



U. S. Department of Justice

Civil Division

Washington, D.C. 20530

Mark T. Quinlivan
(202) 514-3346

December 5, 2003

VIA OVERNIGHT DELIVERY

Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Raich v. Ashcroft, No. 03-15481

Submitted: October 7, 2003
Before: Judges Pregerson, Beam and Paez

Dear Ms. Catterson:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, the United States responds to the Rule 28(j) letter submitted by appellants, which directs attention to the decision in United States v. Stewart, No. 02-10318 (9th Cir. Nov. 13, 2003), in which this Court held that 18 U.S.C. § 922(o), exceeds Congress' authority under the Commerce Clause as applied to the intrastate possession of a homemade machinegun.

The decision in Stewart did not address the constitutionality of the Controlled Substances Act. Thus, for example, the panel in Stewart perhaps believed it to be significant that Congress "failed to make any legislative findings when it enacted [section 922(o)]." Slip op. at 16071. In contrast, as this Court has previously recognized, the Controlled Substances Act "contains express legislative findings regarding the relationship between purely intrastate activities and interstate commerce." United States v. McCoy, 323 F.3d 1114, 1128 n.24 (9th Cir. 2003) (citing 21 U.S.C. §§ 801(4) & (6)). Stewart therefore does not undermine this Court's line of decisions holding that 21 U.S.C. § 841(a) "is constitutional and that no proof of an interstate nexus is required in order to establish jurisdiction of the subject matter." United States v. Visman, 919 F.2d 1390, 1392-93 (9th Cir. 1990), *cert. denied*, 502 U.S. 969 (1991) (quoting United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 947 (1978)). Accord United States v. Kim, 94 F.3d 1247, 1250 (9th Cir.

