FEDERAL ELECTION COMMISSION
Washington, DC 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Spirit of America, et al.	)	**MUR 5181**

STATEMENT OF REASONS
COMMISSIONERS DAVID M. MASON AND MICHAEL E. TONER

I. Summary

This matter was a garden variety complaint regarding a series of mailing list transactions between two political committees which was blown far out of proportion, apparently due to the involvement of the sitting Attorney General,[1] who is a favored target of political attacks by opponents of the current Administration.

At issue in this matter was the relationship between a leadership PAC (the subject of a just-completed Commission rulemaking)[2] and an authorized campaign committee and a series of exchanges of mailing lists (the subject of a just-abandoned Commission rulemaking)[3] among those committees and the candidate. Acknowledging the legal uncertainly faced by the respondents, as evidenced by the Commission's need to issue a new rule on leadership PACs,[4] and even more so by our decision to abandon efforts to issue a specific rule on mailing lists due to an inadequate administrative record,[5] the Commission concluded in MUR 5181 that two

[1] While John Ashcroft was involved in some of the transactions underlying this MUR, there were no findings or even recommendations of findings that the Attorney General violated the law in any way in this matter.

[2] *Leadership PACs: Final Rules and Transmittal to Congress,* 68 Fed. Reg. 67,013 (Dec. 1, 2003).

[3] In the now-closed mailing list rulemaking, the Commission sought to "provide candidates and political committees with more comprehensive guidance on commercial transactions involving mailing lists." *Mailing Lists of Political Committees: Notice of Proposed Rulemaking*, 68 Fed. Reg. 52,531, 52,532 (Sept. 4, 2003), *Notice of Disposition; Termination of Rulemaking*, 68 Fed. Reg. 64,571 (Nov. 14, 2003). Although the Commission recognized the lack of overall support for the mailing list rulemaking, in response to hypotheticals similar to this case, at least one commenter did not appear particularly concerned. Transcript, *Candidate Travel, Multi-Candidate Committee Status, Biennial Contribution Limits, and Mailing Lists Public Hearing* (Oct. 1, 2003) at 68-69.

[4] *Leadership PACs: Notice of Proposed Rulemaking,* 67 Fed. Reg. 78,753 (Dec. 26, 2002).

[5] *Notice of Disposition; Termination of Rulemaking*, 68 Fed. Reg. 64,571 (Nov. 14, 2003).

specific transactions between a leadership PAC[6] and an authorized committee[7] were inappropriate and constituted excessive contributions from the leadership PAC to the authorized committee, but that otherwise no excessive contributions took place in this matter.[8] As is outlined below, we supported the Commission's findings. Legal uncertainty, and the fact that the committees' treasurer might, with greater foresight or planning, have reached a similar financial result without making or receiving an excessive contribution, constituted significant mitigating circumstances in this matter.

Extraordinary claims that this matter constituted a very large violation (more than $2 million in the complaint or $1.7 million in one Commissioner's proposal) directly contravene relevant Commission rules and precedent, have no basis in the commercial and market practices that have always been the touchstone of our regulation of mailing lists, and violate a fundamental principle of economics. The Commission accordingly rejected them.[9] Had the Commission adopted these expansive theories of liability, any federal campaign in the future whose candidate ever associated itself with a leadership PAC would have been exposed to huge potential liability based not on the actions of the candidate, PAC, or campaign, but based on post-hoc subjective judgments of Commissioners or Commission staff.

In light of the Commission's very recent promulgation of a new regulation which resolved the long-running uncertainty about the permissibility of leadership PACs, it is important to emphasize that the resolution of this matter fits squarely within the Commission's longstanding and recently formalized approach in this area. Contrary to the urging of the complaint, we did not consider any transaction between a leadership PAC and an authorized committee to be an excessive contribution. Contrary to the urging of some within the Commission, we likewise did not find that the inevitable or occasional relationships among a candidate, his authorized committee, and a leadership PAC constituted a merging of the legally and politically distinct entities. Instead, we examined specific transactions between the leadership PAC and the authorized committee before us to determine whether those exchanges were made at fair market value.

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[6] Spirit of America or "SOA."

[7] Ashcroft 2000.

[8] *See* Minutes of an Executive Session of the Federal Election Commission, Sept. 30, 2003, at 7-8 (motion to find probable cause violation of 2 U.S.C. § 441a(a)(2)(A) in the amount of $112,962.05 carried 5-1, Commissioners Mason, McDonald, Smith, Thomas, and Toner voting affirmatively, Commissioner Weintraub dissented).

