

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

		X
THE NEW YORK TIMES COMPANY and CHARLES SAVAGE,	:	
Plaintiffs,	:	
	:	No. 10 Civ. 7920 (RPP)
- against -	:	
FEDERAL BUREAU OF INVESTIGATION,	:	
Defendant.	:	
	:	
		X

DECLARATION OF CHARLES SAVAGE

I, CHARLES SAVAGE, declare as follows:

1. I am a reporter with the Washington bureau of *The New York Times*, a newspaper published by The New York Times Company, and a plaintiff in this action along with The New York Times Company (plaintiffs jointly, “NYT”). I make this declaration upon personal knowledge in opposition to defendant’s motion for summary judgment and in further support of NYT’s motion for summary judgment.

2. In my capacity as a reporter with *The Times*, I write about the executive branch, homeland security, law enforcement, and legal policy, with a focus on counter-terrorism.

3. One important issue in this area is domestic investigation and surveillance by the Federal Bureau of Investigation (“FBI”). There is no federal statute establishing specific rules for domestic investigations by the FBI. Instead, limitations are self-imposed within the

Executive through the Attorney General's Guidelines for Domestic FBI Investigations. *See Domestic Investigations and Operations Guide*, 40 (Dec. 16, 2008) available at: http://foia.fbi.gov/diog/domestic_investigations_and_operations_guide_part2.pdf ("the guidelines").

4. These guidelines were first issued in 1976 in response to findings by the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (commonly known as the "Church Committee"). The Committee publicly revealed serious domestic abuses by the FBI, including harassing and discrediting law-abiding civil rights groups and individuals, such as Dr. Martin Luther King, Jr.; wiretapping, bugging, and searching the mail of citizens without a warrant; and maintaining files and databases on thousands of innocent Americans. *See* Emily Berman, Brennan Center for Justice, *Domestic Intelligence: New Powers, New Risks* 8-11 (2011). The guidelines "were intended, in part, to diminish the perceived need for legislation to regulate and restrict the FBI's use of informants." *United States v. Salemm*, 91 F. Supp. 2d 141, 190-91 (D. Mass. 1999).

5. After the attacks on September 11, 2001, the guidelines were changed, first by Attorney General John Ashcroft and then again, in December 2008, by Attorney General Michael Mukasey. The 2008 modifications permitted "assessments" to "proactively" – in the words of the FBI Domestic Investigations and Operations Guide (the "FBI Guide"), rewritten to comply with the guidelines – collect information about individuals or organizations in order to see whether they may pose a criminal or a national security threat. *See* FBI, *Domestic Investigations and Operations Guide* (Dec. 16, 2008), available at <http://documents.nytimes.com/the-new-operations-manual-from-the-f-b-i>. In October, 2009, I published an article about assessments and public concern about the potential for fishing

expeditions against Americans, including racial or religious profiling. Charlie Savage, *Loosening of F.B.I. Rules Stirs Privacy Concerns*, N.Y. Times, Oct. 29, 2009. Attached hereto as Exhibit A is a true and correct copy of that article.

6. As part of my reporting on this issue, I made a FOIA request for the “aggregate results of assessments the FBI has conducted using the new authorities provided by the AG Guidelines that were put into effect in December 2008.” (See Declaration of David McCraw dated February 25, 2011 (“McCraw Dec.”), ¶ 12 & Ex. G.) My initial request sought these statistics broken down into each of the six types of assessments. *Id.* Ex. G. Ultimately, however, I narrowed this request to the data contained in the FBI’s response to Sen. Russell Feingold’s question at a March 25, 2009 Senate oversight hearing. See McCraw Dec. ¶ 14 & Ex. K. The FBI denied access to that data, prompting this suit. *Id.* at ¶ 15-20 & Ex. H, J, & K.

7. During the pendency of this litigation, on March 7, 2011 the FBI released the statistics it had previously redacted (the “Release”). Attached hereto as Exhibit B is a true and correct copy of the FBI’s March 7, 2011 release.

8. On March 26, 2011, I published an article about the Release. Charlie Savage, *F.B.I. Casts Wide Net Under Relaxed Rules for Terror Inquiries, Data Shows*, N.Y. Times, March 26, 2011 (the “Article”). Attached hereto as Exhibit C is a true and correct copy of the Article.

9. As I noted in the article, the Release provided limited insight without additional data from before the December 2008 guidelines. F.B.I. officials said in an interview that the pace of new assessments – 11,667 assessment files were generated over a roughly four-month period – had remained consistent since then. There is no way to confirm these statements, other than to seek subsequent assessment statistics.

10. As part of the Article, I interviewed Valerie E. Caproni, F.B.I. General Counsel, regarding the Assessment Statistics. During that interview, Ms. Caproni indicated that Type 1 and 2 assessments are not purely proactive, despite the wording of the FBI manual, but are always undertaken in response to some kind of tip or lead, even though it falls short of the kind of factual predicate that would be necessary to open a traditional “preliminary investigation.” She further indicated that statistics on purely proactive assessments in search of potential threats were among those categorized as Type 3. Because the statistics the FBI released are aggregated – Type 3, 4, 5 and 6 are combined into one statistic – it is therefore impossible to know how many purely Type 3 assessments were generated during this period without making further FOIA requests.

11. Following publication of the Article, Ms. Caproni wrote a Letter to the Editor, published in the New York Times. Valerie Caproni, *F.B.I. Investigations*, N.Y. Times, March 31, 2011. Attached hereto as Exhibit D is a true and correct copy of that letter. In her letter, Ms. Caproni stated that new technology and record-keeping systems now allow the F.B.I. to track assessments and determine how many develop into full investigations.

12. As a result of the issues identified here in ¶¶ 10-12, I filed two additional FOIA requests on April 15, 2011 (the “Second Request”). Attached hereto as Exhibit E is a true and correct copy of the Second Request. In that request, I sought:

- a. Statistics on the number of Type 3 assessments of criminal activity conducted from December 2008 to March 2009 (the time period represented in the FBI’s response to question 15 during the appearance of FBI Director Robert Mueller before the Senate Committee on the Judiciary on March 25, 2009), including the number of those assessments that are ongoing and the number of preliminary and full investigations opened based upon information developed in those Type 3 assessments.
- b. Statistics on the number of Type 3 assessments of national security threats conducted from December 2008 to March 2009 (the time

period represented in the FBI's response to question 15 during the appearance of FBI Director Robert Mueller before the Senate Committee on the Judiciary on March 25, 2009), including the number of those assessments that are ongoing and the number of preliminary and full investigations opened based upon information developed in those assessments.

- c. Statistics on the number of Type 1 and 2 assessments of criminal activity initiated between March 25, 2009 and the present, the number of those assessments which remain open, and the number of preliminary and full investigations opened based on those types of assessments.
- d. Statistics on the number of Type 1 and 2 assessments of national security activity initiated between March 25, 2009 and the present, the number of those assessments which remain open, and the number of preliminary and full investigations opened based on those types of assessments.
- e. Statistics on the number of Type 3 assessments of criminal activity initiated between March 25, 2009 and the present, the number of Type 3 assessments which remain open, and the number of preliminary and full investigations opened based on each of those types of assessments.
- f. Statistics on the number of Type 3 assessments of national security activity initiated between March 25, 2009 and the present, the number of Type 3 assessments which remain open, and the number of preliminary and full investigations opened based on each of those types of assessments.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Washington, D.C.
April 15, 2011

A handwritten signature in cursive script that reads "Charles Savage". The signature is written in black ink and is positioned above a horizontal line.

Charles Savage