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Executive Director

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BY FACSIMILE AND U.S. MAIL

Attorney General John Ashcroft
U.S. Department of Justice
Room 4400
950 Pennsylvania Ave. NW
Washington, D.C. 20530-0001

Re: Vanessa Leggett grand jury subpoena

Dear Mr. Attorney General:

The U.S. Attorney in Houston, Texas, has indicated that he intends to pursue another subpoena for the testimony of author Vanessa Leggett. We urge the Department of Justice to do what it did not do in issuing the subpoena that led to Ms. Leggett's 168-day incarceration. The Department must recognize that Ms. Leggett is a journalist entitled to the safeguards embodied in the Department's guidelines covering subpoenas to journalists, 28 CFR 50.10. If those guidelines had been applied, the broad subpoena seeking four years of Ms. Leggett's book research would not have been issued.

Officials in your Department have acknowledged that they did not consider Ms. Leggett to be a journalist when they issued the initial subpoena and did not apply the guidelines for subpoenas of the news media to her.

We recognize that the Department did not define "journalist" in its guidelines, probably because of the difficulty in doing so. At a minimum, the Department should follow the constitutional standard set by several federal circuit courts, a standard that we believe includes Ms. Leggett within the definition of "journalist." That standard, which the Fifth Circuit said it would follow in this case, asks whether a person claiming a reporter's privilege against compelled disclosure of confidential sources "(1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public." *In re: Grand Jury Subpoenas*, No. 01-20745, n.4 (5th Cir. Aug. 17, 2001) (unpublished). The appellate panel noted that three circuits -- the Second, Third and Ninth -- also

use this test.

This test does not consider a person's journalistic experience, contacts, contracts or affiliation. Instead, the test considers only the activity the person was engaged in at the time of developing confidential sources.

It is important to note that while some may argue this definition is overbroad, it works. It was established in a case involving a writer who claimed that the journalist's privilege shielded her from forced disclosure of a draft of her book. The Second Circuit found that the privilege did not apply because the writer was gathering information during a trial to help the defense, not to disseminate it to the public. *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987).

In Ms. Leggett's case, her investigative activities in gathering information about a murder of great public interest with the intent to write a book clearly meets the test of who is a journalist. As such, Ms. Leggett qualifies as a journalist and is entitled to the protection of the Department's guidelines for issuing subpoenas to reporters.

Those guidelines require the Department to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 CFR 50.10(a). Section (f)(1) requires that the information sought be essential to a successful investigation and that a subpoena "should not be used to obtain peripheral, nonessential, or speculative information." Section (f)(3) requires that the government "should have unsuccessfully attempted to obtain the information from alternative nonmedia sources." Section (f)(4) limits subpoenas to verification of published information, except under exigent circumstances. Section (f)(6) requires that subpoenas "be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material."

The breadth of the initial subpoena -- requesting all originals and copies, including transcripts, of interviews Ms. Leggett conducted during four years of research -- could not have met the requirements of the Department's guidelines. By demanding, in essence, all of Ms. Leggett's research, the subpoena demonstrated that it was speculative in nature, was not limited in subject matter, did not cover a reasonably limited period of time, and would have required Ms. Leggett to produce a large volume of unpublished material. In addition, a grand jury investigation into whether any crimes have been committed -- the broadest, least defined type of investigation possible -- cannot qualify as an "exigent" circumstance that negates the requirements of specificity without rendering the guidelines meaningless.

Thus, if your Department's guidelines had been applied to Ms. Leggett, the first subpoena would never have been issued.

The purpose of a civil contempt order is to coerce action from a recalcitrant witness. Ms. Leggett spent 168 days in jail objecting to the demands of an onerous and overbroad subpoena. She has proven that she will not comply with such requests from federal prosecutors, not out of spite, but on principle -- a principle on which she has been supported by a great number of media organizations. Further action on the part of your Department to force Ms. Leggett to divulge her confidential research would not only violate the Department's guidelines, it would be pointless.

Sincerely,

Lucy A. Dalglish
Executive Director

Gregg P. Leslie
Legal Defense Director

cc: Terry Clark, Assistant United States Attorney
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