FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JUL 29 2002

Garrett M. Lott, Treasurer
Ashcroft 2000
9378 Olive Blvd., Suite 206
St. Louis, MO 63132

RE: MUR 5181
Ashcroft 2000 and
Garrett M. Lott, Treasurer

Dear Mr. Lott:

On March 15, 2001, the Federal Election Commission notified Ashcroft 2000 ("Committee") and you, as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on July 23, 2002, found that there is reason to believe that Ashcroft 2000 and you, as Treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A) and 434(b), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Order to Answer Questions and Subpoena to Produce Documents must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. Any additional materials or statements you wish to submit should accompany the response to the order and subpoena. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

You may consult with an attorney and have an attorney assist you in the preparation of your responses to this order and subpoena. If you intend to be represented by counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notification or other communications from the Commission.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General

Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Mary L. Taksar, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

David M. Mason
Chairman

Enclosures
Order and Subpoena
Designation of Counsel Form
Factual and Legal Analysis

cc: Ashcroft 2000 c/o
Garrett M. Lott, Treasurer

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Ashcroft 2000 and Garrett M. Lott, as treasurer

MUR: 5181

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by the Alliance for Democracy, Common Cause, the National Voting Rights Institute, Hedy Epstein and Ben Kjelshus alleging that Ashcroft 2000 accepted an excessive in-kind contribution from Spirit of America PAC ("the PAC") in the form of a fundraising list, in violation of the Federal Election Campaign Act of 1971, as amended ("the Act"). *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL BACKGROUND

Ashcroft 2000 is the principal campaign committee for John Ashcroft for the 2000 Senate election. The PAC, according to public information sources, was formed in 1996 by then-Senator John Ashcroft as a "leadership" PAC. See Edward Zuckerman, *The Almanac of Federal PACs 2000-01*, pages 390, 396; *Congressional Quarterly's Federal PACs Directory 1998-1999*, page 393. The PAC filed its initial Statement of Organization with the Commission on June 17, 1996. The PAC filed a Notification of Multicandidate Status on October 7, 1998, identifying five candidates to which the PAC had contributed and certifying that the PAC had received contributions from more than 50 persons. See 2 U.S.C. § 441a(a)(4). Thus, at the time of the activity in this matter, the PAC's contribution limit to candidates and their candidate committees was $5,000 per election. See 2 U.S.C. § 441a(a)(2)(A). The PAC disclosed making, and Ashcroft 2000 disclosed receiving, two $5,000 contributions on June 30, 1999: one in connection with the 2000 primary election and one in connection with the 2000 general election. Thus,

any additional contribution from the PAC to Ashcroft 2000 in connection with a 2000 election would have been excessive.

III. RELEVANT LAW

The Act provides that no person shall make contributions to any candidate and his or her authorized political committees with respect to any election for federal office which in the aggregate exceed $1,000. 2 U.S.C. § 441a(a)(1)(A). Multi-candidate political committees may contribute an aggregate of $5,000 per election to any federal candidate and his or her authorized political committee. 2 U.S.C. § 441a(a)(2)(A). The Act defines "multi-candidate political committees" as those political committees which have been registered with the Commission for at least six months, have received contributions from more than 50 persons, and have made contributions to at least five federal candidates. 2 U.S.C. § 441a(a)(4). Candidates and political committees may not accept contributions which exceed the statutory limitations of section 441a. 2 U.S.C. § 441a(f).

Also under the Act, a "contribution" includes "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). The Commission's regulations provide that "anything of value" includes all in-kind contributions, including the provision of goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services. 11 C.F.R. § 100.7(a)(1)(iii)(A). For purposes of 11 C.F.R. § 100.7(a)(1)(iii)(A), usual and normal charge for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.7(a)(1)(iii)(B). The regulations specifically include mailing lists as an example of such goods or services. *Id. See also*

11 C.F.R. § 100.8(a)(1)(iv)(A). The entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution. 11 C.F.R. § 100.7(a)(2).

