

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on March 18, 2003 in Room 313-S of the Capitol.

All members were present.

Committee staff present:

Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:

Representative R.J. Wilson
Bob Longino, Kansas Department of Revenue, Division of Alcoholic Beverage Control
Amy Campbell, Kansas Association of Beverage Retailers
Tuck Duncan, Kansas Wine & Sprints Wholesalers
John Han, Self, Topeka

The hearing on **HCR 5016 - urging a study and recommendations regarding internet & other sales of wines not available in Kansas**, were opened.

Representative R.J. Wilson appeared as a proponent to the resolution which would form a study committee composed of the Attorney General's office, the Alcoholic Beverage Control, the Department of Revenue, Legislative Research Department and the Revisor of Statutes Office to find a workable solution to allowing one to order wine over the internet. (Attachment 1)

Bob Longino, Kansas Department of Revenue, Division of Alcoholic Beverage Control, stated that the proposed resolution could result in allowing Kansans a larger selection of wines. It would also allow small wineries, or those with limited volumes of product, to sell in Kansas. (Attachment 2)

Amy Campbell, Kansas Association of Beverage Retailers, appeared before the committee and stressed the importance in maintaining the connection between the retailer and the consumer. (Attachment 3)

Tuck Duncan, Kansas Wine & Sprints Wholesalers, reminded the committee that this is not a new issue it's been around since the early 90's. He's was not sure where the study would lead but saw it as opening up ability of wine being shipped to Kansas. (Attachment 4)

John Han, Self, Topeka, informed the committee that wine is allocated to states by the amount of consumption in each state, Kansas ranks 42 in wine consumption. He told the committee that Alaska allows citizens to receive a "reasonable amount". It's possible that Kansas could do the same and require the purchase of a permit and payment of a registration fee. (Attachment 5)

The hearing on **HCR 5016** was closed.

SB 18 - Issuance of executions and orders of sale

Representative Patterson made the motion to strike the provisions of **SB 18** and amend in the provisions of **HB 2307**, as amended on the House floor. Representative Goering seconded the motion. Revisor Jill Wolters requested that she be allowed to make technical amendments on page 1 and page 2 to include "in the judicial district". With permission of the 1st & 2nd the request was included in the motion. The motion carried.

Representative Davis made the motion to report **Substitute SB 18** favorably for passage. Representative Patterson seconded the motion. The motion carried.

SB 37 - Receipts from an interest in minerals and natural resources pursuant to the uniform principal and income act

Representative Jack made the motion to report **SB 37** favorably for passage. Representative Long seconded the motion. The motion carried.

The committee adjourned at 5:00 p.m. The next meeting was scheduled for March 19, 2003 at 3:30 p.m. in room 313-S.

State of Kansas
House of Representatives

R.J. WILSON
Assistant House Democratic Leader



State Capitol
Room 327-S
Topeka, Kansas 66612-1504
(785) 296-7675

Office of the Democratic Leader

**Testimony in Support of
House Concurrent Resolution 5016
House Judiciary Committee
18 March 2003**

A CONCURRENT RESOLUTION urging the Office of the Attorney General and the Division of Alcoholic Beverage Control of the Department of Revenue to conduct a study and hearings and make recommendations with regard to sale and delivery of wines which are not available for sale in Kansas.

Thank you Mr. Chairman and members of the committee for this opportunity to appear and for your willingness to hear this resolution.

HCR 5016 was introduced in the Federal and State Affairs Committee and referred to this committee for hearings. The resolution starts a process in Kansas which may not be a solution for the most pressing problems of our day, but it is an attempt to address concerns which have been brought to my attention by constituents. Since introduction of this Resolution, I have heard from other members of the Kansas House who have told me that they have constituents who have voiced similar concerns.

This Resolution addresses specifically the inability of these same constituents to shop for bottled wine which is not otherwise available in the state of Kansas. This Resolution would bring together the Attorney General's Office, the A.B.C., the Department of Revenue, the Legislative Research Department and the Revisor of Statutes Office during the summer to seek legal and practical remedies for those constituents which to purchase wine not otherwise available in Kansas.

