



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**SENSITIVE**

OFFICE OF THE CHAIR

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of	)	
	)	
Spirit of America PAC and	)	
Garrett Lott, as treasurer	)	MUR 5181
Ashcroft 2000 and Garrett Lott,	)	
as treasurer	)	
	)	

**STATEMENT OF REASONS  
CHAIR ELLEN L. WEINTRAUB**

In the course of the Commission's deliberations on this case, 6 out of 6 commissioners voted to find probable cause to believe that Spirit of America PAC and Garrett Lott as treasurer, and Ashcroft 2000 and Garrett Lott as treasurer violated the Federal Election Campaign Act.<sup>1</sup> Unfortunately, I could not support the conciliation agreement that resulted because it ignores the heart of the complaint, the wholesale transfer of a mailing list, developed at a cost of \$1.7 million, from the Spirit of America PAC (John Ashcroft's Leadership PAC) to Ashcroft 2000 (his principal campaign committee during the 2000 Missouri Senate race). Moreover, the penalty adopted by the Commission for the remaining violations is so low that I do not believe it adequately reflects the severity of the conduct at issue.

The facts of this case have been set out in the General Counsel's Report and Brief and summarized in the Joint Statement of Reasons of Chair Weintraub, Commissioner Thomas and Commissioner McDonald. I will not repeat all the facts here. I found the General Counsel's reasoning to be persuasive and voted in support of the recommendation to find probable cause to believe that Spirit of America PAC and Garrett

<sup>1</sup> Commissioners Mason, McDonald, Toner, Thomas, and Weintraub voted to proceed on an excessive in-kind contribution theory, while Commissioners Smith and Toner voted to adopt an alternative affiliation theory, but all agreed that a violation had occurred, on one theory or another.

23-04-406-2804

Lott, as treasurer, made excessive in-kind contributions of almost \$255,000 to Ashcroft 2000, as recommended in General Counsel's Reports #4 and #5 and justified in the General Counsel's Brief, dated April 23, 2003.<sup>2</sup> I write separately to emphasize certain key points and to explain my objections to the conciliation agreement.

### The Transfer of the Mailing Lists

From January to July 1998, Spirit of America PAC actively raised funds and developed its fundraising mailing list at a cost of \$1.7 million dollars. John Ashcroft, former Attorney General and Governor and then-Senator from Missouri, was the founder and Chairman of the PAC and was actively involved in its fundraising solicitations. He was also, at that time, reported to be considering a run for the presidency. On July 17, 1998, Mr. Ashcroft entered into an unusual "Work Product Agreement" ("WPA") whereby, in exchange for the PAC's use of his likeness and signature in its fundraising, the PAC gave Mr. Ashcroft exclusive rights to all work product resulting from the PAC's activity, including "mailing lists, lists of supporters and contributors to the [PAC], lists of prospective contributors to the [PAC], results of polling data, and any and all other data and documentation regarding the [PAC]." Then, on January 1, 1999, on the eve of renouncing the presidential race (*See* Ashcroft to Focus on Senate Reelection in 2000, Washington Post, January 6, 1999), Mr. Ashcroft entered into another agreement, this time with his Senate principal campaign committee (the "List Licensing Agreement" or "LLA"), granting it use of the fundraising lists. Both the WPA and the LLA, because they are critical to an understanding of the facts of this case, are annexed to this statement as Attachments 1 and 2.

Respondents describe the WPA and the LLA as "two commercially reasonable, arms-length transactions." Respondents' Supplemental Reply Brief, at 2. This description is not supported by the record. Spirit of America was founded and chaired by John Ashcroft to promote his views. It is difficult to imagine the circumstances in which he could be said to have transacted business with his own leadership PAC at "arm's length." Certainly a transaction in which the PAC handed over its most valuable resource to him, for his exclusive use, in return merely for his signature, as a result of a contract negotiated between him and the individual he hired (and could fire) as Executive Director of both his PAC and his principal campaign committee, would not fit a reasonable person's definition of "arm's length."