It is unlawful for any corporation to make a contribution or expenditure in connection with any federal election. 2 U.S.C. § 441b. It is also unlawful for any officer or director of a corporation to consent to any corporate expenditures which may be prohibited contributions to candidates or committees. *Id.* It is unlawful for any candidate or political committee to accept or receive any contribution from a corporation. *Id.* For purposes of Section 441b, the term "contribution" includes any direct or indirect payment, distribution, loan (other than from a national or State bank made in accordance with the applicable banking laws and regulations in the ordinary course of business), advance, deposit, or gift of money, or any services, or anything of value to any candidate or campaign committee in connection with a Federal election. 2 U.S.C. § 441b(b)(2).

A candidate who receives a contribution, or any loan for use in connection with the campaign, or makes a disbursement in connection with such campaign, is considered, for purposes of the Act, to have received the contribution or loan, or made the disbursement as an agent of the authorized committee or committees of such candidate. 2 U.S.C. § 432(e)(2).

Finally, all political committees are required to file reports of their receipts and disbursements. 2 U.S.C. § 434(a). Each report filed by a committee not authorized by a candidate must disclose all contributions made to candidates and their committees. 2 U.S.C. § 434(b)(6)(B)(i). All political committees must report the identification of each political committee which has made a contribution to the reporting committee, together with the date and amount of any such contribution. 2 U.S.C. § 434(b)(3)(B). In-

kind contributions must be reported as both contributions received and expenditures made. 11 C.F.R. § 104.13(a)(2).

IV. COMPLAINT

The complaint alleges that the PAC contributed to Ashcroft 2000 a fundraising list of 100,000 donors and that Ashcroft 2000 in turn generated earnings in 2000 by renting out the list to a fundraiser, Precision Marketing, Inc. ("PMI").[1] See "Possible Ashcroft Campaign Violation," *The Washington Post*, February 1, 2001, at page A4. Specifically, the complaint notes that Ashcroft 2000 received payments throughout the year 2000 totaling $116,922 for rental of the list.

The complaint also states that the PAC developed the fundraising list between 1997 and 1999 at a cost of more than $2 million. Further, the complaint states that the PAC had already given the maximum contribution to Ashcroft 2000 regarding the 2000 election cycle, $5,000 for the primary and $5,000 for the general. The complaint alleges that the PAC's fundraising list constituted an in-kind excessive contribution of "substantial market value" to Ashcroft 2000. In addition, the complaint alleges that the PAC and Ashcroft 2000 failed to report the making and receipt of this contribution.

V. RESPONSE

Ashcroft 2000 filed a response on April 2, 2001,[2] stating that it did not accept any direct or in-kind contributions from the PAC except as reported on its disclosure reports. Ashcroft 2000 also states that it conducted all of its fundraising activity "through outside, professional vendors" and that the vendors used lists prepared by the vendors. Ashcroft 2000 Response, page 1.

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[1] According to publicly-available information, PMI was incorporated in Virginia in 1994.

[2] Ashcroft 2000 identified itself as a multi-candidate committee, although it is in fact a candidate committee. See Ashcroft 2000 Response at page 1.

The response then briefly described the role of candidate John Ashcroft. Ashcroft 2000 stated:

> John Ashcroft granted to [Ashcroft 2000] a license to use certain information owned by him, including the authority to rent from vendors mailing lists developed for [the PAC]. [Ashcroft 2000] subsequently sub-licensed all or a portion of the licensed data to others, along with other intellectual property owned by [Ashcroft 2000], all in full compliance with [the Act] and applicable FEC regulations.

Ashcroft 2000 Response, page 1.

VI. ANALYSIS

A. Exchange of Mailing List for Signature on Fundraising Letters

In determining whether a transaction involving the exchange of mailing lists between a political committee and committee or other entity results in a contribution, the Commission examines whether the transaction involved a bargained-for exchange of equal value. Specifically, the Commission analyzes whether the committee has paid for the use of another organization's mailing list in a commercially acceptable manner, either by the user of the list paying the list owner a fee equal to the market value of the list or alternatively, by the user of the list exchanging names of corresponding value with the list owner. See, e.g., Advisory Opinion 1981-46.