This Resolution was going to be in the form of a Bill, but after consultation with the industry and the parties involved from the governmental side, it was determined that a Resolution which encourages discussions and study over the interim would be more appropriate to address the many tax and delivery issues that such a statute change would cause.

Therefore Mr. Chairman you have the Resolution presented today. You will hear today from the industry experts and the enforcement agencies for the state. They have more expertise on this issue than I do and I am sure they will be willing to hear your questions. I will point out, however, that there is not a fiscal cost for this Resolution and I think the experts will affirm this in their testimony.

Thank you Mr. Chairman for your willingness to hear HCR 5016. I urge the favorable adoption of this Resolution. I will be happy to stand for questions at the appropriate time.

H. JUDICIARY

3-18-03

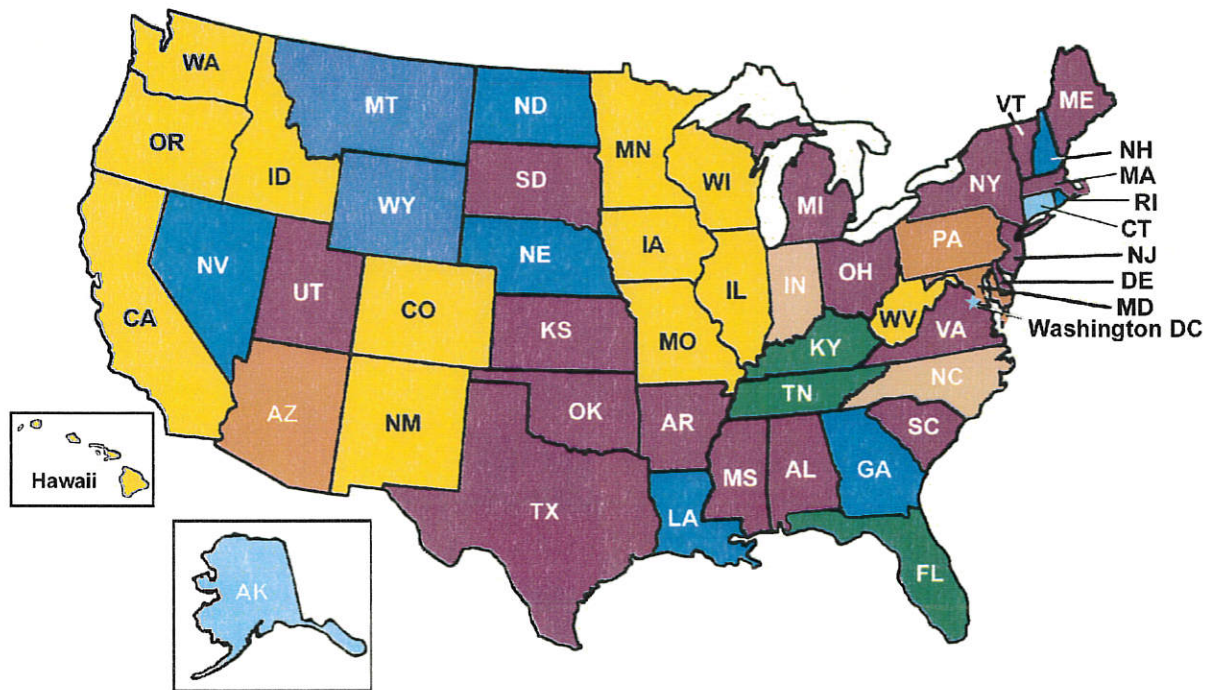
Attachment: 1

Direct Shipment Laws by State for Wineries

(As of June, 2002)

Contact: Wine Institute

(415) 512-0151



Reciprocity state:

- California
- Colorado
- Hawaii
- Idaho
- Illinois
- Iowa
- Minnesota
- Missouri
- New Mexico
- Oregon
- Washington
- Wisconsin
- West Virginia

Attorneys general interpretation or regulatory allowance of limited shipments:

- Alaska (a reasonable amount)
- Connecticut (consumer must get permit)
- Washington D.C. (one quart per person)