[9] *See* Minutes of an Executive Session of the Federal Election Commission, Sept. 30, 2003, at 5 (motion to determine the value of the excessive contribution as equal to $1.7 million failed 1-5, Chair Weintraub voting affirmatively and Commissioners Mason, McDonald, Smith, Thomas, and Toner dissented). *See also id.* at 6 (motion to find an excessive contribution of $254,917.05 rejected 3-3, Commissioners McDonald, Thomas, and Weintraub voting affirmatively and Commissioners Mason, Smith, and Toner dissented).

We concluded that the mailing list exchanges that were the gravamen of the initial complaint did not violate the law. However, in two instances the leadership PAC redirected mailing list rental income that the leadership PAC had accrued and earned to the authorized committee. Because we did not see a basis for such redirection of earned income to take place, and because there is no indication that such a practice is commercially reasonable in the mailing list marketplace, we concluded that these specific transactions were excessive contributions to Ashcroft 2000.

II. Factual and Legal Analysis[10]

A. Case History

The Alliance for Democracy, Common Cause, The National Voting Rights Institute, and two Missouri residents, Ben Kjelshus and Hedy Epstein, filed a complaint with the Commission on March 8, 2001, alleging that SOA and Ashcroft 2000 violated 2 U.S.C. §§ 441a(a)(2)(A) and 434(b) by making and receiving, respectively, excessive contributions. They further alleged violations of 2 U.S.C. § 434(a) and (b) based on a failure to report those alleged contributions.[11] The complaint was based on a February 1, 2001 article in the *Washington Post*[12] that reported SOA had contributed a fundraising list of 100,000 donors to Ashcroft 2000. It further alleged that Ashcroft 2000 "in turn made more than $116,000 by renting out the list to other fundraisers".[13] The *Washington Post* also stated in its article that SOA developed the fundraising list between 1997 and 1999 "at a cost of more than $2 million."

On September 30, 2003, the Commission considered the recommendations of the Office of General Counsel ("OGC") to find probable cause to believe that SOA and Garrett Lott, as treasurer, and Ashcroft 2000 and Garrett Lott, as treasurer, violated the Federal Election

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[10]The activity in this matter is governed by the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), and the Commission's regulations in effect during the pertinent time period, which precede the effective date of the amendments made by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). All references to the Act and regulations herein exclude changes made by BCRA.

[11]The complainants filed suit in the United States District Court for the District of Columbia on March 19, 2002, under 2 U.S.C. 437g(a)(8), which allows them to seek redress in district court if the Commission has not acted on their complaint within 120 days. *Alliance for Democracy, et al. v. FEC,* 1:02-cv-00527 (EGS). Paragraph 17 of the court complaint, reads, in error, that, "Because the March 8, 2001 administrative complaint was brought against the Attorney General of the United States, the nation's highest law enforcement officer, it is a matter whose resolution is particularly in the public interest and the FEC should rule on the complaint without continued delay." In fact, Mr. Ashcroft was not named a respondent in the administrative complaint, 11 C.F.R. § 111.4(d)(1), and the Office of the General Counsel did not name him as a respondent or as a non-respondent witness at any time during the course of the Commission's investigation.

[12] W. Pincus, *Possible Ashcroft Campaign Violation*, Wash. Post (Feb. 1, 2001) at A4.

[13]The Act defines contribution to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

Campaign Act of 1971, as amended ("FECA" or "Act"), on the alternative theories of "affiliation" or "excessive contributions" by respondents with respect to the 2000 Senate election in Missouri.[14]

The Commission took a series of votes on the two alternative theories proposed by OGC approving, by a 5-1 vote,[15] a finding of probable cause that SOA and Garrett Lott, as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) and § 434(b); and Ashcroft 2000 and Garrett Lott, as treasurer, violated 2 U.S.C. § 441a(f) and § 434(b). Although Commissioner Toner joined the majority in voting for probable cause based on an "excessive contribution" theory, he also voted to support Commissioner Smith's motion to find probable cause based on an affiliation theory.[16]

B. Responses

The Ashcroft 2000 response unequivocally denied accepting any in-kind contributions from SOA.[17] The committee stated that all of its fundraising efforts were handled through outside, professional vendors utilizing lists prepared by those vendors. The Ashcroft 2000 response further stated that John Ashcroft granted to SOA a license to use certain information owned by him. The committee stated that it subsequently sub-licensed all or a portion of the licensed data to others, along with other intellectual property owned by the committee.[18]

SOA's response supported the Ashcroft 2000 response to the complaint. SOA's response denied making any direct or in-kind contributions to Ashcroft 2000 except those reported on SOA's financial disclosure reports filed with the Commission.[19] SOA also stated that it had conducted all of its fundraising activities through outside, professional vendors. The vendors selected fundraising prospects based on proprietary lists owned or compiled by the vendors. All such prospecting data was proprietary to the vendors as a matter of vendor policy and was not available to SOA. SOA stated that no prospecting information related to the committee's

[14]General Counsel's Report #4 dated June 30, 2003.

