Anderson* (1972), was reversed by the people in a referendum, wasn't it?

Senator FEINSTEIN. That is correct, in 1978, I believe.

Judge GINSBURG. But the District doesn't have the kind of State-Federal review that you have proceeding from your State courts to the Federal district courts and the ninth circuit. I know something about what has gone on in the regional circuits. I have not had experience with these cases myself.

Senator FEINSTEIN. Thank you very much.

Moving right along to the third topic of the day, to another controversial issue, which is the issue of quotas in affirmative action. Again, let me go back to my mayor's experience. In 1979, there was a Federal case, concerning police officers consent decree, and I was mayor and did not support a consent decree which initially contained quotas, for the very reason that I have seen quotas used to discriminate against, as well as to prevent discrimination, and have never felt that it is a very good vehicle for bringing about affirmative action.

Instead, the consent decree that I did support and which became the law of the city was one that provided goals and timetables and a master to oversee the department as it moved along, and we made some very good progress, both with respect to people of color, first minorities, first gays in the San Francisco Police Department.

I know you have favored affirmative action, but you have generally taken a very restrained approach on the subject of quotas in local government hiring and contracting. I was wondering if you would care to comment on your decisions in that area and your judicial philosophy that brought about those decisions.

Judge GINSBURG. My circuit recently decided a set-aside case, the *O'Donnell* (1992) case. It was the same kind of case as *Croson* (1989). We followed the Supreme Court's precedent and said that the District of Columbia's plan was invalid.

Most plans I have had anything to do with are of the kind that you describe, not fixed, rigid quotas, but goals and timetables, which are really estimates of what the workforce would be, if there were fair employment practices. In so many of these cases, a whole range of items are implicated, including tests.

I remember some police cases involving tests, physical tests that women could not pass at the same rate as men, but that were not at all related to job performance. So some of the plans include new tests that are related to what the job requires, and do not include standards, unrelated to job performance, that men can meet more readily than women.

I remember one test particularly. The job involved was slide projectionist. As part of the physical test, the applicant had to carry a certain weight with arms raised above his head. That posture was much harder for women than for men, and women failed that portion of the test disproportionately. But the weight that had to be carried was something like 18 to 20 pounds, about the weight of a year-old child. Women have carried that weight from the beginning of time, but not with arms lifted over their heads. Once you eliminate that element of the test, the women begin instantly to pass at least at the same rate as men.

Many of these job classifications and tests were set up one way without thinking—with no thought of including women. Eliminating such tests is part of the kind of positive affirmative action that does not entail rigid quotas, but estimates of what one would expect the workforce to look like, if discrimination had not operated to close out certain groups.

Senator FEINSTEIN. Yes, that is certainly true. Of course, even though when the tests were revised for job related strength capacity, it was still difficult for some women, I must say that. There still was a rate where women could not pass it, but many women did and I think that really harkened the day where women could go into police departments and fire departments and have some degree of equal opportunity. We are not entirely there yet, but there has been a big change.

Judge GINSBURG. Yes.

Senator FEINSTEIN. Let me just change to the Japanese internment case, because this also is a major issue where I come from, and I very much appreciated your comment that the *Korematsu* case was wrongly decided. I would certainly agree with that.

With regard to the *Hohri* v. *United States* case, it is my understanding that you voted to permit victims of the internment to file claims for confiscation of their property during World War II. Because this might be useful in the future, could you elaborate on why *Korematsu* was wrongly decided, and why you believe so strongly that the plaintiffs in *Hohri* should be able to sue long after the internment policy was relegated really I supposed to the dust bin of history?

Judge GINSBURG. In *Hohri* (1987), our decision was not the final decision. The key question before us concerned the right court in which to bring that case. The Supreme Court, in a well-stated opinion by Justice Powell, held that the case belonged in the Federal circuit and not in the District of Columbia Circuit.

Justice Powell's decision, incidentally, said there was a tenable case to be made for either side. Congress had not been clear about whether the case belonged in our court or in the Federal circuit, the specialized Federal appeals court in this city.