Felony for wineries or retailers to direct ship:

- Florida
- Georgia (except in compliance with limited direct provision)
- Kentucky
- Maryland (except in compliance with special order below)
- Tennessee

Special order states (via three-tier system):

- Arizona (additional consumer shipment provision)
- Maryland
- Pennsylvania

Limited direct shipping & permit states:

- Georgia (permit required and taxes paid except for on-site sales; also see felony listing)
- Louisiana (permit required - taxes paid)
- Montana (consumer permit required)
- Nebraska (permit required and taxes paid as of 9/1/01)
- Nevada (taxes paid - permit over 2,000 cases)
- New Hampshire (permit required - taxes paid)
- North Dakota (permit required and taxes paid as of 8/1/01)
- Rhode Island (on-site sales only)
- Wyoming (permit required - taxes paid)

Felony for non-basic permit holders to direct ship:

- Indiana
- North Carolina

Direct shipments via common carrier prohibited:

- | | |
|---------------|----------------|
| Alabama | New York |
| Arkansas | Ohio |
| Delaware | Oklahoma |
| Kansas | South Carolina |
| Maine | South Dakota |
| Massachusetts | Texas |
| Michigan | Utah |
| Mississippi | Vermont |
| New Jersey | Virginia |



K A N S A S

JOAN WAGNON, SECRETARY

DEPARTMENT OF REVENUE
ALCOHOLIC BEVERAGE CONTROL

KATHLEEN SEBELIUS, GOVERNOR

To: Representative Mike O'Neal, Chairman, House Judiciary Committee

From: Robert Longino, Director, Alcoholic Beverage Control Division

Date: March 18, 2003

Subj: House Concurrent Resolution 5016

Mister Chairman and Distinguished Committee Members, thank you for the opportunity to appear before the committee today in support of HCR 5016.

HCR 5016 sets the groundwork for a study on making wines, which are not carried by the liquor distribution system in the state, available to Kansans. Current law provides for a strict three-tiered distribution system with products flowing from suppliers and manufacturers to in-state distributors and eventually to retail licensees for sale to the public. These tiers are all licensed and permitted in Kansas and all products sold must be registered with federal authorities and with the state. Currently we have over 12,500 products registered.

Over the past several decades, there has been a drastic increase in the number of wineries nationwide. Many of the smaller wineries feel challenged by the current three-tiered system and are seeking alternative methods to get their products to consumers. This has led to a direct conflict with many state laws and the current distribution system. Several states have enacted laws directly prohibiting distribution outside this system and many of those laws have been challenged in the courts. Although there are unique circumstances in the other states' laws, most have been struck down by the courts.

The current impact on Kansans is the system reduces consumer choices and does not provide for a lawful alternative. Smaller wineries, or those with limited volumes of product, have difficulty competing in our system and therefore may choose not to sell in Kansas. Alternatively, some of these wineries sell through the internet or mail order unlawfully, as there is simply not a lawful option for purchasing or bringing such wines into the state outside of the current system.

Studying and receiving input on this issue as called for by HCR 5016, is the logical first step to determining whether there is a viable mechanism to allow product to enter the state outside the three-tiered system. Several specific concerns that will need to be discussed are: 1) the impact on the three-tiered regulatory system, 2) ensuring the collection of liquor taxes on products sold or purchased outside the system, and 3) ensuring the products are not sold to minors.

DOCKING STATE OFFICE BUILDING, 915 SW HARRISON ST., TOPEKA
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H. JUDICIARY

3. 18. 03

Attachment: 2

Passage of HCR 5016 should lead to a recommendation on options for providing access to such normally unavailable products, while mitigating the risk to the challenges stated above. We look forward to responding to this resolution.

Thank you for your time this afternoon and I would be glad to respond to your questions.



