

As Gun Debate Grows, Second Amendment Champion Gura Girds for Battles Ahead

By: Victor Li - February 7, 2013

With its December 11 ruling striking down a Chicago law forbidding individuals from carrying guns in public, the U.S. Court of Appeals for the Seventh Circuit delivered the Second Amendment Foundation (SAF) a major victory—and handed the group's lawyer, Virginia litigator Alan Gura, yet another big win.

For Gura, a one-time Sidley Austin associate who is now the co-owner of Gura and Possessky, the Second Circuit ruling followed earlier triumphs in a pair of landmark U.S. Supreme Court cases: *District of Columbia v. Heller* in 2008 and *McDonald v. Chicago* in 2010. By persuading the Supreme Court to uphold the rights of individuals to own firearms in *Heller* and *McDonald*—cases that found the Court weighing the scope of the Second Amendment for the first time in nearly 70 years—Gura burnished his reputation as the gun rights movement's go-to advocate.

"He's clearly proven to be the top Second Amendment lawyer by virtue of the fact that he argued and won both *Heller* and *McDonald*," says Cato Institute chairman Robert Levy, whose organization financed the *Heller* litigation and hired Gura to make its case.

Now, in the wake of the second-deadliest school shooting in U.S. history, Gura's specialized skill is almost certain to face fresh tests.

Led by President Barack Obama, officials across the political spectrum reacted to the killing of 26 people—20 of them small children—at Sandy Hook Elementary School by pushing gun control to the top of the country's legislative agenda. New York moved swiftly to enact bipartisan gun legislation viewed widely as the most restrictive in the nation, and Governor Andrew Cuomo signed it into law on January 15. The next day, the president said he was issuing 23 weapons-related executive orders—which, among things, would make it easier for the federal government to subject potential gun buyers to background checks—and called on Congress to pass an assault-weapons ban.

With the political climate shifting, Gura—who, according to the SAF website, is already acting as lead or cocounsel on 12 cases for the foundation—appears ready for the legal battles to come.

Appearing at a January 9 Cato Institute symposium held to discuss former *New York Times* reporter Craig Whitney's *Living with Guns, A Liberal's Case for the Second Amendment*, Gura, who declined *The Am Law Daily's* interview request—made the patriotic case for protecting gun owners' rights.

"The idea of civilian gun ownership is a positive statement of who we are, not that we're paranoid or fearful, but that we trust ourselves with freedom and to be responsible," he said while expressing his belief that the judiciary is the ultimate check on the kind of legislative excess he sees in efforts to, among other things, restrict the right to carry firearms in public and ownership of certain types of guns. "It is absolutely the job of judges to strike down every stupid unconstitutional thing that the government can come up with to violate people's rights."

Outside the seemingly friendly confines of the Supreme Court, Gura has had a mixed record in getting judges to do that job. In addition to winning at the Seventh Circuit in December, he convinced the same court to issue an injunction in July 2011 prohibiting Chicago from enforcing a ban on shooting ranges within the city limits. (The case was remanded to the U.S. district court, where it is pending while the city attempts to redraft the statute at issue.)

On the flip side, Gura failed to win a reversal of a New York state law requiring applicants to show cause as to why they needed to carry concealed guns in public, with a federal district court judge in White Plains ruling in Westchester County's favor on summary judgment in September 2011.

Gura, who filed a certiorari petition with the Supreme Court after a unanimous three-judge Second Circuit panel affirmed the lower court's decision in November, took issue with that ruling during a January 29 debate at Cornell Law School. "The court determined that the core purpose of the Second Amendment was not so much self-defense but rather self-defense in the home," he said. "There's no basis for that in *Heller*, but that's what the court held."

Gura also fell short in a challenge to a Yolo County, California, law forcing applicants wishing to carry concealed weapons in public to prove they had been victims of credible threats of violence. A federal district judge in Sacramento hearing ruled in the county's favor on summary judgment in May 2011. (Gura has also appealed that decision.)

An effort to challenge a D.C. law banning violent criminals from owning firearms failed as well. The D.C. Circuit affirmed a lower court's ruling against Gura's client in that case, a Vietnam veteran convicted of a misdemeanor assault 44 years ago, on January 15. Gura has told multiple media outlets that he will continue to press the case, either by appealing to the Supreme Court or applying for an en banc rehearing.