Documents produced to the Commission establish that Jack Oliver, Spirit of America's Executive Director, viewed his relationship with John Ashcroft as anything but "arm's length." On March 12, 1998, Jack Oliver signed a Direct Mail Fund Raising Counsel Agreement with fundraiser Bruce Eberle. Under the signature line for Spirit of America PAC, Oliver's status is described as follows: "By: Jack Oliver, Representative of

<sup>2</sup> I incorporate by reference the statements of fact and the analysis made in the General Counsel's Report #4 with respect to the issue of the in-kind contributions found on page 1, line 1 – page 2, line 3; Page 2, line 17 – page 3, line 16; page 8, line 1 – page 15, line 16; page 17, line 1 – page 21, line 6; page 21, line 11 – page 21, line 20; and all of Attachment 2. I also incorporate General Counsel's Report #5 and the General Counsel's Brief in their entirety.

Senator John Ashcroft, Chairman, without recourse to either of them individually." Four months later, Mr. Oliver and Mr. Ashcroft signed the WPA. On that document, Mr. Oliver again signed for the PAC, this time with the description "By: Jack Oliver, Executive Director, on behalf of Spirit of America, without recourse to him individually." It defies logic to suggest that someone whose role at the PAC was to represent John Ashcroft could then negotiate an arm's length agreement on behalf of the PAC, sitting across the table from John Ashcroft. Far from arm's length transactions between disinterested parties, the transactions among the PAC, the candidate, and the principal campaign committee would more accurately be described as one-sided. Indeed, the documents redirecting checks from the PAC to the principal campaign committee (activity which the Commission found probable cause to believe violated the law) were signed by "Garrett M. Lott, Finance Coordinator, Ashcroft 2000/Spirit of America." (Attachment 3.)

If not negotiated at arm's length, was it then a commercially reasonable transaction for the PAC to transfer exclusive control of its mailing list to John Ashcroft? Not only was it not commercially reasonable, it appears to have been virtually unprecedented in the annals of political fundraising. First of all, it is noteworthy that the PAC used John Ashcroft's likeness and signature extensively in its fundraising efforts for seven months without compensating him in any way. If, as respondents argue, the value of his signature and likeness was an even exchange for the mailing list that was generated, then Mr. Ashcroft appears to have made an in-kind contribution of the free use of his signature and likeness for the seven months that preceded the WPA. Thus, the "even exchange" argument is contradicted by respondents' own prior practice.

Moreover, it is inconsistent with the practice of every other politician who raises money for political committees. Politicians do not charge their campaign committees or their leadership PACs for raising funds. Politicians raise money for these committees because having well-financed committees yields political benefits to the politician. Indeed, if the signature of a politician is as valuable as respondents say it is, then every other politician who provides uncompensated use of his signature and likeness to a political committee for fundraising purposes is making a (potentially excessive) in-kind contribution to that political committee. Yet Commission staff is unaware of a single other instance of a political committee reporting the value of the use of a politician's name for fundraising purposes as such an in-kind contribution. The signatures either have value, for FECA purposes, or they do not. If respondents are correct in their analysis, every other politician who has raised funds for a political committee without compensation is in violation of FECA. This is just not a credible proposition.

Further, while respondents have come up with an example of a politician acquiring a limited, one-time use of an unrelated organization's list in return for fundraising assistance (*see* MUR 4826), the transfer of exclusive ownership of the fruit of the PAC's fundraising efforts to Mr. Ashcroft is both unprecedented and economically

inexplicable.<sup>3</sup> This, I believe, is obvious on the face of the transaction, but my view was buttressed by testimony in the Commission's hearing on its now-defunct mailing list rulemaking. In that hearing, I asked several of the witnesses if they had ever encountered a situation where an individual, in exchange for signing a fundraising letter for either a party committee or a PAC or any political committee, got unrestricted use of the list that was generated. None had. When I asked whether any of them had encountered a situation where the letter-signer got exclusive use of the list, not only had none encountered such a situation, but one witness suggested that such an arrangement would be pointless, from the political committee's perspective.