The Kansas Association of Beverage Retailers

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Phone 785-266-3963
Fax 785-234-9718
kabr@amycampbell.com

John Davis, President

Amy A. Campbell, Executive Director

TESTIMONY PRESENTED TO THE
HOUSE JUDICIARY COMMITTEE
RE: HCR 5016
MARCH 18, 2003

by, Amy A. Campbell, Executive Director

Kansas Association of Beverage Retailers supports the passage of House Concurrent Resolution 5016 to study the issue of direct shipment in Kansas. Retail liquor store licensees are very concerned that the State of Kansas proceed cautiously when considering allowing alcoholic liquor to be delivered directly into the state. Reviewing and comparing the systems of other states most similar to Kansas will provide the background that is so important when considering possible change and avoiding lengthy and costly federal court battles.

As the licensed point of sale in Kansas, retailers meet a long list of State imposed standards and regulations. This role should be preserved for the best interests of Kansas as it pertains to collecting and remitting State enforcement taxes and safely delivering the product to legal consumers.

We will look forward to working with the Attorney General and the Division of ABC to examine possibilities for utilizing this role to access a wider variety of products for our customers. There are a variety of models being used in other states – unfortunately, allowing certain exceptions can result in federal court challenges which are in progress today. There are no simple answers to the questions that arise related to direct shipment, and we are willing to participate in a cooperative process to review the options and learn from the errors of others.

Today, KABR would not support any change in Kansas prohibition against direct shipments by common carrier. The study recommended in HCR 5016 may help us to move toward a model which preserves the important relationship between the licensee and customers, open access to less available products, and maintains the partnership between the State and its licensees.

H. JUDICIARY

3-18-03

Attachment: 3

K · A · N · S · A · S
WINE & SPIRITS
WHOLESALERS ASSOCIATION.

TO: HOUSE JUDICIARY COMMITTEE

FROM: R.E. "TUCK" DUNCAN
KANSAS WINE AND SPIRITS WHOLESALERS ASSOCIATION

RE: DIRECT SHIPPING RESOLUTION

THE KANSAS WINE & SPIRITS WHOLESALERS ASSOCIATION SUPPORTS HCR 5016 A CONCURRENT RESOLUTION URGING THE OFFICE OF THE ATTORNEY GENERAL AND THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL OF THE DEPARTMENT OF REVENUE TO CONDUCT A STUDY AND HEARINGS AND MAKE RECOMMENDATIONS WITH REGARD TO SALE AND DELIVERY OF WINES WHICH ARE NOT AVAILABLE FOR SALE IN KANSAS.

THIS ISSUE IS ONE THAT HAS BEEN THE SUBJECT OF CONSIDERABLE LITIGATION ACROSS THE UNITED STATES. I HAVE ATTACHED HERETO A RECENT ARTICLE FROM THE FEBRUARY 16, 2003 *SAN FRANCISCO CHRONICLE* REGARDING SUCH ACTIVITIES THAT YOU MAY FIND OF INTEREST.

ALSO ATTACHED PLEASE FIND A REVIEW OF THE LEGAL ISSUES: "CHALLENGES TO STATE'S RIGHTS UNDER THE 21ST AMENDMENT," WHICH REFLECTS THE COMPLICATED INTERPLAY BETWEEN STATES RIGHTS (POLICE POWERS) AND THE COMMERCE CLAUSE.

ISSUES TO BE ADDRESSED IN THE STUDY MOST LIKELY WILL INCLUDE: TAXATION, ACCESS TO PRODUCT BY PERSONS NOT OF THE LEGAL AGE, DELIVERY OF PRODUCT IN "DRY" AREAS, CONSIDERATION OF CURRENT FEDERAL LAWS, AND PRESERVATION OF THE INTEGRITY OF THE STATE LICENSING SYSTEM.

THE K.W.S.W.A. WILL BE PLEASED TO PARTICIPATE IN THIS STUDY AND OFFER POSITIVE IDEAS TO MEET THE DESIRES OF CONSUMERS WHILE PRESERVING STATE INTERESTS.

H. JUDICIARY

3.18.03

Attachment: 4

Wineries in state resort to bootlegging; Shipping restrictions force many to rely on subterfuge

FEBRUARY 16, 2003, SUNDAY, FINAL EDITION The San Francisco Chronicle

Wine Country has a dirty little secret. Bootlegging -- the stock-in-trade of whiskey-peddling mafiosi in the 1920s -- is common practice among California wineries in these modern times.

