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Office of the Deputy Assistant Attorney General

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**MEMORANDUM FOR MICHAEL CHERTOFF
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION**

Whether Section 319(b) of the Patriot Act Includes Authority for the Issuance of Grand Jury Subpoenas to Foreign Banks That Maintain Correspondent Accounts in the United States

The Asset Forfeiture and Money Laundering Section of your Division has asked for our views concerning whether section 319(b) of the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, tit. III, § 319(b), 115 Stat. 272, 312-13 (to be codified at 31 U.S.C. § 5318(k)(3)(A)(i)) ("Patriot Act") provides authority for the issuance of grand jury subpoenas to foreign banks that maintain correspondent accounts in the United States for records maintained outside of the United States.¹

Section 319(b) provides in relevant part: "The Secretary of the Treasury or the Attorney General may issue a summons or subpoena to any foreign bank that maintains a correspondent account in the United States and request records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank." *Id.* at 313. As the Supreme Court has emphasized, "[t]he starting point in every case involving construction of a statute is the language itself." *Lamtreth Timber Co. v. Lamtreth*, 471 U.S. 681, 685 (1985) (alteration in original) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). In that regard, we presume that "Congress 'says in a statute what it means and means in a statute what it says there,'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Therefore, we will give conclusive effect to the literal meaning of the words of a statute unless to do so would

¹ We address only the question whether section 319(b) authorizes federal grand juries to issue subpoenas to foreign banks that maintain correspondent accounts in the United States requesting records related to such correspondent accounts. We do not address whether there is any other source of authority for the issuance of such subpoenas by a federal grand jury.

lead to an absurd result. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994). The language of section 319(b) expressly authorizes the “[t]he Secretary of the Treasury or the Attorney General” to issue subpoenas; it does not, by its terms, authorize any other individual or entity to issue subpoenas. Therefore, the plain terms of this provision indicate that the persons to whom the authority to issue a subpoena has been granted are only the Secretary of the Treasury and the Attorney General. Although your staff has suggested that perhaps the term “Attorney General” may be read to grant the grand jury subpoena authority, we do not agree that this term is susceptible to such a reading. Federal grand juries operate independently from the prosecuting attorney, *see United States v. Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983); *Jenkins v. McKeithen*, 395 U.S. 411, 430 (1969); *Stone v. United States*, 361 U.S. 212, 218 (1960). Moreover, although federal prosecutors advise grand juries and assist them in gathering evidence, it is the federal courts that supervise them and assist in their investigative function by, when necessary, compelling the production of documents and the testimony of witnesses. *See Mistretta v. United States*, 488 U.S. 361, 390 n.16 (1989); *Morrison v. Olson*, 487 U.S. 654, 681 n.20 (1988); *Brown v. United States*, 359 U.S. 41, 49 (1959).

Furthermore, Congress has, in other statutes, explicitly recognized the distinction between an Attorney General subpoena and a grand jury subpoena. For example, records obtained via a grand jury subpoena are exempt from the customer notification requirements of the Right to Financial Privacy Act found in 12 U.S.C. § 3405 (2000). *Id.* § 3413(i) (exempting grand jury subpoenas from the customer notification requirements of the Act and permitting a court to order a financial institution not to notify a customer); *id.* § 3420(b)(1) (prohibiting notification to a person named in a grand jury subpoena in connection with investigations of crimes against financial institutions or under the Controlled Substances Act). However, subpoenas issued pursuant to an administrative subpoena are not exempt from the notification requirements. *Id.* § 3405(2). Additionally, in criminalizing the disclosure of the existence or contents of a subpoena for records of a financial institution for purposes of obstructing a judicial proceeding, Congress has defined “subpoena for records” as meaning “a Federal grand jury subpoena or a Department of Justice subpoena.” 18 U.S.C. § 1510(b)(3)(B) (2000) (emphasis added). Furthermore, there are other federal statutes that specifically refer to grand jury subpoenas as distinct from administrative subpoenas or court orders. *See, e.g., id.* § 2705(a)(1)(B); *id.* § 2520(d). Therefore, it appears that when Congress wants to authorize or regulate the effect of grand jury subpoenas, it does so explicitly and not by general reference to the Attorney General.

The only remaining question is whether this case presents some extraordinary circumstance that would justify failing to give effect to the plain terms chosen by Congress. We are aware of no absurdity produced by reading section 319(b) according to its plain meaning. Whether Congress has wisely chosen to give subpoena authority only to the Secretary of the Treasury and the Attorney General, or whether it might have been wiser to grant such authority to the grand jury as well, are questions we do not answer here. We note only that reading the statute in accordance with its plain meaning does not produce the kind of absurd result that would be required to overcome the statute’s text.

In conclusion, the plain meaning of section 319(b) of the Patriot Act authorizes the issuance of subpoenas only by the Secretary of the Treasury and the Attorney General, not by a federal grand jury. We are aware of no basis for concluding that giving effect to the statute's plain meaning will lead to an absurd result. Therefore, we conclude that section 319(b) provides no authority for the issuance of grand jury subpoenas to foreign banks that maintain a correspondent account in the United States.

Please let us know if you have any additional questions or concerns regarding this matter.



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