

United States Senate
WASHINGTON, DC 20510-3203

April 13, 2020

Mr. Michael Horowitz
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Re: Request for investigation of FBI handling of 9/11-related civil subpoenas

Dear Inspector General Horowitz:

We write to bring to your attention troubling reports concerning the FBI's irregular treatment of a civil subpoena issued by the September 11 families for evidence critical to their pending lawsuit pursuant to the Justice Against Sponsors of Terrorism Act ("JASTA"). For the reasons outlined below, and in the attached addendum provided in good faith by the plaintiffs, we request that you commence an investigation immediately. Any lack of integrity in the FBI's handling of this subpoena is wholly unacceptable.

As detailed in the attached, the 9/11 families seek information concerning the FBI's investigation of Saudi government employees Omar al Bayoumi and Fahad al Thumairy, who are known to have provided substantial assistance to 9/11 hijackers Nawaf al Hazmi and Khalid al Mihdhar, and their possible accomplices. These other accomplices include a "third main subject" who "tasked" Bayoumi and Thumairy to help the hijackers, and who according to public reporting is a more senior Saudi government official.

The 9/11 families served a civil subpoena on the FBI in April of 2018 seeking this information, but it appears, both due to information provided to our offices by the families in good faith, and through related reporting in the *New York Times*,¹ that there may have been major abnormalities in the FBI's handling of that subpoena that deserve your attention, including alleged:

- departures from established processes for responding to civil discovery demands, thereby removing the carefully-crafted mechanisms designed both to ensure the FBI adheres to its legal obligations and guards against conflicts of interest within the FBI itself;

¹ Daniel Victor, "Did the Saudis Play a Role in 9/11? Here's What We Found," *New York Times*, January 23, 2020 (available at <https://www.nytimes.com/2020/01/23/us/september-11-attacks-saudi-arabia.html>).

- possible misstatements to the federal court presiding over the litigation about the actual status of investigations;
- potential misstatements to the federal court regarding the sensitivity of the evidence being sought, including through efforts to conceal original classification designations;
- potential efforts to conceal that the FBI's investigative files are in a state of disorder;
- potential efforts to conceal the fact that key investigative materials collected after the attacks were never properly analyzed; and
- refusal to conduct methodological searches of FBI's electronic databases, and instead empowering FBI officials with inherent conflicts of interest to hand-select the materials to be considered for possible production, and to control the information that is produced.

These allegations by the families raise questions as to whether FBI personnel may be acting in improper ways to withhold evidence the 9/11 families are entitled to receive, and that this obstruction may be driven by an effort to shield the Bureau and individual FBI officials from embarrassment. Obviously, any irregularities, abuse, fraud, or improprieties in the handling of the 9/11 families' subpoena for evidence are entirely unacceptable.

The September 11 attacks represent a singular and defining tragedy in the history of our Nation. Nearly twenty years later, the 9/11 families and American public still have not received the full and transparent accounting of the potential sources of support for those attacks to which they are entitled. Circumstances that leave the impression that our government is hiding facts about 9/11 from the families and public tear at the very fabric of our democracy, and erode trust in our government. The American people must have confidence that their government is not hiding facts about 9/11, for any reason.

We urge you to conduct an immediate and expedited review of the FBI's response to the families' subpoena, and to publish a public report of your findings as soon as possible.

Sincerely,

Charles E. Schumer
United States Senator

Charles E. Grassley
United States Senator

Richard Blumenthal
United States Senator

***Overview of FBI Integrity and Process Abuses
in Handling of 9/11 Families' JASTA Subpoena***

*Provided to Senate JASTA Sponsors
by the 9/11 Families and Survivors United for Justice against Terrorism*

Reported Departures From Established Procedures and Conflicts of Interest. The FBI has departed from normal internal processes in responding to the subpoena, and those departures suggest the potential that parties with significant conflicts of interest are making determinations as to the universe of documents that will be reviewed for possible production to the families and court. Former FBI officials working with us have pointed out that the FBI has an entire unit dedicated to responding to civil discovery demands, whether in the form of a subpoena or through FOIA requests. We understand that this unit includes dozens of highly trained specialists, who handle sensitive and highly classified material on a daily basis, who identify records responsive to civil discovery demands on a systematic basis and make determinations whether those records can be produced. This mechanism ensures both efficiency and integrity in responding to such legal requests, and is capable of handling requests implicating voluminous responsive documents. In the case of our subpoena, however, the FBI has excluded the civil discovery unit from the process, and instead created a special team to select documents to be produced. The members of that special team include FBI officials who were directly involved in the 9/11 investigation, and who in some cases are reported to have had direct involvement in urging that the investigation be closed and that prosecutions not be pursued. If so, the conflicts of interest could not be more apparent, raising obvious concerns that the process is being manipulated to avoid disclosures that may prove embarrassing to the FBI or individual FBI officials.

Potential Misstatements Concerning the Status of the Investigation. The FBI has represented in court filings that the investigative records sought by our subpoena are part of an “active” and “ongoing” criminal investigation. The FBI has invoked the alleged “active and ongoing” status of the investigation to justify refusals to search for relevant evidence, to withhold other evidence from us, and to impose a strict attorney’s eyes only protective order on the limited evidence it has provided, which precludes us and American public from seeing the limited evidence that has been produced. Reporting by the New York times, however, indicates that FBI officials disbanded the team conducting the investigation in 2016 and transferred the file to a unit responsible for “historical terrorism investigations,” and that DOJ officials made a final determination around that same time that the government will not be pursuing any prosecutions. And as matter of practical sense, it seems implausible to suggest that the government has any genuine intention of prosecuting any subjects of the investigation, most of whom appear to live in Saudi Arabia, nearly twenty years after the attacks. For these and other reasons, it is apparent that the FBI has mischaracterized or overstated the “active” status of the investigation, in order to aid efforts to withhold evidence from us and the court.

