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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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The Reader's Digest Association, Inc.,
Plaintiff,

v.

Federal Bureau of Investigation,
et al.,
Defendants.

79 Civ.

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May 13, 1982
10:30 a.m.

BEFORE:

HON. ROBERT J. WARD,

District Judge

APPEARANCES:

Warshausky, Hoffman & Cohen, Esqs.,
Attorneys for Plaintiff
David Cohen, Esq., of Counsel
- and -
David Otis Fuller, Esq.

John S. Martin, Jr., Esqs.,
United States Attorney
Attorney for Defendants
Janis P. Farrell, Esq.,
Assistant United States Attorney

(Case called; both sides ready)

THE COURT: I have before me a letter on the letterhead of the United States Attorney addressed to the Court, dated April 15th, and signed both by Ms. Farrell and by Mr. Cohen, so that this is a letter setting forth a agreement made between the attorneys.

The agreement, in substance, states that defendants will make available to the Court "all of the documents withheld at the Federal Bureau of Investigation and Central Intelligence Agency in Washington, D.C."

The agreement would further provide that the defendants will have an individual present to respond to any questions the Court may have during its review of the documents. The request is that the Court give reasonable notice to Ms. Farrell, Assistant United States Attorney, of the date on which the Court wishes to commence review of the documents, and then that the Court notify all counsel when its review has been completed. After that, the parties will await instructions from the Court regarding the next step in this matter.

The letter, as I have noted, is dated April 15. The press of a number of significant trials has delayed my seeing you until today, almost a month later, and the future looks no better than the recent past, so why I

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got you together is to get an idea of the scope of our problem.

Ms. Farrell, I think the first question should be addressed to you. What is the quantity of documents you propose to submit?

MS. FARRELL: Your Honor, that would be all of the documents involved in the case. In terms of pages, I believe that there are about 5,000 pages from the FBI, and then I believe about 200,000 pages with respect to the CIA.

THE COURT: You did say 200,000?

MS. FARRELL: Yes, your Honor. Those are pages.

THE COURT: If I was able to process 5,000 pages a month, which is optimistic at this point based on my trial schedule, it would take me about three and a half years. Needless to say, if I could only do a couple of thousand pages a month, it might take me about seven years.

It seems to me that is a little unreasonable so far as the Court is concerned.

MS. FARRELL: Your Honor, as an alternative, the government has suggested a random sample which would be maybe one in terms of documents I believe the CIA had suggested may be every fiftieth document, and the documents are already numbered so that it would be clear that the

Bud - CIA has always claimed Shadrach was an FBI case! - Hwy c →

1 government was not attempting to just pick out certain
2 documents that we thought would be favorable to us.

3
4 THE COURT: I rejected that already. I have
5 another suggestion. The suggestion is to obtain security
6 clearance for Mr. Cohen, and to swear him not to disclose
7 the results of his review, which I am sure we can rely upon,
8 and let him read the documents from beginning to end, and
9 then hold an in-camera proceeding at which time he could
10 argue in favor of disclosure of some or all of the documents,
11 and you could argue in opposition. Let him peruse the
12 205,000 pages that he wants to see and make the presentation
13 that he believes appropriate in order to persuade the Court
14 that he is entitled to them.

15 That eliminates the value judgments which the
16 Court would have to make based on a number of factors,
17 one being the nature and degree of input by the representative
18 or representatives of the agencies who you have agreed to
19 have present to respond to any questions the Court may have
20 during its review of the document. If Mr. Cohen,
21 unfortunately, couldn't pass security clearance, I would ask
22 that he designate another attorney to represent the
23 Reader's Digest who could. It seems to me if we can clear
24 people for the position of director of the agency we can clear
25 people for this position, and that eliminates the value

2 judgments which the Court has been concerned about making
3 in this case. I tried one method, spent a fair amount of time
4 on it, and had to discard it.

5 You see, if you were talking about a total of
6 5,000 documents, I think you are talking about something
7 that is manageable, but you are talking about 205,000 pages,
8 and I'm not sure how good the print is on some of them.
9 Some of the stuff I have seen already has been fourth-copy
10 Xeroxed over, and it takes time to make it out. I think
11 after a few thousand pages you learn the shorthand,
12 all right -- that is, what they mean with certain
13 designations. I have, in my experience as an Assistant
14 United States Attorney, had some contact with classified
15 documents, and I know that they are not always easy to read
16 both as to substance and as to the manner in which they are
17 presented -- i.e., as I said, Xerox or photostat copies of
18 documents.

19 Let me ask Ms. Farrell if what I propose would
20 be agreeable to the government. The predicate, of course,
21 being that defense counsel must receive a security clearance
22 for documents of this type.

23 MS. FARRELL: That plaintiff's counsel, your
24 Honor.

25 THE COURT: I beg your pardon. You have

1 corrected me correctly. I meant Mr. Cohen, or if, Lord
2 forbid, he failed to qualify, and I have every reason to
3 believe that he will qualify, an attorney designated by
4 who would. Then he would have the clearance, he would b
5 sworn not to disclose the matter save in the first insta
6 to the Court in your presence in camera, and he might fi
7 after a few thousand of these documents that the race
8 wasn't worth it, and he might decide that he could spend
9 time more meaningfully defending the Reader's Digest ratl
10 than prosecuting for them, since his firm has done both.

