

*Crosby*

WARSHAVSKY, HOFFMAN & COHEN, P. C.

500 FIFTH AVENUE  
NEW YORK, N. Y. 10110

STEPHEN D. HOFFMAN  
SUZANNE M. WARSHAVSKY  
DAVID W. COHEN

TELEPHONE (212) 869-7707

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

Handwritten marks and scribbles on the left margin, including a large arrow pointing right and several curved lines.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

elijah 1

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

THE READERS DIGEST ASSOCIATION,

Plaintiff,

v.

79 Civ. 4812

FEDERAL BUREAU OF INVESTIGATION,  
et al.,

Defendants.

-----x

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

1  
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  
25

1  
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

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

1  
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

1  
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



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

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

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

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

1 eljah 9 .

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

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

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's 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  
2 before.

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

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

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

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

1  
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,

1  
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

1  
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.)

25 ---