



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JUL 29 2002

Tony P. Trimble, Esq.
Trimble & Associates, Ltd.
11700 Wayzata Boulevard
Minneapolis, MN 55305

RE: MUR 5181
Spirit of America PAC and
Garrett M. Lott, as Treasurer

Dear Mr. Trimble:

On March 15, 2001, the Federal Election Commission notified your clients, Spirit of America PAC and Garrett M. Lott, 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 your clients, the Commission, on July 23, 2002, found that there is reason to believe that Spirit of America PAC and Garrett M. Lott, 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.

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.

Tony P. Trimble, Esq.
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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
Factual and Legal Analysis

cc: Spirit of America PAC and
Garrett M. Lott, Treasurer

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4
5 RESPONDENTS: Spirit of America PAC MUR: 5181
6 and Garrett M. Lott, as treasurer¹
7

8 **I. GENERATION OF MATTER**

9 This matter was generated by a complaint filed with the Federal Election
10 Commission ("Commission") by the Alliance for Democracy, Common Cause, the
11 National Voting Rights Institute, Hedy Epstein and Ben Kjelshus alleging that Spirit of
12 America PAC ("the PAC") made an excessive in-kind contribution in the form of a
13 fundraising list to Ashcroft 2000, in violation of the Federal Election Campaign Act of
14 1971, as amended ("the Act"). See 2 U.S.C. § 437g(a)(1).

15 **II. FACTUAL BACKGROUND**

16 Ashcroft 2000 is the principal campaign committee for John Ashcroft for the 2000
17 Senate election. The PAC, according to public information sources, was formed in 1996
18 by then-Senator John Ashcroft as a "leadership" PAC. See Edward Zuckerman, *The*
19 *Almanac of Federal PACs 2000-01*, pages 390, 396; *Congressional Quarterly's Federal*
20 *PACs Directory 1998-1999*, page 393. The PAC filed its initial Statement of
21 Organization with the Commission on June 17, 1996. The PAC filed a Notification of¹
22 Multicandidate Status on October 7, 1998, identifying five candidates to which the PAC
23 had contributed and certifying that the PAC had received contributions from more than
24 50 persons. See 2 U.S.C. § 441a(a)(4). Thus, at the time of the activity in this matter, the
25 PAC's contribution limit to candidates and their candidate committees was \$5,000 per

¹ At the time of the complaint, Marise Stewart was treasurer of Spirit of America PAC. The PAC filed an amended Statement of Organization on July 23, 2001 naming Garrett M. Lott as treasurer.

1 election. See 2 U.S.C. § 441a(a)(2)(A). The PAC disclosed making, and Ashcroft 2000
2 disclosed receiving, two \$5,000 contributions on June 30, 1999: one in connection with
3 the 2000 primary election and one in connection with the 2000 general election. Thus,
4 any additional contribution from the PAC to Ashcroft 2000 in connection with a 2000
5 election would have been excessive.

6 III. RELEVANT LAW

7 The Act provides that no person shall make contributions to any candidate and his
8 or her authorized political committees with respect to any election for federal office
9 which in the aggregate exceed \$1,000. 2 U.S.C. § 441a(a)(1)(A). Multi-candidate
10 political committees may contribute an aggregate of \$5,000 per election to any federal
11 candidate and his or her authorized political committee. 2 U.S.C. § 441a(a)(2)(A). The
12 Act defines “multi-candidate political committees” as those political committees which
13 have been registered with the Commission for at least six months, have received
14 contributions from more than 50 persons, and have made contributions to at least five
15 federal candidates. 2 U.S.C. § 441a(a)(4).

16 Also under the Act, a “contribution” includes “any gift, subscription, loan,
17 advance, or deposit of money or anything of value made by any person for the purpose of
18 influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i). The Commission’s
19 regulations provide that “anything of value” includes all in-kind contributions, including
20 the provision of goods or services without charge or at a charge which is less than the
21 usual and normal charge for such goods or services. 11 C.F.R. § 100.7(a)(1)(iii)(A). The
22 regulations specifically include mailing lists as an example of such goods or services. *Id.*
23 See also 11 C.F.R. § 100.8(a)(1)(iv)(A). For purposes of 11 C.F.R. § 100.7(a)(1)(iii)(A),

1 usual and normal charge for goods means the price of those goods in the market from
2 which they ordinarily would have been purchased at the time of the contribution.

3 11 C.F.R. § 100.7(a)(1)(iii)(B).

4 A candidate who receives a contribution, or any loan for use in connection with
5 the campaign, or makes a disbursement in connection with such campaign, is considered,
6 for purposes of the Act, to have received the contribution or loan, or made the
7 disbursement as an agent of the authorized committee or committees of such candidate.

8 2 U.S.C. § 432(e)(2).

9 Finally, all political committees are required to file reports of their receipts and
10 disbursements. 2 U.S.C. § 434(a). Each report filed by a committee not authorized by a
11 candidate must disclose all contributions made to candidates and their committees.