[15]Minutes of an Executive Session of the Federal Election Commission, Sept. 30, 2003, at 4 (Chair Weintraub, Commissioners Mason, McDonald, Thomas, and Toner voting affirmatively, Commissioner Smith dissented).

[16]Minutes of an Executive Session of the Federal Election Commission, Sept. 30, 2003, at 4-5 (motion to find probable cause violation of 2 U.S.C. §§ 441a(a)(1)(A), 441a(f), 433(b), and 434(b) failed 2-4,Commissioners Smith and Toner voting affirmatively, Commissioners Mason, McDonald, Thomas, and Weintraub dissented). Commissioner Toner joins those portions of Commissioner Smith's Statement of Reasons in this matter concerning the affiliation theory.

[17]Response of Ashcroft 2000, April 2, 2001.

[18]*Id*. at 1.

[19]Response of SOA, March 16, 2001 at 2. SOA admitted that it made a $5,000 contribution to Ashcroft 2000 for the primary and general elections during the 2000 election cycle and reported both contributions on their FEC reports.

fundraising efforts was ever owned, controlled, disclosed to or made available to SOA.[20] Finally, SOA stated that they mutually agreed in writing that Senator Ashcroft would, in exchange for the use of his name and signature on SOA's fundraising letters, personally own any "work product" derived from such use, including lists of contributors and potential contributors.[21]

C. Analysis

Ashcroft 2000 registered as a principal campaign committee with the Secretary of the Senate on June 6, 1996.[22] SOA filed its statement of organization as a multi-candidate committee with the Commission on July 3, 1996. SOA was operated as a "leadership PAC." While the term "leadership PAC" is familiar to political observers, it is not specifically defined in the Act or Commission regulations. However, for over 20 years the Commission has permitted leadership PACs to exist and to conduct a wide variety of political activities.[23] Generally, leadership PACs are unauthorized political committees, usually established by Federal elected officials, that support other candidates for Federal, state, and local office, as well as party committees. The monies raised by leadership PACs are generally used to contribute to other candidates while the person associated with the leadership PAC seeks a leadership position in Congress. Leadership PAC funds have historically been used by federal candidates and officeholders to travel when campaigning for other candidates and to support state and local party committees in key states. Leadership PACs operate as multicandidate committees, and are not connected to any corporation, labor organization or political party committee. They are also not authorized by a candidate or affiliated with the officeholder's principal campaign committee.

While Ashcroft 2000 and SOA were both established by Senator Ashcroft in 1996, they were not established as affiliated committees. In fact, the complaint never considered the two committees affiliated but simply alleged that SOA and Ashcroft 2000 had violated 2 U.S.C. § 441a(a)(2)(A) by making and receiving, respectively, excessive contributions in the form of "fundraising lists"; and that they violated 2 U.S.C. § 434(a) and (b), by failing to report the fundraising lists as a contribution.[24]

Senator Ashcroft established SOA to support conservative Republican candidates for Federal office throughout the United States during the 1998 elections.[25] Senator Ashcroft was a

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[20] *Id*. at 2.

[21] *Id*. at 2-3; *see also* Ashcroft Reply Br. at 2.

[22] *See* 2 U.S.C. § 431(5).

[23] An overview of the Commission's treatment of leadership PACs since 1978 appeared in *Leadership PACs: Notice of Proposed Rulemaking*, 67 Fed. Reg. 78753, 78754 (Dec. 26, 2002).

[24] Complaint of National Voting Rights Institute, et. al., dated March 7, 2001.

[25] Transcript of Deposition of Jack Oliver dated February 27, 2003 (hereinafter "Oliver Dep.").

prominent conservative in the Republican community and was much sought after to make public appearances on behalf of other conservative candidates. He traveled throughout the country to support these conservative candidates. SOA also made direct contributions to their campaigns.[26] In order to support these candidates and SOA's operations, SOA decided to raise funds through direct mail solicitations. Senator Ashcroft was a well known and respected conservative Senator who, the committee anticipated, would be very successful in raising funds for SOA.[27] It was agreed that in exchange for the use of Senator Ashcroft's name and/or likeness on fundraising solicitations, the Senator would receive exclusive ownership of the work product[28] derived from SOA's use of his name and likeness in these solicitations.[29]

It is a common practice for well-known political candidates and officeholders of both major political parties to lend their names and/or likeness to various organizations for fundraising solicitations. In many cases, in exchange for their name, the political candidate or officeholder obtains the work product that resulted from the use of their name. Significantly, the respondents in this matter produced sworn, unrebutted testimony that established this key fact.[30] Specifically, Joanna Boyce Warfield, who testified that she has worked in the direct marketing field for political organizations since 1992, stated under oath that:

> It is common practice of well-known political candidates and officeholders of both major political parties to lend their name and/or likeness to various organizations for fundraising solicitations. <u>In many cases, in exchange for their name, the political candidate or officeholder obtains the work product that has resulted from the use of their signature.</u>

Affidavit of Joanna Boyce Warfield dated June 5, 2003 (emphasis added).