Potential Misstatements Concerning the Sensitivity of the Documents. Available evidence also indicates that the FBI has overstated the sensitivity of the documents responsive to the subpoena, and taken unusual steps to hide the original classification designations assigned to the documents at the time of their creation. Again, the FBI has represented in filings with the Court that the majority of the documents are “classified.” However, we understand that the limited

documentation produced thus far includes various indicia that many of the documents, or portions of the documents, were designated as unclassified when they were created. Meanwhile, the FBI has taken extraordinary and unexplained steps to hide the original classification status of the documents and text within the documents, by redacting from all of the documents produced the header, footer, and portion marking designations reflecting the original classification status of the documents and text within the documents. Those markings are in no way classified in their own right, but the FBI has categorically refused to remove any of the redactions in response to our repeated requests. This approach reflects an effort by the FBI to hide the fact that much of the text was deemed unclassified and non-sensitive at the time it was created, and that the FBI is now classifying that material in service of its efforts to withhold it from us.

Evidence the Investigative Records are in a State of Disorder. The New York Times investigative report indicates that the 9/11 investigative files were moved to long-term storage or destroyed several years ago, and that individual agents pursuing the investigations of Bayoumi and Thumairy discovered a key piece of evidence – an aviation drawing depicting a formula for an aerial descent like the one performed by Flight 77 – “in a trove court of seemingly disorganized evidence taken from Bayoumi’s home” in 2001. This data point from the New York Times corroborates other evidence indicating that the 9/11 investigative file is in state of disarray. In this regard, the FBI has struggled to locate basic records related to its investigations of Bayoumi and Thumairy. For example, we have repeatedly asked for a copy of a videotape of a party Bayoumi is known to have hosted for the first arriving hijackers in San Diego. A copy of the videotape was provided to the 9/11 Commission. Nonetheless, the FBI has been unable to locate a copy of the videotape for production to the families despite having two years to do so. Similarly, the FBI struggled to locate phone and banking records for subjects for more than a year, and when some of those records were ultimately produced, there were major gaps indicating that certain of the records had simply been lost. These circumstances and other facts suggest that FBI personnel may be resisting the families’ subpoena to avoid burdens associated with the FBI’s own failure to maintain the file, and to prevent public disclosure of the fact that investigative materials were not maintained in accordance with applicable requirements and have simply been dumped in a warehouse or destroyed. The FBI’s inability to find this basic evidence also discredits the FBI’s efforts to claim that the investigation remains open, as an inability to find basic records would render any prosecution impossible (both because the government could not adduce the evidence to support a prosecution and because it could not comply with its Brady disclosure obligations). The relevant facts could be easily uncovered, including by sending someone to survey the state of the physical file.

Indications That Key Evidence Was Never Properly Analyzed. Beyond the fact that the FBI’s 9/11 investigative file was not properly maintained and is in a state of disarray, the New York Times reporting indicates that evidence collected during the investigation was never properly analyzed. For instance, the reporting indicates that the aviation drawing and formula retrieved from Bayoumi’s apartment immediately after the attacks had never been analyzed before the individual agents discovered it, almost by happenstance, a decade or more later while combing through the records designated for destruction or storage. Given that Bayoumi was known to have provided essential assistance to the first arriving hijackers, a former FBI supervisor of the 9/11 investigation told the New York Times it would have been viewed as “if not a smoking gun, a warm gun” if it had been properly analyzed at the time it was collected in 2001. This example indicates that FBI personnel may be resisting proper compliance with the subpoena in order to

avoid disclosure of the fact that evidence inculcating additional wrongdoers was never properly analyzed or pursued.

Reported Refusal to Conduct Methodological Searches. Compounding the concerns raised by other process irregularities, the FBI has refused to conduct methodological searches of its electronic database for records responsive to the subpoena. For example, we have requested that the FBI conduct systematic queries of its Sentinel database to identify the universe of records relating to key subjects of the investigation, such as Bayoumi, Thumairy, the third main subject, and several other Saudi government employees implicated in the investigation. The FBI has refused to do so, even though such queries can be conducted in just seconds, and instead left it to individual FBI officials, who claim to have some familiarity with the investigation, to select certain “core records” for review, based on their recollections of the investigation. The refusal to conduct methodological searches is a departure from standard practice, and indicates an effort on the part of involved FBI officials to control the selection of documents that will be reviewed for possible production. This approach is particularly problematic given that the FBI officials making those selective determinations were, in some cases, involved in the underlying investigations and therefore have personal interests at stake, a circumstance that indicates obvious conflicts of interest. Further, because a methodological search is the only way to reliably identify the full universe of records relevant to the court’s inquiry under JASTA, a selective approach based on personal recollections is certain to deprive us and court of evidence critical to determining JASTA’s applicability to the case. Such a result would deeply undermine JASTA, a law Congress enacted to protect our national security.

We thank each of the Senators and their offices for their continuing commitment to ensure justice for the 9/11 community, and for inviting this summary. As indicated during our discussions, our representatives would welcome the opportunity to provide additional details and evidence concerning the potential integrity and process abuses described in this summary both to Members or staff in the Senate and to the Department of Justice’s Inspector General, and to provide recommendations to expedite the investigation of and remedy to the same.