11
12 It was intended by me that it would be
13 plaintiff's counsel who would receive the security cleara
14 and who would conduct his examination in the same type of
15 privacy as I would, and be restricted, obviously, in the
16 first instance.

17 MS. FARRELL: Your Honor, I am aware that t
18 matter came up earlier in this case, and I know that both
19 agencies were extremely reluctant. I will at this time g
20 back to them and talk to them about it and give them a co
21 of the transcript, but I think it will take me until at
22 least Monday or Tuesday to get a definite answer from the

23 THE COURT: I suggest that the matter be
24 taken to the topmost level of the agencies, if you run in
25 bureaucratic problems, because both the Director of the C

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2 Mr. Casey, and the Director of the FBI, Judge Webster, were
3 not career people in intelligence matters, one coming from
4 the business, investment and securities community and the
5 other from the Circuit bench. They managed, as good
6 citizens, to pass muster and are now entrusted with probably
7 considerably more up-to-date and vital matters than we are
8 going to entrust to Mr. Cohen.

9 I do this because you have indicated the scope
10 of the project. I have indicated in return the time-consuming
11 nature of the project, and at this point at least it is a
12 project that I don't see I can pass off to anyone.

13 In addition, your proposal is of concern to me
14 from the practical and economic point of view. You would
15 have someone available to respond to my inquiries. This
16 is the type of project that I might be called upon to do
17 in the evening, over weekends, and on such occasions, and
18 I think it is a little unreasonable to require some
19 government official of some expertise to be available to me
20 on what could almost be 24-hour call for what could be a
21 matter of years. There is a point, in my judgment, of
22 diminishing returns.

23 What I am suggesting, too, and take this back
24 to the agency people, is this. Sometimes a jury will come in
25 here and ask to have the entire testimony of a witness read.

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2 That sometimes is testimony that has consumed two or t
3 days. I have noted on occasion I have started to read
4 and indicated to the jurors, "If you have heard what
5 you came to hear, stop the reporter and we will not go
6 through the whole exercise."

7 I have had juries in two hours indicate
8 they have heard what they wanted to hear and they are
9 satisfied, and that's the end of the matter. So I wou
10 turn to you in the first instance with the position th
11 have taken, but before you go back to the agencies I
12 it appropriate to inquire of counsel on whom I would
13 propose to place the burden whether he is agreeable to
14 I think is an extremely burdensome task.

15 Also, I would ask him, since I have know
16 him a while, and believe him to be a good and loyal ci
17 if he had a security clearance in the past or if he kn
18 of any reason why he would be denied appropriate level
19 security clearance in connection with the project that
20 have outlined.

21 MR. COHEN: I just conferred with Mr. Ful
22 and I would have no objection in undertaking, at leas
23 initially, this task. I don't know what 200,000 pages
24 mean, it may be quicker than that. I asked Mr. Fuller
25 he knew what was involved in a security check, but I do

1 think I would have a problem with one, but I don't know wh.
2 it entails.
3

4 THE COURT: Were you in the service?

5 MR. COHEN: No.

6 THE COURT: Have you had a position which
7 required a security cleraance?

8 MR. COHEN: No, I have never had a security
9 check at all. I can't imagine that there would be any
10 problem with it. I am curious as to what a security check
11 involves.

12 THE COURT: Ms. Farrell has gone through one,
13 and I did have a law clerk, Mary Ellen Kris, who is now
14 a colleague of Ms. Farrell's, who, if I recall, if not in
15 connection with this case but in another, underwent a
16 security clearance. Yours might take a little longer because
17 you are a trifle older than the law clerks.

18 MR. COHEN: Much duller, though.

19 THE COURT: And they go through your entire
20 existence.

21 Ms. Farrell, I make this proposal because I
22 think it is a practical one. If the national security
23 wouldn't be compromised, and I don't believe it would be,
24 assuming there was a security clearance given and we would,
25 of course, in the first instance, swear Mr. Cohen to

1 non-disclosure, the first disclosure he would make would be
2 in camera before me and you, then we would deal with the
3 matter further.
4

5 He knows better than anyone, I think, what
6 his client's needs are, let's put it that way. He might
7 very well determine that the needs wouldn't be satisfied
8 at all within the 205,000 pages. At the same time, he might
9 feel that the needs would be fully satisfied if he could
10 obtain certain smaller portions of the documentation. I
11 would then be prepared to focus on that. I think it would
12 be much more practical.

13 In other words, you have indicated you will
14 make the entire field available to me. What I am saying is
15 he will serve as the microscope and narrow down the field,
16 which would then permit me to hear from him in camera
17 with you there where he would indicate, "This is the material
18 that I believe would suffice, and this is why we need it."

