

AUG 14 1991

Washington, D.C. 20530

August 14, 1991

Michael Davidson, Esq.
Senate Legal Counsel
642 Hart Building
Washington, D.C. 20515

Re: United States v. Rock Island Armory and David
Reese, No. 90-40025 (C.D. Ill. 1991)

Dear Mr. Davidson:

I am writing to notify you that we have determined not to appeal the decision of the district court in the above-referenced case. Although the applicability of 2 U.S.C. 288k(b) is unclear in this particular instance, I thought it best to make you aware of this matter.

The defendants in this case were indicted for, inter alia, manufacturing machineguns without registering them and paying the applicable tax, in violation of 26 U.S.C. 5861(f) and 5822, distributing unregistered machineguns, 26 U.S.C. 5861(j) and 5822, and conspiracy to commit those offenses, in violation of 18 U.S.C. 371. The offenses were alleged to have taken place after May 19, 1986. In the decision at issue, the district court held that, "[a]s applied to machineguns made and possessed after May 19, 1986, the registration and other requirements of the National Firearms Act, Chapter 53 of the Internal Revenue Code, no longer serve any revenue purpose, and are impliedly repealed or are unconstitutional." Slip op. 23. The date to which the district court referred -- May 19, 1986 -- was the effective date of Pub. L. 99-308, § 102(9), 100 Stat. 451, codified at 18 U.S.C. 922(o). Under that statute, it is unlawful for any person to transfer or possess a machinegun, except under certain specified conditions. See 18 U.S.C. 922(o)(2).

The district court appears to have based its ruling on the fact that, under 18 U.S.C. 922(o), it was illegal for defendants to manufacture or possess the machineguns in question. Consequently, the Bureau of Alcohol, Tobacco, and Firearms would not have processed applications for registration or accepted firearms tax payments from defendants. Under 26 U.S.C. 5822, the Bureau must deny applications for registration "if the making or possession of the firearm would place the person making the firearm in violation of law."

The defendants are still subject to prosecution under 18 U.S.C. 922(o) for the conduct charged in this case. In light of that fact and upon consideration of the possibility that this case, if appealed, could simply result in adverse appellate precedent, I determined not to authorize an appeal. A protective notice of appeal was filed pending this determination. Had an appeal been authorized, a brief for the United States would have been due in the United States Court of Appeals for the Seventh Circuit by August 19, 1991. We expect that the court will dismiss the appeal on that date or shortly thereafter.

Please do not hesitate to contact me if you have any questions. With best wishes.

Sincerely,

Kenneth W. Starr / KWS

Kenneth W. Starr
Solicitor General

cc: Steven R. Ross, Esq.
General Counsel to the Clerk
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