These prevalent and commercially reasonable types of transactions have been previously reviewed and approved by the Commission.[31] Moreover, Ms. Warfield's sworn, unrebutted testimony in this matter is bolstered by information that the Commission has obtained in other MURs. In MURs 4382/4401 ("Dole matter"), the Commission obtained through discovery strong evidence that these kinds of transactions and practices are widespread and customary in

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[26]Oliver Dep. at 12.

[27]Oliver Dep. at 26. *See also* Affidavit of Joanna Boyce Warfield dated June 5, 2003 at ¶5 and ¶6.

[28]Work product is defined in the Work Product Agreement as "mailing lists, list of supporters of and contributors to the Committee, lists of prospective contributors to the Committee, results of polling data, and any and all other data and documentation regarding the Committee or John Ashcroft." Work Product Agreement dated August 4, 1999.

[29]Work Product Agreement dated August 4, 1999. *See also* Oliver Dep. at 45-46, 60.

[30]*See* Affidavit of Joanna Boyce Warfield dated June 5, 2003. *See also* Oliver Deposition at 34, 43-44, 84-85.

[31]*See, e.g.,* Advisory Opinions 1981-46 and 1982-41.

the commercial mailing list industry. In the Dole matter, Dole for President, Inc. ("Primary Committee") had received mailing lists from Citizens Against Government Waste ("CAGW") in exchange for Senator Dole's signature on fundraising solicitations that helped generate those particular lists. The Primary Committee and CAGW asserted that CAGW gave the Primary Committee the names of donors and others who responded to the letter signed by Senator Dole and that "the arrangement was part of a bargained-for arms length agreement" and "is a usual and normal practice in the direct mail industry".[32] The Primary Committee also argued that the transactions between the Primary Committee and CAGW met in all respects the FEC's test that an exchange of equal value, as determined by industry standards, that were commercially reasonable transactions, resulted in no contribution to the Primary Committee.[33] CAGW further argued that the agreement between Senator Dole and CAGW to provide Senator Dole with the names of individuals who responded to the letters he signed on behalf of CAGW endorsing CAGW's cause, represented a bargained-for exchange of equal value that is a usual and customary practice in the direct mail industry.[34]

In support of their arguments in the Dole matter, CAGW submitted statements from numerous experts[35] in the direct mail industry that, according to CAGW, "unequivocally demonstrated" that the exchange of signatures for the names of the respondents is an exchange of equal value, and that such transactions are considered usual and normal in the direct mail industry.[36] Specifically, Rhonda K. Bell, who indicated that she has been involved in the direct mail fund-raising business since 1976, stated to the Commission that "[e]xchanging signatures for names is a widespread and commonly accepted practice in the direct mail industry." Letter from Rhonda K. Bell, President of Liberty Lists & Resources, Inc. (attached at pp. 1-2 of Attachment 1 to General Counsel's Report #2 in MURs 4382/4401 (Aug. 2, 2000). Ms. Bell further stated that:

> Celebrities or politicians who agree to sign fund-raising letters for non-profits, whether citizens' action, educational, or charitable in exchange for the use of the names, have always considered these exchanges to be of equal value. <u>The rights</u>

[32]MURs 4382/4401, General Counsel's Report #2 dated Aug. 2, 2000 at 12.

[33]*Id*.

[34]*Id*. at 13.

[35]Rhonda K. Bell, President, Liberty Lists & Responses, Inc.; Linda L. Fisher, President, Preferred List; Arthur L. Speck, President, Precision Marketing, Inc.; Dan Morgan, President, Dan Morgan, Todd Meredith & Associates; Richard A. Viguerie, President, The American Target Advertising; Steven Winchell, President, Steven Winchell & Associates, Inc.; Richard F. Norman, President, The Richard Norman Company; John Griswold, President, Griswold & Griswold, Inc.; and David A. Keene, Chairman, The American Conservative Union in MURs 4382/4401 (Dole for President, et al.).

[36]General Counsel's Report #2 at 15.

> to the names generated by one's signature has been a generally accepted industry standard.

Id. (emphasis added). In addition, Linda L. Fisher, President of Preferred Lists, submitted the following written statement to the Commission:

> During my 22 years in the direct mail fundraising business, it has been a common practice for politicians to exchange the use of their signature for mailing names. For example, a Congressman agrees to sign a fundraising letter for a non-profit organization in exchange for the use of the names generated by the letter. This has always been considered an equal exchange and a standard practice.