In Advisory Opinion 1981-46, a Congressional candidate committee contracted with a fundraising vendor to develop a direct mail program to raise funds for the committee and to act as a broker of the committee's contributor list. As part of the package provided by the vendor to the committee, the vendor would negotiate with other organizations for use of their mailing lists to increase the list of names from which the client committee could solicit contributions. In its request for this advisory opinion, the committee asked the Commission whether the committee's exchange of names from its contributor list for the use of names of corresponding value from the list of another

political committee is considered "usual and normal charge" for goods within the meaning of 11 C.F.R § 100.7(a)(1)(iii)(B). The Commission concluded that if the exchange of names on a contributor list is an exchange of names of equal value according to accepted industry practice, the exchange is considered full consideration for services rendered and therefore, no contribution results.

The Commission also has considered the impact of a three-way exchange of mailing lists. See Advisory Opinion 1982-41. The proposed exchange in Advisory Opinion 1982-41 involved a Congressional committee allowing an organization called Jubilee Housing ("Jubilee") to use 5,000 names from its mailing list in exchange for Jubilee making arrangements for the committee to use 5,000 names from a mailing list belonging to a third organization. In return, the third organization would use 5,000 names from Jubilee's mailing list. The committee asserted that the use of a list of value is the consideration for which each party bargained and that a multi-party exchange is a routine and usual method of arranging such transactions. The committee asked the Commission whether the described exchange of lists or any similar arrangement within the general practice of the trade was an acceptable means of paying for the use of the mailing list and further, whether the exchange would result in a contribution that would be limited or prohibited. The Commission noted that it has recognized that if an exchange of names on a contributor list is an exchange of names of equal value as determined by industry practice, the exchange would be considered full consideration for services rendered. The Commission concluded that assuming such multi-party exchanges are routine and usual in the list brokering industry and the three-way exchange is an exchange of equal value, the exchange of lists between the committee and the two organizations was permissible under the Act and did not result in a contribution being

made by these organizations to the committee, but was instead a bargained-for exchange of consideration in a commercial transaction.

The available information at this stage fails to establish whether the exchange at issue was a bargained-for exchange of equal value and therefore, the difference in value between the mailing list and then-Senator Ashcroft's signature in the fundraising appeals would result in a contribution from the PAC to Ashcroft 2000. See 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.7(a)(2). Such a contribution would constitute receipt of an excessive contribution because the PAC had already given the maximum contribution to Ashcroft 2000 regarding the 2000 election cycle, $5,000 for the primary and $5,000 for the general. See 2 U.S.C. §§ 441a(a)(2)(A) and 441a(f).

The very brief and unsworn response submitted by Ashcroft 2000 indicates that John Ashcroft received the mailing list from the PAC and that he granted Ashcroft 2000 "a license to use certain information owned by him, including the authority to rent from vendors mailing lists developed for [the PAC]." Ashcroft 2000 Response, page 1. Ashcroft 2000 does not provide any information regarding the value of the mailing list and the use of then-Senator Ashcroft's signature or an explanation as to how the items can be considered items of equal value. Ashcroft 2000 neither describes the purported agreement between the parties nor provides a copy of the agreement, license or sub-license. The campaign committee also fails to provide information that the exchange of a mailing list for a signature on fundraising letters is routine and usual in the direct mail industry. See Advisory Opinion 1982-41. If the exchange is not routine and normal in the industry or if the value of the list exceeds the value of the use of the Senator's signature in the PAC's fundraising appeals, a contribution resulted. 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.7(a)(2).

Moreover, it is not apparent that the Senator anticipated making any use of the list other than for the benefit of his campaign. It appears that candidate Ashcroft neither obtained the mailing list from the PAC for his own personal use nor had any other use for the mailing list except for use in connection with his campaign. Thus, then-Senator Ashcroft may have acted as an agent of his authorized committee, Ashcroft 2000, in receiving a contribution from the PAC in the form of a mailing list for use in connection with his campaign. See 2 U.S.C. § 432(e)(2).

Furthermore, pursuant to 2 U.S.C. § 434(b), because committees must report all contributions made and received by the committee and candidate and Ashcroft 2000 did not disclose the transaction on its FEC Reports, the campaign committee may have also failed to meet the reporting requirements relative to the possible contribution from the PAC.

In light of the possible excessive contribution received by Ashcroft 2000 and the attending possible reporting violations, there is reason to believe that Ashcroft 2000 and Garrett M. Lott, as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b).