"It's silly to suggest that Congress intended to prohibit someone convicted of common-law misdemeanor from owning firearms," Gura told Bloomberg. "There's no way [my client] in the same category as serious felons."

Path to Gun Rights Prominence

Gura has identified himself in multiple interviews as both a libertarian and gun owner. He told *Washington Jewish Week* in 2008 that he was driven by a desire to protect his wife and infant son and purchased his first gun, in part, after watching the 1992 Los Angeles riots explode on television. Born in Israel and raised in Los Angeles, he graduated from Cornell University in 1992 and Georgetown University Law Center in 1995, then clerked for U.S. District Judge Terrence Boyle in North

Carolina's Eastern District before returning to California for a two-year stint as a deputy attorney general. From there, he returned to Washington, D.C., and joined Sidley from 1998 to 2000. He left private practice to serve as counsel to the U.S. Senate judiciary committee's subcommittee on criminal justice oversight from 2000 to 2001.

Gura's path to gun rights prominence began more than a decade ago when the Fifth Circuit ruled in *United States v. Emerson* that the Second Amendment afforded individuals a right to bear arms. Clark Neily, a senior attorney for the Institute for Justice and Gura's cocounsel on *Heller*, recalls having drinks with a colleague shortly after that 2001 ruling, the first such appellate decision. "We knew the issue would go to the Supreme Court soon, either as a criminal case or a public interest case, and we obviously felt that the latter would be better," Neily says.

Neily and Cato's Levy began recruiting clients the following year—and looking for an attorney to serve as lead counsel. (Levy doesn't practice law and Neily had too many other cases.) Recalling Gura from his days as an Institute for Justice intern, Neily recommended him to Levy, who says he hired Gura because his rates were reasonable and he had true passion for the issue.

Gura quickly immersed himself in Second Amendment issues. Though he had never argued before the Supreme Court, Levy stuck with him as the *Heller* case proceeded. "Towards the end, when we got to the Supreme Court, there were all sorts of suggestions that we should switch to more experienced advocates like Ted Olson or Ken Starr," Levy says, referring to two former U.S. solicitors general. "Alan knew the subject matter inside out. Plus, our arrangement was that if he'd work for submarket wages, it would be his case no matter what. He did a superb job."

Neily concurs, saying Gura was ready for anything the justices might ask. "That's the hallmark of a capable litigator. We had done half-a-dozen moot courts in preparation for the oral argument, and I can't remember any setting where he got a question he wasn't prepared for."

Drawing Fire from His Usual Allies

Gura's current docket represents the final phase of a three-step plan that began with establishing via *Heller* that the Second Amendment affords an individual the right to bear arms, according to Levy. The second step involved ensuring that the right to bear arms applies to the states, which was achieved with the *McDonald* decision. The final, and most drawn-out, step is geared toward defining the scope of that right. "Everyone understands it isn't absolute and that there should be some restrictions," Levy says.

Maybe not everyone.

Gura has said he is hardly a gun rights absolutist and has expressed support for banning machine guns, preventing felons from acquiring weapons, and allowing instant background checks for prospective gun buyers. Those positions have put him at odds with some of his usual allies. During the *Heller* oral arguments, he said there was no question that governments could ban certain types of firearms and appeared

to endorse not just background checks, but also laws requiring gun owners to store their arms in a safe.

"I received a very negative reaction from the real far-out, anti-gun control crazies, who were really angry with me," author Adam Winkler quotes Gura as saying in *Gunfight: The Battle over the Right to Bear Arms in America*. In the book, Gura recalled being compared to Osama bin Laden and Benedict Arnold, and drawing the ire of both the Gun Owners of America and the National Rifle Association. "These people are crazy," Gura told Winkler. "I could have [made an absolutist argument before the Court]. And that would have probably made me very popular in some cabin somewhere out there in the woods. Of course I would have lost 9 to 0."

The tension between Gura and the NRA is well documented. He clashed openly with the group during the Heller litigation, accusing it of trying to derail the case out of fear that the Court would deliver an unfavorable decision. Gura also felt the NRA tried to hijack *McDonald*. He was especially angry when the Supreme Court took some of his allotted time and gave it to the NRA, represented by then-King & Spalding appellate partner Paul Clement.