While Prohibition ended 70 years ago, 1930s-era laws in 37 states still restrict wineries' ability to send vino to customers' homes. Those restrictions have given rise to a stealthy network of Wine Country shippers who use tricks such as repackaging wine bottles and labeling them as olive oil to move them across state borders.

Gov. Gray Davis bumped against those laws just last month, when he was unable to ship a case of Cabernet Sauvignon to Florida to settle a Super Bowl bet with Gov. Jeb Bush. In the Sunshine State, alcoholic beverage shipping is confined to licensed wholesalers and retailers; sending wine to a residence from out of state through FedEx, United Parcel Service or any other common carrier is strictly verboten.

Still, illegal shipping "happens every day -- it's standard practice," said wine industry consultant Scott Del Fava. "I just finished consulting for a winery whose wine club is shipping to every state in the country. I told them, 'You guys are just waiting for something bad to happen.'" Since unlawful wine shipments skirt official channels, nobody can put a price tag on the trade.

RISKS CAN BE HIGH But the risks are high: Winery owners could face jail, fines and permanent revocation of their operating licenses if caught sending wine to states where wine shipping is a felony. In a 1997 sting operation, Maryland authorities fined California's Kendall-Jackson Wine Estates \$35,000, and three other wineries lesser amounts, for sending wine into the state.

Utah in the late 1990s extradited and prosecuted the president of Illinois-based Beer Across America, an Internet beer-of-the-month club. The club was fined \$27,000 for shipping beer to customers in the Beehive State; the same laws apply to wine. The shipping problem reflects a yawning divide in this nation's values about alcohol consumption. On one side, a glass of wine at a business lunch is just fine in California. On the other, Utahns must pay a "membership" fee to order a martini at a bar.

Competing financial interests also weigh heavily in the debate. For wineries, turning away business is particularly difficult now, with the economy sluggish and wine prices soft. Sales to out-of-state wine club members can be a critical source of income for wineries that are too small to attract a distributor. State governments have their own concerns -- they fear losing millions of dollars in sales tax revenue if alcoholic beverages are sold outside official channels. The states have a strong political ally in liquor wholesalers, who aggressively defend their lock on alcoholic beverage transportation.

NO CONSENSUS ON HORIZON A consensus among these competing interests is nowhere on the horizon -- and, in fact, appears increasingly remote. California passed the first law allowing direct shipping in 1986, and 12 more states have joined since then. Ten other states have passed limited direct-shipping laws. But since 1995, seven states have made wine shipping a felony.

Nowhere is the clash of values more apparent than in Wine Country tasting rooms. Every day, out-of-state tourists ask to ship a favorite wine home. Often they are told: "No can do." Other times, they get lucky. The Chronicle contacted several local shippers and retail shops, asking whether they would deliver a case of wine to Utah, where even carrying a bottle of wine over the border for personal consumption is unlawful.

Some firms said they couldn't ship to Utah; others said they would. Many seemed confused about what's legal and what's not. Laurie Kneeland, the owner of Mail Center Etc. in Santa Rosa (Sonoma County), readily agreed to ship wine to Utah. When the caller identified herself as a Chronicle reporter and mentioned the restrictions, Kneeland said she would check her list.

"You're right, there are no shipments that can go to Utah," she said. "They're changing the laws all the time."

WINE CHANGED TO OLIVE OIL A clerk at a Mailboxes Etc. in the East Bay, when queried about shipping a case of wine to Salt Lake City, said he would be happy to do so, "but it will go as olive oil." The service would cost \$30, plus an additional \$25 to pack it "in disguise," he said.

Freight-forwarding services often label wine shipments as "computer parts," another shipper said. While some shippers defy the law blatantly, others are the victims of simple confusion. Late last year, Coast Copying & Shipping, a small shipper in the Mendocino County towns of Willits and Fort Bragg, took out newspaper ads promising to deliver wine to customers' doorsteps in all 50 states.

