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July 23, 1982

David Otis Fuller, Jr., Esq.
The Reader's Digest Association, Inc.
200 Park Avenue
New York, New York 10166

Re: RDA v. FBI et al.

Dear Dave:

Enclosed is a copy of the latest proceedings before Judge Ward, which you attended with me. I am taking the liberty of sending a copy of this directly to Henry Hurt. The transcript is poor quality, but I think the essence of the proceeding shines through.

Sincerely,

David W. Cohen

DWC/lb
Encl.

cc: Henry Hurt

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE READERS DIGEST ASSOCIATION,

Plaintiff,

v.

79 Civ. 4812

FEDERAL BUREAU OF INVESTIGATION,
et al.,

Defendants.

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Before: HON. ROBERT J. WARD,
District Judge

New York, N. Y.
June 9, 1982 - 3:20 p.m.

APPEARANCES:

WARSHAVASKY, HOFFMAN & COHEN, ESQS.,
Attorneys for Plaintiff

BY: DAVID COHEN, ESQ.,
-and-

DAVID OTIS FULLER, JR., ESQ.,
of Counsel

JOHN S. MARTIN, JR., ESQ.,
United States Attorney for the
Southern District of New York

BY: JANE FARRELL, ESQ.,
Assistant United States Attorney

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2 (Case called)

3 MR. COHEN: Good afternoon, your Honor.

4 The plaintiff is ready.

5 MS. FARRELL: Ready.

6 THE COURT: This conference was scheduled
7 following receipt by the Court of letters from Ms. Farrell
8 together with an enclosure from Mr. Sporkin and an
9 opinion from the Court of Appeals of this circuit. The
10 letter from Ms. Farrell dated May 26, which is a
11 follow-up to matters which we discussed at the May 13,
12 1982 hearing. As often happens when a letter is
13 submitted to the Court, there was an initial response
14 from Mr. Cohen, a letter dated June 2. In that
15 letter, which has to do with the question of in-camera
16 review of numerous documents, Mr. Cohen indicated that
17 the Readers Digest was prepared to either have the Court
18 make the review itself, or consent to have a magistrate
19 make the review.

20 That letter was followed by a hand-
21 delivered letter of -- I guess they were all
22 hand-delivered, no one trusts the mail anymore -- letter
23 of June 7, and that letter points out that counsel was
24 disturbed by the document count. The Court was also,
25 I may say. And Mr. Cohen concludes his letter with the

1 following: "Thus it seems that neither the FBI nor the
2 CIA seems competent or willing to provide a realistic
3 document count so that even the magnitude of the problem
4 can be gauged."

5 We feel strongly that both plaintiff and the
6 Court are entitled to an explanation for the reasons
7 for the glaring misstatements made by the defendant
8 during the course of the litigation, and if the Court
9 so directs, plaintiff would be prepared to undertake
10 appropriate discovery.

11 At this point, I would call upon
12 Ms. Farrell for comment.

13 MS. FARRELL: Your Honor, I regret that I have
14 received neither of those two letters from Mr. Cohen.
15 However, with respect to the document count, I must say
16 that what happened was, my notes reflect those numbers
17 from a telephone conversation with my clients. Following
18 the hearing, after speaking to them, I was told that I
19 was mistaken in those numbers, and, therefore, since I
20 have been told by Mr. Sporkin of the CIA, who has
21 undertaken to make sure that an accurate count has been
22 made, that the numbers reflected in his letter are in
23 fact accurate, and that there was some misunderstanding
24 with the person I had spoken to on the phone, that we
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2 now have the accurate number.