"They're not bringing anything substantive to the argument," he told *The Washington Post* in 2010. "The NRA is principally interested in taking credit and fund-raising." (In the same *Post* article, Clement justified his client's involvement by arguing that Gura was seeking to overturn several precedents in pressing the Supreme Court to rely on the Fourteenth Amendment's "privileges or immunities" clause to find that the Second Amendment applies to states. The NRA's argument—that applying the Second Amendment to the states via the 14th Amendment's more commonly used "due process" deserved some of the oral argument time allotted to Gura, Clement said. In the end, the privileges-or-immunities argument only swayed one justice, Clarence Thomas.)

Adversaries Remain Unpersuaded

More recently, Gura criticized the NRA's response to the Newtown massacre, specifically taking the group's executive director, Wayne LaPierre, to task during his January 9 Cato Institute appearance.

"The NRA chose to address its hardest-core members," Gura said. "They spoke to their mailing list rather than the broad national audience that tuned into that press conference, and that was a fantastic and stupefying mistake." He added, "The NRA passed up the chance to build support for its views, and it did a lot of damage to itself and the cause it purports to advance." Gura also found fault with LaPierre's suggestion that armed guards be placed in every school in the country. "This idea of turning schools into security zones or armed camps is unhealthy," he said. Gura even ridiculed LaPierre for using dated pop-culture references and flatly stated there was no evidence that violent video games and movies lead to violence.

At the same time, Gura tried to find a middle ground in the debate, saying that "anti-gun rights people, for lack of a better term, do need to come to terms with the fact that gun ownership and gun rights are a feature of American culture," while "people who are pro-gun rights probably need to stop acting like the other sides' caricatures of what they are."

Some in the gun control camp view such conciliatory pronouncements with skepticism.

Alan Morrison—the George Washington University Law School professor who cofounded the Public Citizens Litigation Group and was slated to be Gura's opposing counsel in *Heller* until being dropped in January 2008 in favor of O'Melveny & Myers partner Walter Dellinger—tells *The Am Law Daily* that despite Gura's claims to the contrary, he views him as a Second Amendment absolutist.

"[Gura] was saying that the right to bear arms shall not be infringed, that the government can't do anything regarding guns and that the courts are the only part of our government that should do anything about the Second Amendment," says Morrison, referring to the January 9 Cato panel, at which he also appeared. "Sure, he's more reasonable than Wayne LaPierre, but that's not hard." Morrison, who says he doesn't know Gura well, believes that he appears less extreme than he actually is because he talks in less bombastic terms than some gun rights proponents and doesn't make wild accusations about people whose views differ from his.

Jonathan Lowy, the director of the Legal Action Project at the Brady Center to Prevent Gun Violence agrees with Morrison's assessment. "Often what you'll find with Alan is that when he's on a case, he will say that whatever law he is challenging is unconstitutional in his view, but that doesn't mean other laws are unconstitutional," says Lowy, who estimates that he has argued opposite Gura between 10 and 20 times. "Then in the next case, he'll challenge those other laws as being unconstitutional."

Gura's approach was on display at the January 29 Cornell event. When asked about New York state's recently passed gun control law, which limits the capacity of gun magazines from 10 rounds to seven, Gura called it "ridiculous" and "clearly unconstitutional." He also argued that Americans have an expectation that their guns can shoot more than seven rounds. At the same time, he said he believed states "can regulate the amount of ammunition that one takes with him or her walking down the street."

Saying he respects Gura as an attorney, Lowy nonetheless makes it clear he's no fan of what his frequent adversary is trying to accomplish. "What has happened since *Heller* has the potential to have much broader and more dangerous effects on the safety of Americans," says Lowy. "That is what Alan and others are advocating—a broad expansion of the Second Amendment to prevent communities from having the kind of common sense public safety laws they want and overwhelmingly support."

Gura himself believes he could make further gains on that front soon. He told sibling publication *The National Law Journal* in December that courts have been "all over the place" in determining whether state and local gun control laws are constitutional. Gura has already filed a petition asking the Supreme Court to review the Second Circuit's November decision upholding New York's public carry ban. It's also possible that Illinois could ask the Court to review the Seventh Circuit's December.

"Right now there are a variety of Second Amendment disputes working their way up to the Supreme Court," he told the *NLJ*. "We're having conflicting opinions by

appellate courts on the extent to which local governments can regulate the carrying of guns outside the home for self defense."

Gura plans to have something to say about how those conflicting opinions are resolved in the post-Sandy Hook era.