Coast owner Jack Drucker had contracted with a Los Angeles freight-forwarder whose managers said the firm had permits to ship to homes in every state. After a reporter raised questions, Drucker canceled the service -- but not before Sally Ottoson, one of his biggest winery clients, had unwittingly broke the law.

Ottoson, of Pacific Star Winery near Fort Bragg, started taking orders from customers whom she earlier had turned away from her wine club because they live in restricted states. "It's important for all of us in the business to not appear to be (flouting) the law," said Ottoson. Many wineries are not as careful as Ottoson's about their wine clubs, according to Del Fava. Wineries commonly fill out shipping forms using members' "signature on file," even for states that require customers to buy direct-shipped wine in person.

'DARK SHADE OF GRAY' This "technically works in a dark shade of gray," said Del Fava. For serious wine collectors in restricted states, questionable shipping practices come with the territory.

"It is common knowledge (among collectors) how you can safely negotiate these laws and ship anywhere you want," said Peter Ekman, chief executive officer of San Francisco's Wine.com, which caters to such customers.

Wine.com has established a network of licensed retail entities around the country that allow the e-tailer to sell wine legally in 29 states. But in the remaining states, Wine.com goods travel through back channels and what Ekman and others describe as "gray areas" of the law.

Neil Aldoroty, who runs the wine storage facility 55 Degrees in Napa, works with Wine.com and other retailers. When a customer in a restricted state tries to purchase wine from Wine.com, for example, the Web site directs the customer to Aldoroty for "wine-sourcing options."

For a fee, Aldoroty provides locker space where out-of-state customers can store California purchases. He then provides a list of local shippers who advertise that they will deliver wine to every state and washes his hands of responsibility.

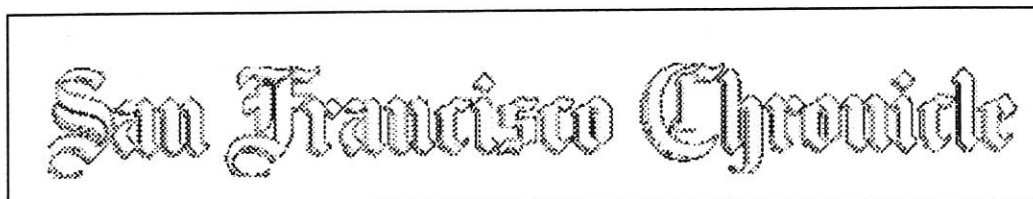
"It's legal," said Aldoroty of his role. "The onus is on the customer to make arrangements. Then later, they send me e-mail saying, 'Let Joe Blow shipper pick up these wines.' That's how it works."

Ekman also disclaims any responsibility. Since customers are effectively shipping to themselves, both merchants and shippers feel protected under the law. No state laws penalize their residents who buy and ship wine illegally. "Once it's your wine, you can do what you want with it," said Ekman.

But liquor-control authorities plan to hold businesses responsible. In Utah, "the winery could be sued and so could all the shippers," as well as anyone acting as a "clearinghouse" for shipments outside of Utah's state-controlled liquor system, said Earl Dorius, licensing and compliance director of the Utah Department of Alcoholic Beverage Control.

Maryland's felony law, which passed about three years ago, has discouraged some illegal shipping -- but the state will still prosecute any "flagrant" violators it catches, said Charles Ehart, director of the Alcohol and Tobacco Tax Division of the Maryland comptroller's office.

"I'll extradite them if I can," said Ehart.



DIRECT SHIPPING LITIGATION

Challenges To State's Rights Under The 21st Amendment

"The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). (doc: 96 KB)

"The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders . . . Indeed, "[t]his Court's decisions ... have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." . . . § 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984). (doc: 74 KB)

"The Court has made clear that the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets . . . In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor [t]hat . . . is unquestionably legitimate." North Dakota v. U.S., 495 U.S. 423, 413-32 (1990). (doc: 160 KB)

"§ 2 of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese. . . No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation. . . Every use of sec.2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then sec.2 would be a dead letter. No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause." Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851-53 (7th Cir. 2000) cert. denied sub nom Bridenbaugh v. Carter, 121 S. Ct. 1672 (2001).