In this case, the point was obvious: it was to provide a means of transferring to Ashcroft 2000 free use of Spirit of America's valuable mailing lists. It is not surprising that a candidate might feel entitled to the proceeds of his fundraising prowess. But the PAC's mailing lists were developed at a substantial cost (almost \$2 million), a cost that Spirit of America was able to pay with the proceeds of its fundraising under the \$5000 PAC limit. The lists were then conveniently transferred to Ashcroft 2000, with its then-limited resources and its \$1000 contribution limit. This, in my view, represents both an excessive in-kind contribution from the PAC to the principal campaign committee and an end-run around the \$1000 contribution limit.

If it is permissible for leadership PACs to provide their assets to principal campaign committees by the simple device of giving them to the politician associated with both committees, the wall between PACs and principal campaign committees will become meaningless. Politicians with leadership PACs will effectively be able to fund their principal campaign committees with \$7000 contributions (since an individual can give \$2000 to the principal campaign committee plus \$5000 to the PAC and the PAC will be able to transfer assets to the principal campaign committee through the politician). In addition to violating statutory contribution limits, this will in short order become another major advantage for incumbents and diminish even more the competitiveness of elections.

#### The Penalty

As noted in my joint statement with Commissioners McDonald and Thomas, the Commission was able to summon a majority to find probable cause only on the redirected income checks. I will not repeat the analysis of that finding since it is well argued in the General Counsel's Report and Brief, but it is particularly telling that the arrangement was so unusual that the vendor required a "hold harmless" letter before it would proceed. (Attachment 4.)


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<sup>3</sup> I am also aware of a newspaper report of a former Member of Congress who has apparently taken the mailing list of his principal campaign committee as his personal property. That another person has managed to do this and avoided a complaint is unpersuasive to me. The Commission has not been presented with analogous facts in an enforcement action, but I believe that such allegations would raise serious concerns about conversion to personal use of a campaign resource.

Although I voted with the majority to find probable cause on the redirected list income, I dissented from the proposed agreement that formed the basis for conciliation.<sup>4</sup> The conciliation agreement adopted by the Commission, in addition to eliminating any reference to the transfer of the mailing list that formed the heart of the complaint, also contained a penalty that was wholly inadequate to reflect the gravity of even the remaining violations and was not substantiated by reference to analogous Commission precedents. I could see no justification for this and so objected. Indeed, one of the reasons I support making the Commission's penalty schedule public is that doing so will discourage unexplained departures from the published schedule and will enhance both the appearance and the reality of even-handed treatment of respondents.

In the Administrative Fine Program, where the schedule of penalties is public and the Commission has very limited discretion, small time players are aggressively pursued for the full regulatory penalty. Even in the most sympathetic cases, the Commission consistently holds the Committee and its treasurer responsible for the full penalty. By contrast, in the MUR system, which often involves significant alleged violations by major political players, the Commission has broad discretion to decide on the penalty. This sometimes results in drastic reductions in penalty for some of the most egregious conduct.

Plainly, there are instances where the Commission should exercise discretion in setting penalties. I believe the Commission should show leniency towards inexperienced, low-budget committees that do not have ready access to savvy counsel and skilled compliance staff. When confronted with violations by sophisticated career politicians, however, the Commission has every reason to expect and demand compliance with the spirit and the letter of the law. These officials have the resources and the know-how to get the best advice. They should be setting the highest standards. For the Commission to show leniency to the savviest players while denying it to those less sophisticated demonstrates a set of priorities that I cannot support.

  
Ellen L. Weintraub, Chair

<sup>4</sup> The conciliation agreement also represents a departure from prior Commission practice in that statements as to Respondents' contemporaneous understanding of the events are incorporated in the body of the agreement, rather than as separate "contentions" of respondents. The Commission has no way of independently verifying respondents' thoughts and beliefs, and any such statements should be clearly segregated from Commission findings, in accordance with the Commission's standard past practice.