June 13, 1997 Letter from Linda L. Fisher (attached at p. 3 of Attachment 1 to General Counsel's Report #2 in MURs 4382/4401 (Aug. 2, 2000) (emphasis added).[37]

Unlike the transactions at issue in the Dole matter, then-Senator Ashcroft's agreements with SOA and Ashcroft 2000 provided for his ownership (sole or joint depending on interpretation of the agreements) of the mailing lists. This led OGC and some of our colleagues to conclude that the mailing list agreements were not fair market value exchanges. While the Dole matter involved the exchange of a signature for one time use of responsive names, the testimony of direct mail industry experts did not indicate that one time use was a universal or exclusive rule.[38] Furthermore, at least one other MUR[39] and one publicly-reported federal ethics disclosure[40] indicate that joint ownership of mailing lists is not unprecedented.

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[37] *See also* July 7, 1997 Letter from Dan Morgan, President, Dan Morgan, Todd Meredith & Associates (attached at p. 4 of Attachment 1 to General Counsel's Report #2 in MURs 4382/4401 (Aug. 2, 2000) ("I have worked in the political fund-raising industry for over ten years. The practice of allowing a signer of a mailing access to those who responded to that mailing is and has been a usual and normal industry standard.") (emphasis added); *Id. at 5* (June 24, 1997 Letter from Richard A. Viguerie (noting his involvement in the direct mail business for 32 years and stating familiarity "with the practice of exchanging signatures for names. This practice usually involves politicians, in particular members of Congress . . .It has always been the common standard and routine practice in the direct mail industry to consider this an exchange of equal value: in fact, such a practice has not been questioned in the past."); *id.* at 6 (June 18, 1997 Letter from Stephen Winchell, President, Stephen Winchell & Associates, Inc. (same)); *id.* at 7 (June 19, 1997 Letter from Richard F. Norman, President, The Richard Norman Company (same)).

[38] *See* Statements of Rhonda K. Bell, President, Liberty Lists & Responses, Inc.; Linda L. Fisher, President, Preferred List; Arthur L. Speck, President, Precision Marketing, Inc.; Dan Morgan, President, Dan Morgan, Todd Meredith & Associates; Richard A. Viguerie, President, The American Target Advertising; Steven Winchell, President, Steven Winchell & Associates, Inc.; Richard F. Norman, President, The Richard Norman Company; John Griswold, President, Griswold & Griswold, Inc.; and David A. Keene, Chairman, The American Conservative Union in MURs 4382/4401 (Dole for President, *et al.*).

[39] *See* MUR 5160 (Friends of Giuiliani Exploratory Committee).

[40] Edward Walsh, *Rogan Finds List is One Way to Profit from Loss*, Wash. Post (Dec. 13, 2002) at A43.

In this very matter in an ancillary transaction which no one questioned, SOA and its direct mail vendor shared ownership of a mailing list generated in a particular contractual arrangement.[41] Also in this matter, at least one organization, the Reagan Project, apparently independent of Senator Ashcroft, granted him ownership of a mailing list in return for his signature on fundraising letters.[42] Testimony on this point at the Commission's hearing on mailing lists was inconclusive.[43] Several witnesses indicated that they were not aware of exchanges of signatures for ownership or permanent use of a mailing list while another witness indicated vigorously that he believed such an exchange was appropriate.[44] Yet other witnesses testified that joint ownership arrangements in which one entity provided a raw list and another updated and enhanced the list were normal in the industry.[45]

Based on the unrebutted testimony offered by the respondents in this MUR that the exchange of Senator Ashcroft's signature for ownership of responsive names was commercially reasonable, the apparently arm's length exchanges in this and other Commission proceedings which involved joint ownership of lists, and evidence in other enforcement matters and our rulemaking record that a variety of exchange practices are routine in the direct mail industry, we concluded that Senator Ashcroft's agreements with SOA and Ashcroft 2000 were fair market value exchanges. The Commission's decision to abandon its mailing list rulemaking in part due to the lack of an administrative record on which to base a specific valuation rule would render any declaration in this matter to the contrary wholly arbitrary.

Those who differ with our conclusion that exchanging responsive names for use of signatures is a fair market value exchange would be obliged, in assessing the scope of any potential violation, to come up with a reasonable, empirically sound alternative. The claim that SOA's gross development costs for its mailing list is the market value of the list, generating the $2 million and $1.7 million liability claims advanced in this matter, is wholly without empirical basis. In its prior advisory opinions,[46] audits,[47] and enforcement matters,[48] the Commission has

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[41] Interim No-Risk Agreement between Brice W. Eberle and Associates and SOA entered into Jan. 15, 1998, Ex. 1 to Dep. of Bruce W. Eberle.

[42] Reply Brief submitted June 6, 2003 at 5, 7.

[43] *See generally,* Transcript, Candidate Travel, Multi-candidate Committee Status, Biennial Contribution Limits, and Mailing Lists Public Hearing (Oct. 1, 2003).