Despite a wealth of Supreme Court and appellate court opinions upholding a State's right under the 21st Amendment to control the importation and distribution of alcohol, lawsuits have been filed over the past several years in eight different States challenging alcohol regulatory systems prohibiting the unlicensed interstate direct shipment of alcohol to consumers. Litigation has occurred in:

Indiana, Texas, Florida, Virginia, New York, Michigan, Washington, and North Carolina.

The proponents of these lawsuits denounce direct shipping bans and claim violations of the "dormant" Commerce Clause. Should an appellate court accept this position, it could severely damage the ability of a State to regulate the distribution of alcohol as it deems appropriate for the protection of its citizenry - especially minors, and to efficiently collect excise and sales tax revenue.

In a substantial victory for the 21st Amendment, state rights and enumerated powers, on April 23, 2001, the Supreme Court denied a petition for certiorari arising out of a 7th Circuit ruling that the dormant commerce clause may not be used to shield interstate shipments of alcohol from state regulation. Bridenbaugh v. Freeman-Wilson

In the 7th Circuit opinion, Judge Frank Easterbrook (Williams, J., concurring) held that in a battle between the 21st Amendment "which appears in the constitution, against the dormant commerce clause, which does not," the 21st Amendment prevails. The Court of Appeals had previously denied plaintiffs' petition for rehearing and petition for rehearing en banc.

Section 2 of the 21st Amendment provides that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Clearly this enumerated power means that a state is empowered "to control alcohol in ways that it cannot control cheese," Easterbrook wrote, but to what degree?

Answering his own question, Easterbrook noted that that there is no discrimination in requiring that out-of-state distributors be subject to the same regulatory scheme as in-state distributors. "Section 2 . . . closes the loophole left by the dormant commerce clause, . . . No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation . . . Every use of sec.2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then sec.2 would be a dead letter. No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause."

In so ruling, Judge Easterbrook reminded us that, although the nature of interstate commerce has changed in the 68 years since the repeal of prohibition, State rights enumerated by the 21st Amendment remain a constant.

In presentations at various industry meetings I have suggested that **temperance is merely a single word for describing the goal of providing for the public health, safety, morals, or general welfare of the citizenry, and that the 21st Amendment is merely an articulation of the "police power" of the state.**

A government's exercise of its police power is presumed to be constitutional, and anyone challenging an exercise of the police power has the burden of establishing that the use of the police power was arbitrary and unreasonable and unrelated to the public health, safety, morals, or general welfare. Although the exercise of police power often causes tensions between the government and its citizens, if a challenge is raised, a court will examine whether the statute, ordinance, or regulation was promulgated for a legitimate "police power" purpose, and whether it is carried out in an unreasonable and arbitrary manner.

If there was no 21st Amendment as it relates to the delegation of beverage alcohol control to the states, would it matter ??

The U.S. Supreme Court in U.S. v. Lopez, decided April 26, 1995, 115 S.Ct. 1624, 131 L.Ed. 2d 626, distinguished the powers of congress to control commerce from the states exercise of police powers. After respondent, then a 12th-grade student, carried a concealed handgun into his high school, he was charged with violating the Gun-Free School Zones Act, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U.S.C. 922(q)(1)(A). The District Court denied his motion to dismiss the indictment, concluding that 922(q) is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. In reversing, the Court of Appeals held that, in light of what it characterized as insufficient congressional findings and legislative history, 922(q) is invalid as beyond Congress' power under the Commerce Clause.

The Court. held that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States . . ." U.S. Const., Art. I, 8, cl. 3. To uphold the Government's contention that 922(q) is justified because firearms possession in a local school zone does indeed substantially affect interstate commerce would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States.

The Court stated: "We start with first principles. The Constitution creates a Federal Government of enumerated powers. See U.S. Const., Art. I, 8. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was

adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*, at 196.

Even as modern-era precedents which have expanded congressional power under the Commerce Clause, this power is subject to outer limits. The scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S., at 37; see also *Darby*, *supra*, at 119-120 (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard*, *supra*, at 125 (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."