3 I can only say, therefore, that I was mistaken
4 in the numbers that I provided to the Court at the last
5 hearing.

6 THE COURT: What troubles the Court,
7 Ms. Farrell, is that this was not the first mistake made by the
8 government. I'm not trying to cast blame upon you, but
9 I originally attempted to resolve this matter on the
10 basis of affidavits submitted by your Agency client.
11 you were most helpful to the Court during the process of
12 attempting to resolve the matter by reference to the
13 affidavits, but there came a point in time, as you know,
14 where the Court lost confidence in the accuracy of the
15 affidavit material. That, of course, has gotten us to this
16 point where, being concerned about the accuracy of the
17 summaries, I felt constrained to review the materials.
18 Then, of course, I received the document count which,
19 if I can suggest it, I found surprising when the number
20 205,000 pages was presented.

21 You will recall that I immediately took pencil
22 to paper and determined that if I were to review all those
23 pages at a fairly fast clip, I would be doing nothing else
24 for a considerable period of time.

25 It now appears from your report and the materials

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2 submitted by Mr. Sporkin, that I am talking about
3 perhaps 15,000 to 16,000 pages in the aggregate, as
4 opposed, of course, to in excess of 200,000.

5 Now, next question is, if I am to receive
6 approximately 15,000 pages, and I'm not holding us now to a
7 single number, I said "approximately," it would seem to me
8 that it would still take a fair amount of review. I am
9 prepared to undertake the review in my chambers. However,
10 the first caveat I put on it is this: Prior documents
11 which I have seen, and I would think I would see them again,
12 are frequently poor copies. I'm sure you have had the
13 same problem. A carbon, for example, then Xeroxed a couple
14 of times, comes out rather difficult to read. I think
15 I could make my way through 15,000 pages of originals,
16 which would be easily read.

17 There is just something that gets very
18 difficult continuing to concentrate on a mass of documents
19 which are poor copies. My first question to you,
20 without getting into the contents of these documents is,
21 in what share are they, if you know?

22 MS. FARRELL: Your Honor, I have not seen
23 the originals, but it is my understanding that they do
24 have the originals of most of the documents. Some of them
25 are newspaper articles and also copies of letter where they

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2 were CC'd onto it. But for the most part, they are
3 original documents.

4 We may have some of the documents that they
5 have maybe in carbon form, but they would be legible if
6 they weren't when they sent it to you in the Xerox.

7 THE COURT: Let me stop you based on
8 something you just said.

9 As I was visualizing essentially memoranda such
10 as I have seen on prior occasions or in other cases, internal
11 Bureau documents, et cetera, you just mentioned newspaper
12 articles. I have a lot of difficulty in visualizing how
13 showing newspaper articles could compromise national
14 security. They obviously have already seen the light of
15 day. I suppose the argument is that you take a certain
16 small sampling of articles, they will perhaps direct
17 the attention of the reader more specifically in some
18 areas which might be sensitive. If you have some other
19 argument on matters such as that, I'd like to hear about
20 it, because I am trying to visualize what my job should be.

21 MS. FARRELL: Your Honor, with respect to
22 something such as an article, the article itself is not
23 redacted. It has been -- they have a Xerox copy and
24 then they may have an internal document, stapled to that
25 article, explaining somebody in the organization sees

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2 reaction to the article. It's not the article itself.
3 The article is merely attached for reference to the
4 comments that are made. It's much like the letter that
5 I sent to your Honor with the copy of the Court opinion
6 attached.

7 In such a situation, the article itself has
8 already been released, but not the memorandum that is
9 attached to it.

10 THE COURT: Let me put this question to you.

11 Would I be able, over a period of some weeks,
12 perhaps to have some one on call, because I'd have to work
13 on it from time to time, to explain the documents and
14 their significance as I get to them?

15 MS. FARRELL: Yes, your Honor. Both agencies
16 have assured me that they will have someone fully
17 familiar with the documents prepared to explain any --
18 answer any questions raised by your Honor.

19 THE COURT: Also I would need the previously
20 submitted affidavits, the ones I looked at and returned
21 to the government, together with the underlying documents.
22 And I think under the circumstances, if I am going to do
23 it in chambers, I would request security clearance for at
24 least one law clerk, which is what I did several years
25 ago with regard to another phase of this litigation, or

2 perhaps it was another litigation. I think it was another
3 case, now that I think of it.

