GUN FIGHT

THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA

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To Melissa, for her enduring inspiration;
and to Danny, for her smile.

PREFACE

WHEN PEOPLE HEARD I WAS WRITING A BOOK ABOUT GUNS, THEIR first question was always the same: "Is it pro-gun or anti-gun?" The goal of *Gunfight*, however, is to move beyond the stark, black-or-white, all-or-nothing arguments that have marked the gun debate in America over the past forty years or so. This book shows that we can have both an individual right to have guns for self-defense and, at the same time, laws designed to improve gun safety. The two ideas—the right to bear arms and gun control—are not mutually exclusive propositions. In fact, America has always had both.

The founding fathers enshrined the right to bear arms in the Second Amendment of the U.S. Constitution, but they also supported gun control laws so extensive that few Americans would today support them. They barred large portions of the population from possessing firearms, required many gun owners to register their weapons, and even conditioned the right on a person's political leanings. The Wild West, which occupies the very heart of America's gun culture, was filled with firearms; yet frontier towns, where the civilized folks lived, had the most restrictive and vigorously enforced gun laws in the nation. Gun control is as much a part of the history of guns in America as the Second Amendment.

The longstanding effort to balance gun rights with gun control was just one of many surprising discoveries I made while researching this book. I also found that race and racism have played a central role in the evolution of gun law. America's founders strictly prohibited slaves and even free blacks from owning guns, lest they use them for the same purpose the colonists did in 1776: to revolt against tyranny. America's most notorious racists, the Ku Klux Klan, which was formed after the Civil War, made their first objective the confiscation of all guns from newly freed blacks, who gained access to guns in service to the Union Army. In the twentieth century, gun control laws were often enacted after blacks with guns came to be perceived as a threat to whites. Ironically, it was conservatives like Ronald Reagan—still a hero to the members of the National Rifle Association—who promoted new restrictions on guns.

Indeed, the gun rights movement so familiar to modern-day Americans is a relatively new phenomenon, even though the ability of individuals to bear arms is one of our oldest constitutional rights. For much of its history, the NRA, which was founded in 1871 by a former reporter for a newspaper not known for its sympathy for gun rights, the *New York Times*, supported rather extensive gun control laws. When a wave of laws requiring a license to carry a concealed weapon swept the nation in the 1920s and 1930s, leaders of the NRA were closely involved with the drafting of the bills, which they then lobbied state governments to adopt. It wasn't until the 1970s that the NRA became the political powerhouse committed to a more extreme view of gun rights we know today.

What I learned about the Second Amendment was unexpected too. For all the attention paid to whether that ambiguously worded provision guarantees individuals a right to own guns or just protects states' right to form militias, the right to bear arms has never rested primarily on the U.S. Constitution. The vast majority of states—forty-three as of this printing—protect the right of individuals to bear arms in their own state constitutions, meaning most Americans would enjoy the right regardless of the Second Amendment. And while my research led me to conclude that the NRA was correct in reading the

Second Amendment to guarantee an individual right to bear arms, I was startled to discover that it was only recently that the NRA made the Second Amendment the heart of its mission. Although long a supporter of law-abiding individuals' access to firearms, the NRA for most of its history ignored the Second Amendment.

It was my desire to share these discoveries, which shatter so many of the myths of America's gun culture, that led me to write *Gunfight.*

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PART I

CHAPTER 1

BIG GUNS AND LITTLE GUNS AT THE SUPREME COURT

JASON MCCRORY AND DAN MOTT WERE THE FIRST IN line. It was early Sunday evening, and McCrory pulled his rabbit fur hat tight around his ears to protect himself from the frigid March wind whipping down First Street in Washington, D.C. A security guard told the two men, both in their early twenties, where on the sidewalk to wait. They were soon joined by two men from Phoenix, who had come straight from the airport. Then three more people arrived, with heavy winter coats, thick scarves, woolen caps, and sleeping bags—everything they'd need to sleep on the street for two nights, waiting for Tuesday morning. McCrory and Mott curled up in blankets to get some sleep,

but the weather made that all but impossible. It "was cold, cold, cold," McCrory recalled. "After about four am, it was too cold to sleep." Despite the chill, people kept arriving and joining the queue in front of the United States Supreme Court.[1]

The reason scores of people were willing to camp out on the street in front of the Supreme Court like groupies at a rock concert is captured in a single word: "guns." The justices were scheduled to hear a case about one of the most heated, polarizing issues in America. Pro-gun and anti-gun forces debate each other with passionate intensity. One side views guns as essential to personal freedom, while the other insists they are instruments of mayhem and violence. Guns are lightning rods of American culture, and in such a charged atmosphere common ground is hard to find. Every gun control proposal is an occasion for pitched battle, with the stakes portrayed as nothing less than the future of life, liberty, and justice.

When the sun rose behind the Supreme Court Building on Tuesday morning, the culture war over guns would move into the serene and sanctified halls of the nation's highest court. The justices were going to rule on a question that, incredibly, the Court had never before squarely addressed. Did the Second Amendment to the Constitution guarantee individuals the right to own guns?

The Second Amendment is maddeningly ambiguous. It provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Yet to many of those sleeping outside the Supreme Court Building, the words couldn't be more clear. Gun rights supporters unquestionably believed that the Second Amendment guaranteed individuals the right to own guns and imposed strict limits on gun control. Gun control advocates believed that the only guarantee the Second Amendment offered was a state's right to have a militia, like the National Guard, with no restrictions on gun control. For decades, the federal courts had sided with the gun control advocates, taking their cue from an ambiguous 1939 Supreme Court decision. Since then, America's highest court had stubbornly refused to weigh in on the meaning of the Second Amendment.