[44] *Id.*

[45] *Id.*

[46] *See, e.g.,* Advisory Opinions 2002-14, 1982-41, 1981-53, and 1981-46.

[47] *See* Final Audit Report on Bauer for President 2000, Inc. (May 31, 2002); Final Audit Report on Buchanan/Foster, Inc. (Dec. 23, 2002); Final Audit Report on Dole for President, Inc. (June 3, 1999).

[48] MURs 4382/4401 (Dole for President, et al.).

never suggested that the costs incurred in developing a mailing list have any relevance in determining the market value of the list.[49]

In fact, in 1999 the Commission explicitly rejected a proposal to value a supporter list on a cost basis, concluding, "Fair market value of a list is not determined by the cost but rather by what someone is willing to pay for the use of the list."[50] This is in accord with a fundamental principle of economics that sunk costs are irrelevant to determining value. If we did adopt a development cost methodology, we would have to address the fact that list development ("prospecting") mailings generate income in the course of the development effort. On a "cost" basis this income would reasonably have to be applied to offset printing, postage and other gross spending on the mail effort.[51] While prospecting mailings most often produce net losses, at least some prospecting efforts actually break even financially. Thus, by this speculative methodology, the most successful mailing lists would have no "cost," and thus no value, while the most spectacularly failed list development efforts would produce the highest costs and values of any lists. In addition to defying economic fundamentals and our prior regulatory guidance, this speculative methodology defies common sense.

The Commission has very recently reviewed mailing list sales between related political committees and approved a sales valuation of approximately $.50 per name (for a 88,422 name list) and rejected a sale price of $2.75 per name (for a 71,784 name list) as too high.[52] Under these precedents the value of SOA's 80,000 name list at issue here might safely be assessed at $40,000.[53] However, in assessing the value of the exchange between Senator Ashcroft and Ashcroft 2000 under this methodology, we would be required to subtract the value of any new names Senator Ashcroft received from Ashcroft 2000 in return for use of the original lists, an analysis which was never attempted.[54] Thus, even if we concluded that the exchange between Senator Ashcroft and Ashcroft 2000 was not at fair market value, the sales valuation we have very recently approved in other Commission matters would produce an alternate valuation of only a small fraction of $1.7 million.

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[49] In the Final Audit Report on Buchanan/Foster, Inc. (Dec. 23, 2002), the Commission's Audit Division staff described a transaction in which Buchanan/Foster, Inc. purchased 71,784 names from Buchanan Reform, Inc. for $197,496 ($2.75 per name). This price was based on the 1997 purchase of the 1996 Buchanan campaign donor list by another group at $3.00 per name. Final Audit Report on Buchanan/Foster, Inc. (Dec. 23, 2002) at 7. The report further noted that Quayle 2000 purchased a comparable list for $45,000, arrived at through "two independent valuations that valued the list at $40,000 and $50,000." Final Audit Report on Buchanan/Foster, Inc. (Dec. 23, 2002) at 9; Final Audit Report on Dole for President, Inc. (June 3, 1999) at 25.

[50] Final Audit Report on Dole for President, Inc. (June 3, 1999) at 31.

[51] Interim No-Risk Agreement between Brice W. Eberle and Associates and SOA entered into Jan. 15, 1998, Ex. 1 to Dep. of Bruce W. Eberle.

[52] Final Audit Report on Buchanan/Foster, Inc. (Dec. 23, 2002).

[53] *See* General Counsel's Report #4 dated June 30, 2003 at 17 (SOA's list contained approximately 80,000 names).

[54] Final Audit Report on Bauer for President 2000, Inc. (May 31, 2002).

One other aspect of certain alternate theories advanced in this matter is worthy of comment: the complainant, OGC, and some of our colleagues appear to ignore the fact that there was no exchange of mailing lists between SOA and Ashcroft 2000 in this matter. In fact, Senator Ashcroft entered into an agreement with SOA resulting in his ownership of certain mailing lists.[55] As noted above, he owned or had rights to yet other mailing lists through arms length agreements with other entities. In a separate agreement Senator Ashcroft licensed the lists he owned to Ashcroft 2000 in return for the expanded and updated list that reasonably could be expected to be generated by his re-election campaign.[56]

Under judicially approved Commission precedents, the Commission may not simply ignore legally and economically separate steps in a series of transactions or collapse those transactions,[57] and specifically may not treat the financial or property interests of a candidate and his authorized committee as identical.[58] If the Commission were to treat property (mailing lists) that are personally owned by a candidate per se as property of his authorized committee (absent, for instance, a joint ownership agreement), the statute's segregated fund and personal use rules would be vitiated.