4 I would think that that would require
5 security clearance for the law clerk I would have coming
6 in September, since I want this to be the first and hte
7 last time we went through this exercise. That's what I would
8 need.

9 My question is a simple one to both of you, and
10 that's one of the reasons I thought a conference was a
11 very good idea. I think all of this will put the Court
12 to a lot of time, it isn't a question of 100 or 200
13 documents.

14 In addition, it would put everyone to a
15 certain amount of expense. I know the Digest has certain
16 matters that interests them. They seem to be pretty well?
17 on the subject, based on the article that I have seen,
18 at least one book that has been published. If they still
19 have a real and abiding need, and I mean need, for this,
20 I will go through the exercise. But if it's something
21 that is much more a matter of "principle" than a matter
22 of necessity, I would suggest they save their requests for
23 matters of necessity. I am not enthusiastic about going
24 through this exercise unless I have to. It's very simple.
25 We do have much to do around here. The liability of

2 people and rights, and I recognize the Digest has certain
3 rights.

4 But I tell you frankly, though I do many
5 things with enthusiasm, I do not look forward, with the
6 few moments that I may have available, to plodding my way
7 through 15,000 documents.

8 Mr. Cohen?

9 MR. COHEN: Well, your Honor, I can represent
10 to the Court that there is still a need --

11 THE COURT: You better spell it out for me,
12 then, because I have had enough dealings over these last
13 several years with the Readers Digest to know generally
14 what they want and what they are looking for.

15 I also see on the horizon some legislation which
16 may well shut the door on this whole thing when I am halfway
17 down the road. Because I assure you, this is going to take
18 time. It has to. You think about that for a moment. If
19 your need is immediate, I can't deliver. The government
20 has put some restrictions on me. I attempted to take a
21 practical approach. The government has said no, I'm
22 not in a position to overrule the government. They generally
23 say, "Judge, you've got to look at this." I am not
24 a censor and I'm not an editor. That is what you are asking
25 me to be, both of you. I am not unsympathetic to the needs

1 of the Digest, but at the same time, I assure the Digest
2 that there better be a mighty need for this before you
3 ask a federal court basically to wade through 15,000 pages
4 of material with which the Court has a modest background
5 where I will have to have someone on call to explain to
6 me this jargon that usually appears when you are trying
7 to decipher records of these two agencies.
8

9 It's not like picking up a book. And lots of
10 this can get by me, and possibly on appellate review where
11 they are just as busy, and maybe more so, get by them.
12 And they are not to have the advantage, I would think,
13 of having someone sitting at their elbow.

14 MR. COHEN: First, your Honor, the matter is
15 still under active pursuit at the Digest. That I can
16 represent. There's never been a suggestion on the part
17 of the Digest other than before the first book and article
18 came out that there was any immediacy to the attention,
19 and of course, I think -- no one from the Digest is
20 suggesting that the Court drop all its matters and look at
21 this thing right away, before the legislation passes or
22 whatever legislation passes or for tomorrow' newspapers.

23 But I will say this, your Honor, that initially
24 this matter was brought in 1980, the requests of the Digest
25 were preceded by the requests of Mrs. Shadlon for years

1 before.

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3 When we consented to have the Court look
4 at the in-camera documents, the government didn't submit
5 proper document counts, the Court had questions about it.
6 We reluctantly asked, at the Court's suggestion, we agreed
7 to the in-camera, then we agreed to have the Court look
8 at the documents, then we agreed that it was too many
9 for the Court to look at and we'd look at it, and then
10 we were told that the documents were not what the
11 government said they were, they were one-tenth of it.

12 We are agreed again to let a magistrate look
13 at it. I realize it's an imposition on the Court,
14 and believe me, neither the Readers Digest nor any
15 individual editor or writer up there wants to do it.