19 It might well be that material or some of it
20 could be made available without further judicial determination
21 or it could be that judicial determination would be needed
22 with regard to all of it. I don't know. So I would ask you
23 to take back the transcript, indicate to the respective
24 agency people that this was the Court's suggestion based on
25 the scope of the problem as you present it -- i.e., that you

2 believe that a total of 5,000 pages would be furnished to the
3 Court by the FBI, and an aggregate of approximately
4 200,000 pages by the CIA.

5 Indicate, also, the Judge's concern, since it
6 would be a job that he would be required to do himself, for
7 the time involved for all the reasons that you know,
8 together with the Judge's concern that this could very well be
9 exceedingly time consuming on the person, it might be one,
10 it might be one from each agency, who would have to be
11 present during the time the Court was reviewing that
12 particular agency's documents, who would then respond to
13 questions.

14 I make the suggestion I do because I believe
15 it is a practical step forward. Needless to say, if the agency
16 rejects, or both agencies reject it, then we will have to
17 consider how we proceed. But you have indicated a willingness
18 to furnish the transcript to the agencies with a request that
19 they consider the matter. Mr. Cohen has indicated a
20 willingness to do the job, assuming that he can get
21 clearance, and if he cannot I would ask him to designate
22 another attorney who he believes could be cleared. We could
23 try a second person.

24 I have known him long enough and have enough
25 confidence in him to believe that he will pass muster with the

1 matter at hand.

2
3 There is one other thing you may wind up with
4 Giving him a level of clearance which would afford him access
5 to 80 or 90 percent of the documents, leaving perhaps a very
6 few which for some reason are super-classified, and might
7 make the job easier in that respect, too.

8 There are several ways to go about it.
9 Obviously, if he can get total clearance that would be
10 most ideal. If it is the type of minimal clearance that
11 would permit him to see five to ten percent of the document
12 it wouldn't seem to me to be worthwhile. But I think what
13 we have to do is see what you are able to come up with.

14 I don't believe, in the context of this
15 case, that the course that I have suggested will compromise
16 national security. If I thought it would, I wouldn't have
17 suggested it in the first place, and I have tried to build
18 into it the safeguards that would come from, for example,
19 providing security clearance to a law clerk of mine who
20 would undoubtedly have to work with me in connection with
21 the matter. That would make the job a more efficient one.
22 But by virtue of the scope of the problem I would suggest
23 even there I just don't have a law clerk who could do it
24 because I have a feeling probably the time consumed would
25 go beyond the tenure of my law clerk.

2 We have a lot of practical problems that are
3 caused, I think, by the scope of the documentary material.

4 I recognize that on some pages there may be
5 just a few lines, maybe even two or three. Other pages
6 may be full text. I am aware of that. But by virtue
7 of the number that you have mentioned -- in fact, I thought
8 you were going to tell me maybe it was 15,000 or 20,000,
9 but actually what you have said is perhaps ten times
10 that.

11 If it's agreeable, then, to proceed with your
12 making the inquiry, why don't you tell me what we should
13 provide as the next step. Do you want to communicate with
14 Mr. Cohen and with the Court and then come back here
15 when you have the information? Do you want to set a date
16 now? What would be best?

17 MS. FARRELL: What I will do today is speak
18 to the agencies and get the transcript down to them as
19 quickly as possible. I anticipate having an answer for the
20 Court by the middle of next week.

21 At this time, I have no idea what that response
22 is going to be.

23 THE COURT: I will join you in saying that
24 I don't, either. I have made a proposal that I don't
25 believe has been presented to the agencies before quite in t

1 way I have indicated, and I recognize they may have man
2 policy considerations that they have to consider.
3

4 At the same time, I think we have to reco
5 that as long as this legislation is on the books, I don
6 think that Congress intended to take a federal judge fu
7 away from his other duties as a document reviewer for a
8 period of three and a half years. I recognize there is
9 case around here that has gone on many years because it
10 several million documents, but fortunately the parties v
11 able to apparently dispose of that one.

12 What do you want to do time-wise? Do you
13 to report with a letter or come back here? Which would
14 best?

15 MS. FARRELL: I think initially, your Hono
16 I would like to report with a letter.

17 THE COURT: Is that satisfactory, Mr. Cohe

18 MR. CONEN: That's fine.

19 THE COURT: Let me ask you to get a letter
20 by Friday, May 21. If you run into a problem just let u
21 know beforehand, let Mr. Cohen know that you will take
22 another few days. I just want to keep it on a track. I
23 responsible for the last delay because I couldn't get to
24 and I'm not holding you to that date as it must be. If
25 it is worth taking up on a higher level in one of the

1 agencies to get it approved, I'm willing to wait a bit,
2 I'm sure Mr. Cohen is, too. In other words, I don't wa
3 low-level rejection and that's the end of it, because I
4 I haveto know by a week from tomorrow.
5

6 At this point in time, what we will do is
7 it that you will report to Mr. Cohen and to the Court by
8 May 21, and then depending on the nature of the report
9 we will proceed from there.

10 Is that satisfactory?

11 MR. COHEN: That's fine, your Honor.

12 THE COURT: Thank you.

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