The question on the merits in *Hohri* concerned when the statute of limitations began to run. The view my court took of that question was different from the view ultimately taken by the Federal circuit.

Korematsu (1944), as presented to the Supreme Court, involved a challenge to a race classification—people of Japanese ancestry—and a defense based on national security. We now know—it came out clearly in the fifties—that the pressing national security need urged before the U.S. Supreme Court didn't exist and never existed. An overwrought general wrote an affidavit that the Court relied on. J. Edgar Hoover, hardly someone who had no concern about national security, had said that there was no reason to have the kind of massive relocation program our country ordered during World War II. The FCC said that the alleged communications between the West Coast and Japanese ships at sea didn't exist, either.

The question was at what point in time the clock began to run. When did the people affected have a claim a court would hear. We said the clock began to run when it became clear that there was no national emergency justification for curfews and relocation.

Now, the end of the story is that Congress passed legislation providing compensation. Before that there was a congressional declaration recognizing that a wrong had been done. There were two dissents in *Korematsu* itself. I recall one, the dissenting opinion of Justice Murphy. Every judge, I believe, would like to think he or she would have joined Justice Murphy, had he or she been a member of the Court at that time. But no one can say for sure. History has certainly made it plain that there was nothing like the kind of emergency the Court was told of, nothing that required the kind of treatment to which people were subjected solely on the grounds of their race or ancestry.

Senator FEINSTEIN. Thank you very much. Judge Ginsburg, I just want you to know that, for me, it has been a very great pleasure and privilege to listen to this. You really are a remarkable person. I am also just very proud that you are a woman.

Judge GINSBURG. I appreciate your saying that so much.

Senator FEINSTEIN. Thank you.

The CHAIRMAN. Thank you very much, Senator Feinstein.

Senator Moseley-Braun.

Senator MOSELEY-BRAUN. Thank you very much, Mr. Chairman.

The CHAIRMAN. Last, but not least.

Senator MOSELEY-BRAUN. You know, I think it kind of makes me the most popular person in this room, that I am now starting the last of the questioning for the evening. But it makes it a little difficult, obviously, when you are number 18 in a grueling session such as we have had, and I just want to thank and applaud the Judge for her patience and her deliberate manner. You have been just hanging in there, in spite of the fact that you have been talking all these hours and answering questions all these hours and mental gymnastics with the members of the committee.

I want to thank my senior Senator, who I know is only here because he has been so nice to me and he is looking out for me.

Senator SIMON. I am here because I want to hear Judge Ginsburg.

Senator MOSELEY-BRAUN. You want to hear Judge Ginsburg, not me. [Laughter.]

OK. You see, that is also why he is the senior Senator. Thank you, Senator Simon, for staying.

Judge Ginsburg, as you know, this month the worst deluge in memory has caused massive flooding along the Mississippi and Missouri Rivers and devastated much of the Midwest, including vast areas of my home State of Illinois. This has been a tragedy of epic proportions.

One of the most notable developments has been the failure, at several points along the various rivers that were affected, of levees that were denied to hold the waters back. The rupture of these levees has prompted a heated debate among scientists and engineers and environmentalists, farmers and thousands of ordinary citizens.

On one side are the people who say that the levees, which were artificially created to begin with, have distorted the Mississippi's natural drainage system, can never be built high enough to anticipate all of nature's fury, and may even make flooding worse by channeling the waters so that they become even faster and higher.

Supporters of the levees, on the other hand, claim that through the construction of the levees and other flood control systems, thousands of acres of land have been turned into productive farmland, housing and recreational areas.

In short, Judge Ginsburg, across a wide swath of the country, thousands of people and entire communities have made decisions, and invested their savings in some instances, for more than 100 years on where to locate their homes and their farms in reliance on this system of levees.

As I mention, though, this year's disaster and some new scientific evidence has prompted many to argue that pulling down the levees or actually not reconstructing them might actually improve flood control and, in terms of the environment, be better for the communities as a whole.

In fact, some have speculated that one day in the near future, the Army Corps of Engineers or some other arm of the executive branch may determine that the levees are counterproductive to re-