

As a preface to my excerpt, I want to give you, the reader, some context. I include this brief timeline of my involvement with The Coalition For Free Trade (CFT), leading up to the Supreme Court case I write about in this episode from my chapter on Politics, Bureaucracy, and Organized Crime.

During the mid-'90s, several California wine producers had been selling wine directly to consumers in the state of Florida; the state responded by attempting to make it a Felony to do so. They did this because a producer of an Alcoholic Beverage is required to obtain a Federal License called a Basic Permit to produce alcohol for resale. But, if that enterprise or its owner is convicted of a Felony, they lose their Basic Permit. In essence, it would put them out of business. Thus, there was a call to action, and CFT was established in 1996.

In that same year, the officers of CFT asked me to join their Board. This was in large part because The Henry Wine Group (THWG), where I was CEO, was the only wine distributor in the country who believed a wine producer should have the legal right to sell wine directly to the consumer. I accepted wholeheartedly.

I testified in November of 1997 about why I believed wine producers needed to have access to ship wine direct to the consumer before a Joint Session of the California Legislature. My testimony was in direct opposition to the position of the powerful Wine & Spirits Wholesale Association (WSWA). To this day, WSWA fights tooth and nail to turn back progress for the on-line sales and interstate shipment of wine to consumers. (I chronicled that testimony in my previous book excerpt).

January 1999, at a reorganization meeting for CFT, I was voted in as President of the organization. Because it was a vintner's fight, I declined and told them if they recruited a vintner, I was comfortable with, I would serve as VP. I was delighted when a friend of mine: Patrick Campbell, Laurel Glen Vineyard Founder, and owner stepped up and became the President. Our term as the lead officers was two years, 1999 & 2000.

After stepping down as Vice President of CFT, The Henry Wine Group continued to support their cause both financially and for me, vocally. We remained the only wholesale distributor in the country to take a stand on the side of CFT.

In 2003 CFT believed the stage was set to take on marshaling a trial case to the Supreme Court to settle the issue of legally selling wine direct to the consumer. They retained the firm of Kirkland & Ellis, and along with that came Ken Starr. Ultimately this resulted in the episode as described below in this transcript.

## **SUPREME COURT ORAL ARGUMENT, DECEMBER 7, 2004**

### **THE DAY THAT CHANGED THE WINE MARKET**

One of the issues the Coalition for Free Trade (CFT) faced was the potential of rogue attorneys going off on their own and filing suits that either did not have merit or could set a precedent that would ultimately harm the cause. So, in 2003 CFT decided to retain a heavyweight attorney and firm. They ultimately chose Kirkland & Ellis and Ken Starr, the former Solicitor General of the United States. Ken had argued numerous cases at the Supreme Court and, as it turned out, was the right person to take on the cause.

The Federal Trade Commission (FTC) put out a report that year on E-Commerce. In October of 2003 before a U.S. House of Representatives Subcommittee on Commerce & Trade, Office of Policy Planning Director Todd Zywicki testified to the FTC findings. Their report concluded that online wine sales benefitted consumers by increasing their choice in wine and provided access to a wider variety of wine than previously available.

Zywicki went on to outline what FTC called less-restrictive means than those currently in place to regulate consumers' new purchasing alternatives. This powerful report helped the attorneys who were arguing for shipping wine directly to consumers in court cases like *Granholt v. Heald* in which the 6th Circuit Federal Court struck down a Michigan law banning wine's interstate shipment. However, in the 2nd Circuit Federal Court (*Swedenburg v. Kelly*), a judge upheld an identical law that prohibited out-of-state wineries from shipping to New York residents.

These were just the ingredients necessary to prompt the Supremes to schedule oral arguments and rule one way or the other. In May of 2004, the Supreme Court combined the cases and agreed to review and hold oral arguments in *Granholt v. Heald*. High Stakes Poker at its best!

There was a flurry of activity in the summer and fall of 2004 leading up to the Supreme Court hearing scheduled for December 7th. Numerous amicus briefs were filed with the court. For my part, as CEO of the Henry Wine Group, I not only stood up and continued to speak openly and publicly for the wineries' right to ship

directly to out-of-state consumers; but added fuel to the fire by filing an amicus brief as well. This put The Henry Wine Group on the record for history.

I would like to add at this point, Warner Henry, during his time in the wine business did more for winery owners and vintners than they ever recognized or gave back to him and his enterprise. This shameful lack of action on their part was, sadly, something I experienced and witnessed all too often.

You can only imagine the excitement and energy as the date in December approached very quickly. Both Warner and I had been given reserved seat passes for the oral arguments. It was a fitting gesture by the CFT in recognition of our contribution.

One envisions the Chambers of the Supreme Court to be a grand room so, I was amazed at how small it was. I estimated it held no more than 125 to 150 spectators, with standing room included. The Justices sit in enormous, oversized black leather chairs that rock back and forth and can even lay flat. In these giant seats they look like 10-year-old caricatures of themselves. When they get rocking back and forth or lean forward to ask a question, it has an almost dizzying effect on your vision. I am sure it is distracting and intimidating to the lawyers arguing their cases.