These considerations help establish an appropriate valuation of the mailing lists at issue in this matter. And even differing with the list valuation reasonably supported by the respondents, any exchanges not at fair market value would produce only minor violations. If SOA is assumed to have "overpaid" Senator Ashcroft by giving him ownership rather than, for instance, one time use of names generated by his signature, no violation of the Act is readily apparent.[59] If Senator Ashcroft then gave mailing lists he owned to his authorized committee at less than the usual and normal charge, he would have made a contribution of some value to his

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[55] Work Product Agreement between SOA and Mr. Ashcroft, effective July 17, 1998.

[56] List License Agreement between Ashcroft 2000 and Mr. Ashcroft, effective Jan. 1, 1999.

[57] *See In re Sealed Case*, 223 F.3d 775, 782 (D.C. Cir. 2000) (citing approvingly the Commission's rejection of the principle that a set of lawful transactions, each with a legitimate purpose, can be tied together to create an unlawful one). *In re Sealed Case* arose out of the Commission's consideration of MUR 4250 (Republican National Committee). *See* Statement of Reasons in MUR 4250, Commissioners Wold, Elliott, and Mason dated Feb. 11, 2000. *See also* MUR 4000 (Fisher for Senate, et al.) (summarized in Statement of Reasons in MUR 4250, Commissioners Wold, Elliott, and Mason dated Feb. 11, 2000 at 11-13) and MUR 4314 (Sherman for Congress, et al.) (summarized in Statement of Reasons in MUR 4250, Commissioners Wold, Elliott, and Mason dated Feb. 11, 2000 at 13-14).

[58] *See* 2 U.S.C. § 432(b)(3)("All funds of a political committee shall be segregated from, and may not be commingled with, the personal funds of any individual."); 2 U.S.C. § 439a (prohibition on personal use of campaign funds); 11 C.F.R. § 110.10(b) (definition of "personal funds").

[59] Outside of the public funding context, the fact that a political committee may have paid more than it possibly could have for goods or services does not normally present a FECA violation.

own campaign.[60] Any such contribution would be permissible and would simply have to be reported. Thus, even disagreeing with the list valuation for which the respondents have provided record evidence, the result is simply a reporting violation of some difficult-to-determine amount. While the Commission has and will continue to pursue failure by candidates to report fully or timely contributions to their own campaigns, such violations are not normally considered major matters.[61]

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Although we found the list exchange agreements in MUR 5181 to be bona fide and commercially reasonable, we did support the Commission's finding that two particular kinds of transactions at issue here were not commercially reasonable and therefore constituted in-kind contributions from SOA to Ashcroft 2000. To our knowledge the Commission has not previously encountered list transactions where certain list-related income accrued to and earned by one political committee was subsequently re-directed to another political committee, as occurred here. These are the transactions – totaling $112,962.05 – for which we found probable cause to believe that SOA made excessive contributions to Ashcroft 2000.[62]

Through 1999, SOA continued to rent its list and receive income. On December 10, 1999, Garrett Lott requested that list vendors redirect list rental payments from SOA to Ashcroft 2000. Six checks dating from September 28, 1999 to December 3, 1999 totaling $49,131 and already issued to SOA were reissued to Ashcroft 2000, along with additional rents of $17,530. In addition, in March 2000, Mr. Lott assigned accounts receivables owed on SOA lists held by one vendor to a second vendor for $46,299, apparently because of a controversy surrounding the first vendor.[63] Ashcroft 2000 received rents through 2000.

The treasurer of both SOA and Ashcroft 2000 (the same individual) argued in essence that administrative oversight allowed these particular revenues to be accrued by SOA, and that

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[60] *See* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 110.7(a)(1)(iii)(A) & (B) (unless exempted, "the provisions of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution.").

[61] Under the Commission's schedule of fines of the administrative fines program, for instance, failure to report last minute contributions can result in a potential civil penalty of $100 plus 10% of the amount of the contribution. 11 C.F.R. § 111.44(a)(1) (when there are no prior violations, as is the case here, the civil penalty for the failure to file timely a notice regarding contributions received after the 20th day but more than 48 hours before the election as required under 2 U.S.C. § 434(a)(6) is calculated at $100 plus 10% of the amount of the contribution).

[62] *See* General Counsel's Report #4 dated June 30, 2003 at 17 (identifying $66,662.22 in earned SOA list rental income that was re-directed to Ashcroft 2000, as well as $46,299.83 of SOA accounts receivable that were transferred to Ashcroft 2000

[63] Lott Dep. (9:00 am) at 33; Speck Ex. 17 & 18 (assignment documents). In November 1999, one of the committee's direct mail vendors was terminated as a result of unflattering press reports regarding another project. Eberle Ex. 11 (termination letter). Eberle Ex. 23 (redesignation letter and attachments).

he intended and legally could have caused the revenues to be earned by Ashcroft 2000.[64] Notwithstanding this purported legal authority and professed intent, the treasurer did not inform the vendors authorized to rent the mailing lists of any change in plans or status and indeed apparently collected and held checks from the vendor payable to SOA for several months before informing the vendor of the altered arrangements. At no time did the treasurer argue that the initial checks made payable to SOA were issued in error or contrary to his instructions. Rather, the treasurer argued that he had authority to allow SOA or Ashcroft 2000 to use the lists as needed. Even if the treasurer did have such authority – which is highly doubtful given that such authority was nowhere specified between the parties – we see no basis for concluding that the treasurer had the authority to transfer rental revenues from one committee to the other after the fact.