**WORK PRODUCT AGREEMENT**

This Agreement ("Agreement") is made and entered into effective as of the 17<sup>th</sup> day of July, 1998, by and between the Spirit of America PAC, a Federal Election Commission regulated political action committee ("Committee") and John D. Ashcroft ("John Ashcroft").

**RECITALS**

- A. The Committee desires to use the name and likeness of John Ashcroft in connection with fundraising activities on behalf of the Committee under the conditions set forth herein.
- B. John Ashcroft is willing to permit the Committee to use his name and likeness in exchange for ownership of all work product developed by the Committee in connection with the use of John Ashcroft's name and likeness.

NOW, THEREFORE, the parties agree as follows:

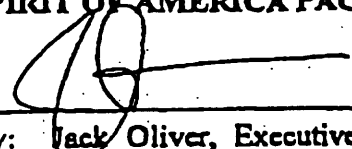
**AGREEMENT**

1. Use of John Ashcroft's Name/Likeness. John Ashcroft hereby permits the Committee use his name or likeness in conjunction with the Committee's activities, including but not limited to endorsements, communications, solicitation of business, advertisements and publications.
2. Ownership of Work Product. The parties acknowledge and agree that in exchange for the use of his name and/or likeness, the work product resulting from the Committee's activities shall be the exclusive property of John Ashcroft. Work product shall include, but not be limited to, mailing lists, lists 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.

IN WITNESS WHEREOF, the parties have executed or caused this Agreement to be duly executed on their behalf by their respective officers and, as of the day and year first above written.

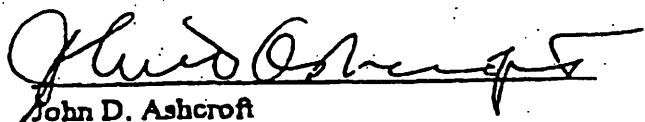
**SPIRIT OF AMERICA PAC**

Dated: 8-4-99

  
By: Jack Oliver, Executive Director, on behalf of Spirit of America, without recourse to him individually.

("Committee")

Dated: 8-3-99

  
John D. Ashcroft

### LIST LICENSE AGREEMENT

This Agreement ("Agreement") is made and entered into effective as of the 1<sup>st</sup> day of January, 1999, by and between John D. Ashcroft ("Licensor") and Ashcroft 2000, a Federal Election Commission registered and regulated principal campaign committee ("Licensee").

### RECITALS

- A. Licensor is the owner of certain items of intellectual property in the form of data constituting a mailing/contact list of individuals who have made or may potentially make monetary contributions, or otherwise provide support to Licensor.
- B. Licensee is a Federal Election Commission registered and regulated political campaign committee involved in a political campaign election effort in the State of Missouri. The parties to this Agreement desire Licensor to grant a non-exclusive license to Licensee to use the Data in connection with Licensee's election effort, all in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, the parties agree as follows:

### AGREEMENT

1. **License.** Subject to the terms and conditions set forth in this Agreement, Licensee hereby agrees to license from Licensor, and by its acceptance of this Agreement, Licensor hereby grants to Licensee a nonexclusive, non-assignable license for a term of five (5) years from the date hereof (the "License") to use that portion of Licensor's financial data identified on Schedule A attached hereto (the "Data"), including the right to sell, transfer, assign, license or sublicense the Data to other persons or parties, including, but not limited, to candidates for public office, their volunteers, agents, employees and committees; political party units and their volunteers, agents, and employees; and any other commercial or professional fundraising vendors, volunteers or agents, except as otherwise expressed in writing by Licensor to Licensee. Other than the License granted herein, Licensor expressly reserves and Licensee expressly agrees that the entire right, title and interest to such Data shall remain at all times with Licensor. Licensor hereby retains the right, at his sole discretion, to provide the Data to any other campaign, committee or entity.