12 2 U.S.C. § 434(b)(6)(B)(i). All political committees must report the identification of
13 each political committee which has made a contribution to the reporting committee,
14 together with the date and amount of any such contribution. 2 U.S.C. § 434(b)(3)(B). In-
15 kind contributions must be reported as both contributions received and expenditures
16 made. 11 C.F.R. § 104.13(a)(2).

17 The Commission has historically considered fundraising lists, usually called
18 mailing lists, as potential contributions, both as items of value given to political
19 committees and as items that are sold or rented out by committees and therefore, the
20 payment for the property or use of the property must not be from a prohibited source and
21 must not exceed the contribution limits. See 2 U.S.C. §§ 431(8)(A)(i), 441a(a), 441b and
22 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.7(a)(2).

23

1 **IV. COMPLAINT**

2 The complaint alleges that the PAC contributed to Ashcroft 2000 a fundraising
3 list of 100,000 donors and that Ashcroft 2000 in turn earned over \$116,922 in 2000 by
4 renting out the list to a fundraiser, Precision Marketing, Inc. ("PMI").² See "Possible
5 Ashcroft Campaign Violation," *The Washington Post*, February 1, 2001, at page A4.

6 The complaint also states that the PAC developed the fundraising list between 1997 and
7 1999 at a cost of more than \$2 million. Further, the complaint states that the PAC had
8 already given the maximum contribution to Ashcroft 2000 regarding the 2000 election
9 cycle, \$5,000 for the primary and \$5,000 for the general. The complaint alleges that the
10 PAC's fundraising list constituted an in-kind excessive contribution of "substantial
11 market value" to Ashcroft 2000. In addition, the complaint notes that the PAC and
12 Ashcroft 2000 failed to report the making and receipt of this contribution.

13 **V. RESPONSE**

14
15 The PAC filed a response on March 16, 2001, stating that it did not make any
16 direct or in-kind contributions to Ashcroft 2000 except as reported on the PAC's
17 disclosure reports. The PAC stated that it conducted all of its fundraising activity
18 "through outside, professional vendors." PAC Response, page 2. The PAC elaborated
19 that the vendors selected fundraising prospects based on proprietary lists owned by the
20 vendors, and that all such prospect data was proprietary to the vendor as a matter of
21 vendor policy and was not available to the PAC. The PAC concluded that "[t]herefore,
22 no prospecting information related to the [PAC's] fundraising efforts was ever owned,
23 controlled, disclosed to, or made available to the [PAC]." PAC Response, page 2.

² According to publicly-available information, PMI was incorporated in Virginia in 1994.

1 The response then briefly described the role of candidate John Ashcroft. The
2 PAC stated:

3 Because the [PAC] from time to time used the name of then-Senator John
4 Ashcroft, it was mutually agreed in writing that Senator Ashcroft would own any
5 "work product" derived from such use, including lists of contributors and
6 potential contributors. Senator Ashcroft supported the [PAC's] efforts by serving
7 as "Honorary Chairman." Because this position was honorary only, it did not
8 confer on him any authority, express or implied, to bind or direct the [PAC], and
9 he did not control or direct its efforts.

10
11 PAC Response, pages 2-3.

12 VI. ANALYSIS

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

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

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

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

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

3 The very brief and unsworn response submitted by the PAC indicates that it
4 issued fundraising appeals using the Senator's name and that pursuant to a written
5 agreement, the Senator became the owner of the list of resulting donors and other
6 responding persons. The response implies that the Senator acquired unlimited use and
7 unlimited ability to rent, license and/or resell the list in exchange for the use of his
8 signature; however, it is unclear exactly what the Senator acquired. The purported
9 agreement has not been provided to the Commission, nor has it been described in any
10 detail. The available information at this stage regarding Spirit of America PAC and
11 Ashcroft 2000 fails to establish whether the mailing list transaction was a bargained-for
12 exchange of equal value and therefore, the difference in value between the mailing list
13 and then-Senator Ashcroft's signature in the fundraising appeals would result in a
14 contribution from the PAC to Ashcroft 2000. See 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R.
15 §§ 100.7(a)(1)(iii)(A) and 100.7(a)(2). Such a contribution would constitute an excessive
16 contribution because the PAC had already given the maximum contribution to Ashcroft
17 2000 regarding the 2000 election cycle, \$5,000 for the primary and \$5,000 for the
18 general. See 2 U.S.C. § 441a(a)(2)(a).

19 In addition, it is not apparent that the Senator anticipated making any use of the
20 list other than for the benefit of his campaign. It appears that candidate Ashcroft neither
21 obtained the mailing list from the PAC for his own personal use nor had any other use for
22 the mailing list except for use in connection with his campaign. Thus, then-Senator
23 Ashcroft may have acted as an agent of his authorized committee, Ashcroft 2000, in

1 receiving a contribution from the PAC in the form of a mailing list for use in connection
2 with his campaign. See 2 U.S.C. § 432(e)(2).

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

7 In light of the possible excessive contribution by the PAC to Ashcroft 2000 and
8 the attending possible reporting violations, there is reason to believe that Spirit of
9 America PAC and Garrett M. Lott, as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A) and
10 434(b).