B. Sale/Rental of List by Ashcroft 2000 to Third Parties

The Commission has historically considered the exchange of fundraising lists, usually called mailing lists, as potential contributions, both as items of value given to political committees and as items that are sold or rented out by committees, and therefore, the payment for the property or use of the property must not be from a prohibited source and must not exceed the contribution limits. See 2 U.S.C. §§ 431(8)(A)(i), 441a(a), 441b and 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.7(a)(2). The Commission has specifically advised that when a committee asset is sold or used to produce revenue for a committee, the proceeds are considered contributions to the committee. See Advisory Opinions 1992-40 (committee's receipt of funds raised in a phone service marketing project would

constitute contributions); 1991-34 (committee's receipts from ongoing enterprise involving sale of data from a leased database of registered voters would constitute contributions); 1983-2 (committee's receipt of funds from "fee-for-services" use of its computer would constitute contributions).

The Commission has permitted isolated sales of committee assets without inherent contribution circumstances where the assets had been purchased or developed for the committee's own particular use rather than for sale in fundraising activity and such assets had ascertainable market value. See Advisory Opinions 1989-4, 1986-14, and 1981-53. Specifically, the sale or rental of a mailing list does not result in a purchaser or renter making a contribution when two criteria are met: the mailing list must be developed by the campaign committee in the normal course of its operations and for its own use rather than as an item to be sold or rented to third parties; and the list must be sold or rented at the "usual and normal" charge. See Advisory Opinions 1989-4 (a committee's sale of its mailing lists and other assets to a state committee at the usual and normal charge would not result in a contribution); 1988-12 (a committee providing membership lists for reimbursement from a federally chartered savings bank in the form of an unspecified portion of the annual membership fee on each credit card issued is not bargained-for consideration in a commercial transaction and results in a prohibited contribution); 1981-53 (a committee's sale of a mailing list it had developed to a commercial list vendor for usual and normal charge for such a list would not constitute a contribution).

For example, in Advisory Opinion 1981-53, the Commission examined whether a committee's sale of its computer tape mailing list to a corporation would constitute a contribution prohibited by 2 U.S.C. § 441b. The committee stated that it had developed its mailing list by compiling names from publicly available voter registration lists in

Indiana and that the $4,216 in expenses that were incurred relative to the list included travel expenses, supplies, copying, labor, and equipment. The committee proposed selling the list to a corporation for $4,000. The Commission determined that the Act would permit the committee to sell its computer tape mailing list to the corporation provided that: the committee developed the mailing list in the normal course of its operations and primarily for its own use rather than for sale as a fundraising item; and the price the committee charged represented the usual and normal charge for such tapes under 11 C.F.R. § 100.7(a)(1)(iii), which indicates that "the usual and normal charge" for goods means the price of the goods in the market from which they ordinarily would have been purchased at the time of the contribution.

In this matter, Ashcroft 2000 apparently entered into a transaction with PMI, Inc. that enabled the corporate entity to rent or use the mailing list developed by the PAC. Ashcroft 2000 disclosure reports disclose receipts totaling over $116,922 from PMI, Inc. in 2000 for list rental. Because the mailing list that Ashcroft 2000 rented, licensed or sub-licensed to PMI, Inc. was developed for or by the PAC and not developed by Ashcroft 2000 for its own use, the transaction between Ashcroft 2000 and PMI, Inc. fail to meet the first criterion required for the narrow exception that allows the sale of a campaign asset not to result in a contribution – the sale or rental involves a mailing list that has been developed by the campaign committee in the normal course of its operations and for its own use. In addition, it is not apparent from the available information that the transaction meets the second criterion of the narrow exception, i.e., whether PMI, Inc. the renter, licensee or sub-licensee, paid the usual and normal charge for the mailing list. See Advisory Opinions 1989-4, 1988-12, and 1981-53. See also 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and (B) and 100.7(a)(2).

The transaction between Ashcroft 2000 and PMI, Inc., therefore appears to have resulted in the making and receipt of a prohibited corporate contribution. In light of the possible corporate contribution received by Ashcroft 2000 from PMI, Inc., there is reason to believe that Ashcroft 2000 and Garrett M. Lott, as treasurer, violated 2 U.S.C. § 441b(a).