2. **Ownership of Work Product.** The parties acknowledge and agree that the Work Product (as defined herein) resulting from Licensee's use of the Data shall be the joint property of Licensor and Licensee. "Work Product" shall include, but not be limited to, updated and revised or added names, addresses and other contact information received from Licensee's use of the Data in its election efforts. Licensee agrees to regularly provide Licensor with this Work Product in a form satisfactory to Licensor.

### 3. Miscellaneous.

3.1 **Binding Effect.** The provisions hereof shall be binding upon and shall inure to the benefit of Licensor and Licensee and their respective heirs, personal representatives,

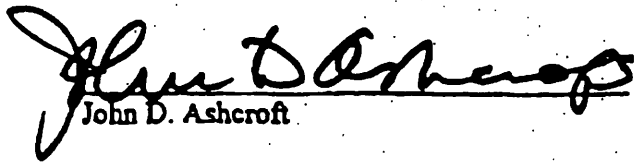
23 OCT 1999

successors and assigns. Neither this Agreement, nor any of the rights or obligations of either party hereunder, may be assigned, in whole or in part, without the written permission of the parties hereto.

3.2 Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Missouri without giving effect to the choice of law provisions thereof.

3.3 Entire Agreement. This Agreement constitutes the entire agreement of the parties and supersedes and terminates any prior oral or written understandings or agreements between the parties relating to matters addressed herein. No agent, employee or other representative of either party is empowered to alter any of the terms hereof, unless done in writing and signed by an authorized officer of the respective parties.

IN WITNESS WHEREOF, the parties have executed or caused this Agreement to be duly executed on their behalf by their respective officers and, effective as of the day and year first above written.

  
John D. Ashcroft

("Licensor")

ASHCROFT 2000

By: Gianth M. Loth  
Its: COMPTROLLER

("Licensee")

23.04.406.2611  
192.904.40.33



*John Ashcroft*

December 10, 1999

Ms. Sandra Redlage  
Omega List Company  
1420 Spring Hill Road, Suite 490  
McLean, VA 22102

Dear Sandy:

It is the intention of Senator Ashcroft that all list rental revenue assuming Spirit of America's debt has been paid off, be attributed to Ashcroft 2000. The list rentals dating back to January 1, 1999 fall into this category.

Attached are copies of the checks written to Spirit of America which I would like to have changed to Ashcroft 2000. The checks have not been deposited and will be sent back to you. I have included a copy of the contract which shows Senator Ashcroft's ownership of the names and his ability to grant the right of list rental to either party which he chooses. Thank you very much for your assistance in this matter.

Sincerely,

*Garrett M. Lott*

Garrett M. Lott  
Finance Coordinator  
Ashcroft 2000/Spirit of America

2000 DEC 12 P 10:45  
FEDERAL BUREAU OF INVESTIGATION  
OFFICE OF THE ATTORNEY GENERAL  
WASHINGTON, D.C.

2000 DEC 12 P 10:45

Attachment 3  
Page 1 of 1

Omega List Company  
1420 Spring Hill Road  
Suite 490  
McLean, VA 22102

Dear Sir or Madam:

Pursuant to the Work Product Agreement between Spirit of America (SOA) and John D. Ashcroft (Ashcroft) dated July 17, 1998, which establishes that Ashcroft owns the list(s) used by SOA for direct mail fund raising with the authority to direct list rental income, you are hereby authorized and directed to issue checks to Ashcroft 2000 reflecting receipts for list rental income for the Ashcroft owned lists used by SOA for the period commencing January 1, 1999. This applies to the list rental income reflected on Omega List Company checks numbered 9878, 9882, 9884, 9885, 9896 and 9934, as well as any future list rental income from the Ashcroft owned lists.

The undersigned hereby warrants and confirms that the transfer of receipts referenced above is fully authorized by Ashcroft and SOA, does not contravene any existing agreement, law and/or regulation of any governmental authority, and that Omega List Company and Bruce W. Eberle & Associates shall be held harmless from any and all claims to the contrary.

Sincerely,

Garrett M. Lott

ASHCROFT 2000 / SPIRIT OF AMERICA

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

Attachment 4  
Page 1 of 1