16 But my goodness, if you look at the record, all
17 we have done is ask. I think we have been as patient and
18 lenient with the government on this. We are willing to take
19 discovery. Maybe it's only 3,000 documents, maybe it's
20 50,000. So far as we are concerned, we think we haven't
21 gotten a really straight answer. You remember the
22 affidavits filed originally. I think the Court itself
23 was led to remark on how the convoy moves at the pace of
24 the slowest horse. I think the history of this litigation is
25 pretty well written in terms of the Readers Digest attitude

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2 and indulgence towards both the government and the Court.
3 We have bent over and we are still willing to do just about
4 anything. This is a personal thing. I wasn't looking
5 forward to looking at those documents myself, and
6 Mr. Fuller knows that. So we said, "We will accommodate
7 the Court." I can represent to you it's a good faith act
8 on the part of the Digest. We don't bring it up if it
9 wasn't. We are still willing to compromise on that.

10 THE COURT: I will accept that. To be fair,
11 as you jog my memory, I can think of a lot of time and
12 effort that we have put into this case when we thought we
13 could dispose of it on affidavits, where we could have,
14 if the government had leveled with the Court, had been
15 straight with the Court. It must be said that not only
16 has the government led the Readers Digest a merry chase,
17 but I am going to add, the Court has been led to a
18 merry chase.

19 I have put in time in reliance on the accuracy
20 of those affidavits, my confidence in the government was
21 damaged, and now it's been totally shattered. And I said
22 so in a decision which I filed. I make a suggestion to try
23 to avoid problems such as this, and I am turned down.
24 I will tell you, I cannot remember a case where I wrote a
25 whole opinion and then I couldn't use it because the material

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2 on which it was based proved to be inaccurate and
3 unreliable.

4 I would like to note that a lot of time has been
5 put in by this Court, and by my law clerk, Mr. Meal, in
6 an attempt to resolve this judicial dispute in a judicial
7 fashion. I cannot think of a case, going back over the
8 last 10 years, in which I have had a more helpless feeling
9 of being put at the mercy of the bureaucracy in the name of
10 national security. The bureaucracy do not believe that
11 the federal courts are as concerned with the national
12 interest as they are. I suggest that they are sadly mistaken.
13 In my own view, it's been judges of the federal courts,
14 and I exclude myself, who have served this country's
15 interest when the Constitution was violated in the name of
16 national security; internal security. I do not take
17 kindly to the government's performance up to this point.
18 If we are to go forward, the government's performance,
19 their responsibility will have to improve.

20 I would ask Ms. Farrell, how long do you
21 believe that it would take for security clearance to be
22 obtained for the law clerk who will be coming on board in
23 September?

24 MS. FARRELL: Your Honor, I am told it
25 takes approximately six weeks.

2 THE COURT: Very well.

3 We will furnish you with his name and address, warn
4 him what is to come and get that process started.

5 MS. FARRELL: Your Honor, I believe it's
6 also necessary for the government to have his Social Security
7 number.

8 THE COURT: I believe we should be able to
9 obtain his name, his address and his Social Security number
10 and furnish it to you.

11 Mr. Cohen, I propose that the in-camera
12 review be carried on in my chambers. I would prefer not
13 to delegate the matter to a magistrate. I appreciate,
14 as a matter of fact, your indulgence in that regard, but
15 I do believe it is essentially and primarily my
16 responsibility. If I must do it, and I say I don't
17 enter upon the job gladly, I will do it. It will take some
18 time, I think you can appreciate that. But what I propose
19 to do is furnish Miss Farrell with the name of my law clerk
20 who will be coming on board at the beginning of
21 September. It would seem to me we ought to be able to
22 coordinate the security check and clearance with his coming
23 on board so that probably very close to the time he begins
24 work he will be handed this chore. I fear that if he hears
25 too much about it, he may never report. But he is a good

1 fellow and I think that we can count on doing a good job.