The morning of the hearing, scores of protesters, reporters, and camera crews joined the street sleepers in front of the famous marble staircase of the Supreme Court. The gathering was anything but tranquil, as both sides in the gun debate were determined to be heard. They "turned the steps and sidewalk in front of the ornate building into a theater of lively debate on citizens' rights to own firearms," reported the *Washington Post*. Some carried signs declaring "GUN CONTROL KILLS," "MILITIAS, NOT MURDER," and the ever popular "GUNS DON'T KILL PEOPLE, PEOPLE DO." Well-intentioned law students in the crowd tried to mediate the chaos with thoughtful discussions about the original meaning of the Second Amendment, but the chants of a gun rights supporter with a bullhorn drowned them out. "More guns!" the man bellowed. "Less crime!" a group of fellow gun enthusiasts shouted back. "More guns!" "Less crime!"

Gun control proponents in the crowd tried to break up the rhythm. They whispered something to one another and then waited for the man with the bullhorn to repeat his chant. "More guns!" he yelled, prompting the anti-gun people to scream out in unison, "More death!" Yet, as in gun politics generally, their voices were no match for the better-coordinated, more-intense voices on the pro-gun side, which simply hollered even louder.

It was March 18, 2008, and everyone was certain the case on that day's docket, *District of Columbia v. Heller*, would be a landmark. Usually the spectator seats in the Supreme Court sit empty, but Jason McCrory and Dan Mott knew that this was no ordinary case. The Court makes seats available to the public on a first-come, first-served basis, and the many people who camped out on the street didn't want to miss out. The first fifty in line would be awarded seats. By the morning of the hearing, however, hundreds of people were lined up around the block—so many that the Court mercifully decided to allow them all to come in and watch for three minutes each. Anyone who had braved the elements deserved to witness at least some of this historic event.

Wearing a helmet over his silver hair and a puffy down parka on top of his dark blue suit, Walter Dellinger pedaled his titanium

Litespeed bicycle past the crowd, his tie dangling loosely from his neck. The sixty-six-year-old Dellinger was a former solicitor general of the United States—the federal government's chief advocate before the Supreme Court—and he currently headed the appellate division of one of the nation's premier law firms, O'Melveny and Myers. When it came to Supreme Court lawyers, Dellinger was among the very best. He had taught constitutional law for over forty years and argued twenty cases in the nation's highest court. In 2008 alone, Dellinger had three cases before the justices. *Heller* was one of them.

Dellinger parked his bike on the empty rack at the north side of the Supreme Court Building. Although the team of lawyers Dellinger worked with on the *Heller* case came to the Court by more prosaic means, Dellinger preferred to ride. It cleared his mind and sharpened his focus. He could practice his argument in his head while he rode, without being distracted by the telephone ringing or an urgent email. On his ride this morning, he rehearsed his argument that the Second Amendment did not protect an individual right to bear arms outside of the militia. Dellinger's client was the District of Columbia, whose gun control laws were being challenged in the *Heller* case. D.C. outlawed handgun ownership and required that all long guns—rifles and shotguns—be kept disassembled or secured with a trigger lock. The District had the strictest gun control laws in the nation, and it was Dellinger's job to keep them in place.[2]

Arguing the other side was Alan Gura, a Georgetown Law School graduate in his midthirties whose task would be to convince the justices that the Second Amendment guaranteed the right of individuals to own guns. He wasn't a constitutional law expert like Dellinger, however, nor was he a partner at a big-name law firm. Gura practiced law out of a small, one-person office in Alexandria, Virginia, not far from his home. He had no paralegals or even a secretary to help him. His practice was remarkable mainly for being exactly what one wouldn't expect of a lawyer arguing a landmark constitutional law case in the Supreme Court. He spent most of his time suing police officers for abuse and handled copyright and trademark cases on the side. He had never before argued a case at the U.S. Supreme Court.

Gura arrived at the Court on foot, having spent the preceding night in a Hyatt hotel a few blocks away. Although he lived with his wife and young son less than ten miles from the Supreme Court, Gura didn't want to take any chances with his commute. He couldn't afford to show up late for what would certainly be one of the most important days of his career. Not when the weight of the gun rights movement was resting on his shoulders.[3]

The National Rifle Association wasn't happy that Alan Gura was carrying that burden. In fact, the NRA never wanted this case to be brought at all. In 2002, when rumors first circulated that a lawsuit might be filed against the D.C. gun laws, the NRA did everything it could to try to stop it. When Gura refused to quit, the NRA tried to hijack his case and replace him with its own, more-experienced lawyers. When that failed, the NRA lobbied Congress to pass a law overturning the D.C. gun laws, which would have rendered Gura's case moot. The NRA wasn't just trying to protect its turf. The nation's leading gun rights organization was dead set against a Supreme Court ruling on the meaning of the Second Amendment.

The leaders of the NRA thought Gura's lawsuit was too risky. They dreaded the prospect of losing, of having the Supreme Court declare in no uncertain terms that the Constitution didn't protect an individual's right to bear arms. Such a ruling would be especially devastating from *this* Supreme Court, which was politically conservative and had a strong majority of justices, seven of nine, appointed by Republican presidents. Gura speculated that the NRA was also worried he might win. The NRA's most effective fund-raising strategy was to threaten gun owners that the government was coming to get their guns. *The gun grabbers are out to destroy the Second Amendment. Your donation will enable us to fight them off. Contribute now, or your right to bear arms will be nothing more than a distant memory.* That strategy helped make the NRA one of the most influential interest groups in America. Gura suspected the NRA was fearful its fund-raising machine might grind to a halt if the Supreme Court held that the Second Amendment guaranteed an individual's right to own guns.

Gura walked around the north side of the building, past the bike