Astoundingly, Justice Thomas spent much of the hour literally flat on his back. He never asked a question, as if he had no interest in the case. Later, back at Kirkland's office during lunch I asked Ken Starr, "Hey, what's up with this clown Justice Thomas lying flat out most of the time?" His response to me was, "Hell, he was more alert than I have seen him in the past." Really!! I thought to myself, this is our justice system! Suitably, Justice Thomas wrote the dissenting opinion in the case. (He really did, folks).

However, I am getting ahead of myself in this story. After listening to the oral arguments, it was clear that Ken's choice to have Kathleen Sullivan argue the significant points of our case was astute. Kathleen was the Dean of the Law Department at Stanford University, and she hit it out of the park that day. One of her counterparts on the other side, Thomas L. Casey, the Solicitor General of Michigan, was either unprepared or just did not believe that their side was in any danger of losing this case. He appeared to have been run over like roadkill by the Justices and their questions.

After the hour of oral arguments had concluded (each side gets only 30 minutes), we began to file out onto the enormous Plaza that makes up the Supreme Court Building entrance. It was raining, and the news media started to swarm around

Ken. In another corner, Kathleen gave statements and solicited any comments for the record.

I was in a group with Jess Jackson, Barbara Banke, Fred and Peggy Furth of Chalk Hill Winery, and Warner Henry and his wife, Carol. As I opened an umbrella to shield several of us from the late morning rain, I noticed Juanita Duggan, CEO & President of Wine & Spirits Wholesale Association standing in the middle of the plaza like a jilted woman on a blind date. She had no umbrella and looked lost, as if everyone had abandoned her. Her appearance was that of a drowned rat. Standing by herself without an escort summed up the feelings at WSWA: they knew they had lost.

Once back at Kirkland & Ellis's offices in Washington, D.C., several others joined our group to enjoy lunch with Ken and Kathleen and review the morning's proceedings.

Ken professed again that he felt we had won. I remember Jess Jackson expressing the same opinion as we filed out of the Supreme Court. All were in excellent spirits and energized by the outcome.

Jess and several others around the table began to espouse the laws and areas we as an industry should tackle next to improve access and business opportunities.

Fishing through my suit coat for a pen, I realized I had pocketed a brochure in the Supreme Court lobby as we waited to get into the room: titled Visitor's Guide to Oral Argument, with pictures of the nine Justices. I pulled the brochure out and pushed it to Patrick Campbell on my left and said, "Patrick, sign this. We just made history." I then turned to Ken on my right and asked him to sign it and pass it around the room for others to sign.

When I returned to California, I cut out the front page of the New York Times account of the hearing: "Justices Pick Apart Ban on Wine Sales from State to State." My Graphic Art Department framed the signed brochure and the Times article for posterity below. It still hangs in my office today though it surely belongs displayed at some point at the Smithsonian Institute. It is a one of a kind, for sure!



The Supreme Court of the United States

1. Chief Justice Rehnquist  
 2. Justice Stevens  
 3. Justice O'Connor  
 4. Justice Scalia  
 5. Justice Kennedy  
 6. Justice Souter  
 7. Justice Thomas  
 8. Justice Ginsburg  
 9. Justice Breyer  
 10. Clerk of the Court  
 11. Marshal of the Court  
 12. Counsel

(Revised 8/00)  
DECEMBER 7th 2004

# Visitor's Guide to Oral Argument

*Paul Ryan*  
 "AT LAST"  
 Supreme Court of the United States  
*What's going on?*  
*Detail Campbell - we won!!!*  
*to State*  
*approve!*  
*everybody*  
*Key Hall*  
*Robert Hall*  
*Chen!*  
*has 3 books*  
 OF THE SUPREME COURT OF THE UNITED STATES  
 SEAL  
*Sissy Serra*

## Justices Pick Apart Ban on Wine Sales From State to State

By LINDA GREENHOUSE  
 WASHINGTON, Dec. 7 — If the Supreme Court argument Tuesday on interstate wine sales proves to be a reliable roadmap to the eventual decision, consumers who want to order wine directly from out-of-state wineries will soon be able to do so with the court's blessing.  
 The justices appeared notably unmoved by the arguments offered by New York and Michigan in defense of laws that prohibit the direct shipment of wine from other states while permitting in-state wineries to ship their products to their customers' homes.  
 The 50 states are divided almost in half on a question that has grown increasingly contentious in the age of Internet advertising and sales. Twenty-six states permit direct shipment from out-of-state wineries; 24 ban it. The federal appeals courts are divided, too, one court upheld New York while another, almost simultaneously, declared Michigan's law unconstitutional.  
 The states' central argument, presented by Solicitor General Thomas L. Casey of Michigan and Solicitor General Caitlin J. Halligan of New York, was that the 21st Amendment gave states such blanket authority over the "importation" of alcohol as to trump the constitutional principle that applies everywhere else in the national marketplace: that states cannot discriminate in favor of their own products.  
 "More protectionism is permitted" by the amendment that repealed Prohibition, Mr. Casey said.  
 "This case goes to the very core of the 21st Amendment," Ms. Halligan