2 I know the last time around, it was very
3 inhibiting to me, despite the cooperation of Miss Farrell,
4 and I know it was good faith cooperation on her part to
5 work around the problem of not compromising security.
6

7 So if it's agreeable to you, I will proceed to the
8 task.

9 Is there anything you wish to add or to say?

10 MR. COHEN: Good luck, your Honor.

11 THE COURT: Thank you.

12 Miss Farrell, Mr. Meal will furnish you with
13 the name and as soon as we have it, the Social Security
14 number of the law clerk who will be coming on board in
15 September, and we can start the process. We will advise
16 him that he is about to be checked out, not because we
17 believe he is a security risk, but rather it will be
18 a part of his job.

19 And I think that will then bring us within the
20 ambit of my friend Mr. Sporkin's letter and needless to say,
21 I recognize his concern and will attempt to allay any fears
22 that he has that the national security will be breached
23 at this end.

24 May I inquire as a last matter, if there is any
25 legislation which is in process which would make my effort

2 here futile and academic? I read little bits and pieces
3 in the newspaper about legislation cutting back on
4 freedom of information access to certain governmental
5 files, and every once in a while I think, will this
6 moot our case.

7 I would ask Miss Farrell and Mr. Cohen and
8 Mr. Fuller if you know about any legislation that is
9 actually active which stands a reasonable chance of making
10 this an exercise in futility?

11 MS. FARRELL: Your Honor, I personally know of
12 none, but I can't speak for the Agencies on that.

13 MR. COHEN: Your Honor, I personally know of none,
14 either.

15 I know of proposals which would provide
16 severe penalties for release by former agents, but I know
17 of nothing that would affect this. If it comes to
18 my attention, I will certainly let the Court know.

19 THE COURT: I would ask Miss Farrell, who
20 is probably in the best position, being in the Justice
21 Department, to make an inquiry. If you ascertain that
22 there is some legislation, Miss Farrell, which is in
23 an active state, perhaps has been reported out of committee or
24 is the subject of present or very-shortly-to-be-commenced
25 hearing which would impact, as I say, adversely on this,

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2 I would ask that you bring that to the attention of
3 the Court and counsel, because I wouldn't want to be
4 halfway through the job, as we were through these
5 opinions, and we were longer than halfway through, and
6 find that the exercise had been one in futility.

7 So if you would let us know if there is anything
8 actively before the Congress that would impact adversely
9 on this situation, I'd appreciate it. At this point, I
10 am going to close this afternoon's proceeding, thanking
11 you all for coming. You have an expression of my views.
12 None of them are personally directed; at the same time,
13 at times things get frustrating and I'd rather tell it to you
14 as I have, than not tell it to you and just think about it.

15 I think the best way to leave it is that we
16 will proceed with the security clearance and then proceed
17 with our review of the documents. Just so the matter
18 doesn't go completely away, I am going to request that the
19 government submit a brief status letter by November 30.
20 In other words, just so I have a control date on it. I
21 don't want to bring you in for a conference, but just
22 indicate, Miss Farrell, at that time that perhaps it is
23 my understanding that the Court is in the process of
24 reviewing the documents. You can check with us before you
25 write the letter, but I want to have some holding date, I

2 just don't want to leave it sine die.

3 And finally, I suppose that, Mr. Meal has
4 reminded me, motion for summary judgment will probably
5 be made by the government at some point in time.

6 Did you think about when you intended to make that
7 motion?

8 MS. FARRELL: Your Honor, I talked about it
9 with the Agencies, but we thought it would be fruitless
10 to do so until at some point after the Court has reviewed
11 the documents.

12 THE COURT: I have no quarrel with that at
13 this point.

14 I am going to put on you the onus of
15 just furnishing a general status letter by November 30,
16 1982. It may be that action by me in the interim will
17 moot that and make it unnecessary to furnish. I have may
18 done something that asked for something else from you
19 people which will make it moot. But if there is total
20 silence, I would just like you to note where we are, and
21 then I may ask someone to furnish another status letter a
22 month or two beyond that.

23 Is there anything further? Thank you.

24 (Time noted: 4:10 p.m.)

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