D. Presidential Campaign Implications

Material to the analysis of this matter is the fact that Senator Ashcroft was publicly considering running for President during the period in which SOA was most active.[65] The most expansive liability theories proposed rely on the preposterous claim that SOA was a 4-year, $3.5 million conspiracy to generate a mailing list for Senator Ashcroft's 2000 Missouri Senate campaign. During the course of the investigation in this matter, the Commission issued a Notice of Proposed Rulemaking, sought comments, and promulgated a final rule providing a clearer, much needed framework for the activities of leadership PACs undertaking activity related to a candidate's exploration of a potential Presidential campaign.[66] That rule requires reimbursement of specific expenses if Presidential efforts progress beyond an exploratory stage. Consistent with our broader rule on leadership PACs, the Commission's new Presidential leadership PAC regulation does not attribute all, most, or necessarily any leadership PAC activity to a subsequent presidential campaign.

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[64] General Counsel's Report #5 dated Sept. 23, 2003 at 5-6.

[65] *See, e.g.,* Scott Canon, *Ashcroft Outlines Visions of Future, Senator's Ideas Resemble Platform for Campaign*, Kan. City Star, Dec. 31, 1998, at B3; David Lightman, *Race for the White House Stirring to Life, Democrat Bradley, Republican Ashcroft Testing the Waters,* Hartford Courant, Dec. 5, 1998, at A1; David Goldstein, *Senator Sets Jan. 5 as Day of Decision, Ashcroft is Likely to Enter Race for President,* Kan. City Star, Dec. 5, 1998, at A5; Tim Poor, *Ashcroft Will Announce Presidential Plans in January,* St. Louis Post Dispatch, Dec. 5, 1998, at 21; *Ashcroft Tests the Waters in Iowa,* St. Louis Post-Dispatch, Aug. 16, 1998, at B1; Andrew J. Glass, *Ashcroft in 2000?*, Balt. Sun, July 26, 1998, at 3C; Marianne Means, *Republican Senator Making Name for Himself,* San Antonio Express-News, Feb. 27, 1998, at 5B.

[66] *See Public Financing of Presidential Candidates and Nominating Conventions: Final Rule*, 68 Fed. Reg. 47,387, 47414 & 47419 (Aug. 8, 2003) (revisions to 11 C.F.R. § 110.2; 9034.10) (precandidacy expenditures by leadership PACs and other multicandidate committees for certain expenses incurred in presidential campaigns may be in-kind contributions under these new regulations)).

The Commission's disposition of this matter is consistent with its well-established recognition of leadership PACs associated with candidates considering a run for the White House. In the current election cycle, Sen. John Edwards, Sen. John Kerry, Rep. Richard Gephardt, and Sen. Joseph Lieberman maintained such committees (Sen. John Edwards – New American Optimists; Sen. John Kerry – the Citizen Soldier Fund; Rep. Richard Gephardt – the Effective Government Committee; Sen. Joseph Lieberman – Responsibility, Opportunity, Community PAC).[67] Had the Commission adopted the expansive and unprecedented liability theories advanced by some of our colleagues in this matter – which would have found excessive contributions ranging from hundreds of thousands of dollars to $1.7 million – these and other federal candidates and officeholders who conducted leadership PAC activity under settled Commission precedents would have been at serious risk.

III. Conclusion

The final conciliation agreement in this matter reflects the core factual and legal bases for the Commission's finding of an excessive contribution from SOA to Ashcroft 2000, contains an appropriate civil penalty, and requires that respondents cease and desist from such violative activity. The settlement reflects the fact that at the end of the day the Commission determined to conclude this matter under the plain, simple rules governing list exchanges and limiting contributions between political committees. We believe this balanced result has sound empirical support in the record and is consistent with the way in which the Commission has treated other similarly situated candidates, leadership PACs, and authorized committees in the past.

December 12, 2003

David M. Mason
Commissioner

Michael E. Toner
Commissioner

[67] *See It's Showtime: With an Eye on the 2004 Campaign, White House Wannabees Hit the Money Trail*, Money in Politics Alert, Vol. 6, No. 53 (May 16, 2002), available at http://www.opensecrets.org/alerts/v6/alertv6_53.asp (visited Dec. 11, 2003).