Under the theories that the Government presents in support of 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

"To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. ... The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden*, *supra*, at 195, and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel*, *supra*, at 30. This we are unwilling to do.

In Cleveland v United States decided November 7, 2000, Justice Ginsburg delivered the opinion of the Court stating that permits or licenses of this order do not qualify as "property" for purposes of the mail fraud statute. In the case at bar the Louisiana statute establishes a typical regulatory program. "It licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization. In this regard, it resembles other licensing schemes long characterized by this Court as exercises of state **police powers**. E.g., *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) (license to transport alcoholic beverages); *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 558 (1917) (license to sell corporate stock); *Fanning v. Gregoire*, 16 How. 524, 534 (1854) (ferry license); *License Cases*, 5 How. 504, 589 (1847) (license to sell liquor) (opinion of McLean, J.), overruled on other grounds, *Leisy v. Hardin*, 135 U.S. 100 (1890)."

"Even when tied to an expected stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. **Such regulations are paradigmatic exercises of the States' traditional police powers, the Court ruled.**

It has been said that the police power is the inherent and plenary power in state over persons and property which enables the people to prohibit all things inimicable to comfort, safety, health and welfare of society. It is an authority conferred by the American constitutional system upon the individual states. Police power is an inherent power of the sovereign and rests upon the fundamental principle that all property is owned subject to the limitation that its use may be regulated for the safety, health, morals, and general welfare of the community in which it is located. Whatever affects the peace, good order, morals and health of the community may come within its scope.

Thus, if temperance (which I would probably define as social responsibility) is the goal, that is, regulating conduct to protect the health, and safety of the citizenry, then regulators who enact rules that evenhandedly effectuate a legitimate local public interest, and whose effects on interstate commerce are only incidental, such rules will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Thus, those of us that support states rights in this area suggest that there is both police power authority as well as the grant of authority pursuant to the 21st Amendment to the U.S. Constitution for the regulation of direct shipments into the state.



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John Han Testimony

March 18, 2003

HCR 5016

As a consumer residing in the state of Kansas, I, John Han, believe that the sale of wine products on the Internet would be beneficial and necessary for wine consumers in this state. Because wine is sold to each state based on the consumption, Kansas only ranks 42nd and therefore is not allotted the quality of wines that are in demand. If consumers in Kansas were able to purchase wine over the Internet, consumers would be able to buy the best quality of wine products on the market that otherwise would not be available to the state of Kansas.

22 states are allowed to purchase wine over the Internet. The courts of New York and Virginia recently upheld a ruling that prohibiting the shipping of wines to those states is unconstitutional. And 6 more states have either legislation or judgment pending on the topic of interstate direct shipment of wine. A decade ago only 4 states allowed for interstate direct shipment of wine.

For instance, 'E Guigal produces a wine named Chauteauneuf du pape that has been named "Wine of the Year" by Wine Spectator, a wine magazine available anywhere in the world. 'E Guigal produced 15,000 cases of Chauteauneuf du pape in 1999 that is shipped to most states but it is not offered in Kansas.

According to the Wine Institute, there are 2100 wineries in the U.S. and 2050 of the wineries produce less than 5% of the U.S. wine production. And less than 17% of the U.S. wineries are represented by distributors in all 50 states.

H. JUDICIARY

3-18-03

Attachment: 5

But this is not an issue exclusive to small wineries. Large wineries also blend special, small production lots that the current system cannot adequately sell. The well aged ‘library’ wines are often only available from the winery or retailer. Also the majority of special imports, like Bordeaux “futures”, are purchased and sold by only a handful of East Coast retailers.

As a fascinated consumer of wine, I have traveled to over 50 different vineyards in the country and learned the importance and the strong effort that goes into producing a quality wine. I have lived in 3 states where I was able to purchase wine over the Internet. As a permanent resident in the state of Kansas I believe that bringing the opportunity for wine consumers to purchase wine over the Internet would be beneficial and culturally expanding of wine advocates if this Resolution were to be passed.

Respectfully,

John Han