In the Matter of	**)**	
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Spirit of America PAC and Garrett Lott, as treasurer	**)**	**MUR 5181**
Ashcroft 2000 and Garrett Lott, as treasurer	**)**	
Precision Marketing, Inc.	**)**	
Precision List, Inc.	**)**	

STATEMENT OF REASONS

CHAIR ELLEN L. WEINTRAUB
COMMISSIONER SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD

In MUR 5181, the Commission split 3-3 on the General Counsel's recommendations that the Commission find probable cause to believe John Ashcroft's leadership PAC, Spirit of America, made excessive in-kind contributions of almost $255,000 to John Ashcroft's authorized committee, Ashcroft 2000, in violation of the Federal Election Campaign Act ("the Act"). An investigation conducted by the Office of General Counsel revealed that a mailing list of contributors, developed by Spirit of America at considerable cost, had been transferred to Mr. Ashcroft. Mr. Ashcroft, in turn, allowed his campaign committee to use this mailing list during his Senate campaign. The investigation further found that Spirit of America also redirected income earned on the rental of the mailing list to the campaign treasury of Ashcroft 2000.

Under the Act, Spirit of America could not have given the mailing list directly to Ashcroft 2000. *See* 2 U.S.C. § 441a(a)(2)(A). By routing the list through Mr. Ashcroft, Spirit of America and Ashcroft 2000 tried to do indirectly what they plainly could not do directly. Accordingly, after a review of this factual record and the applicable law, we voted to approve the General Counsel's legal analysis and conclusions.

Commissioners Mason, Smith, and Toner voted against the General Counsel's recommendations. Although they agreed that Spirit of America and Ashcroft 2000 had violated the Act, they disagreed with the Office of General Counsel over the extent of the violation. In their view, the violation was confined to certain list rental assignments involving less than half the amount of the violation found by the Office of General Counsel.

I.

On June 6, 1996, John Ashcroft filed a Statement of Candidacy with the FEC designating Ashcroft 2000 as his principal campaign committee for the 2000 election for the United States Senate in Missouri. Spirit of America PAC, a so-called leadership PAC formed by John Ashcroft, filed a Statement of Organization with the FEC on July 5, 1996.

In January 1998, Spirit of America began to develop a mailing list of contributors. Throughout 1998, Spirit of America sent out over 3.9 million prospecting solicitations signed by John Ashcroft at a cost of over $1.7 million. The resulting mailing list was extremely valuable not only because of its expensive development costs, but because it listed the names and addresses of individuals who responded to Mr. Ashcroft's solicitation and message with a contribution to Spirit of America. Obviously, these contributors would be likely contributors to Mr. Ashcroft's principal campaign committee, Ashcroft 2000.

Spirit of America arranged to provide this valuable mailing list to Ashcroft 2000 through two "agreements." First, Spirit of America entered into a "Work Product Agreement" (effective July 17, 1998) with John Ashcroft in which it agreed to give Mr. Ashcroft all rights to the mailing list in exchange for the use of his name and likeness. Then, John Ashcroft entered into a "List License Agreement" (effective January 1, 1999) with Ashcroft 2000 giving Ashcroft 2000 the right to use the Spirit of America mailing list now purportedly owned by John Ashcroft.

Ashcroft 2000 received significant benefit from this conveyance. Unlike other campaigns, Ashcroft 2000 did not need to spend its resources developing a contributor mailing list. In addition, Ashcroft 2000 received mailing list rental income from Spirit of America for its rental of the list to outside entities.

The Act provides for a $5,000 limit on contributions by a multi-candidate political committee to a candidate and the candidate's campaign committee with respect to any election for federal office. 2 U.S.C. § 441a(a)(2)(A). The Act also prohibits the knowing acceptance by candidates and political committees of contributions in excess of the § 441a limitations. 2 U.S.C. § 441a(f). A "contribution" includes "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). "Anything of value" includes "all in-kind contributions" and "the provision 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." 11 C.F.R. § 100.7(a)(1)(iii)(A) (2002). The Commission's regulations further state: "Examples of such goods or services include, but are not limited to: Securities, facilities, equipment, supplies, personnel, advertising services, membership lists, *and mailing lists*." *Id.* (emphasis added). Finally, the Act requires that all political committees file reports disclosing all contributions made and received. 2 U.S.C. § 434(b).

On March 8, 2001, Hedy Epstein, Ben Kjelshus, and the Alliance for Democracy filed a complaint with the FEC alleging "the Spirit of America PAC contributed a fundraising list of 100,000 donors to Ashcroft 2000 and that, in turn, Ashcroft 2000 made a significant amount of money by renting [it] to other entities." Complaint at ¶ 8. Citing a newspaper article, the complaint stated that Ashcroft 2000:

> made more than $116,000 by renting out the list to other fundraisers. The article cites FEC reports in 2000 showing that Ashcroft 2000 received payments throughout the year—totaling $116,992—from Precision Marketing, Inc. for rental of the list. The article also states that the Spirit of America PAC developed the fundraising list between 1997 and 1999, at a cost of more than $2 million.

Complaint at ¶ 9, *citing* Pincus, *Possible Ashcroft Campaign Violations*, Washington Post (February 1, 2001). Concluding that "[t]he Spirit of America PAC's fundraising list of 100,000 donors constituted an in-kind contribution to Ashcroft 2000, a contribution which, on information and belief, had a substantial market value," the complaint alleged that "[t]he Spirit of America PAC and Ashcroft 2000 violated federal law, 2 U.S.C. § 441a(a)(2)(A), by making and receiving, respectively, contributions of value in excess of the statutory limit for political action committees in a federal election." Complaint at ¶ 13. The complaint also alleged that "Spirit of America PAC and Ashcroft 2000 violated federal law, 2 U.S.C. § 434(a)-(b), by failing to report to the FEC the fundraising list as a contribution made and received, respectively, in a federal election." Complaint at ¶ 14.

On July 10, 2002, the Office of General Counsel sent a report to the Commission containing an analysis of the allegations presented in the complaint. Acting on recommendations contained in this report, on July 23, 2002, the Commission unanimously found reason to believe that Spirit of America violated 2 U.S.C. §§ 441a(a)(2)(A) and 434(b), that Ashcroft 2000 violated 2 U.S.C. §§ 441a(f) and 434(b), and that Precision Marketing, Inc. ("PMI"), a corporation renting the list from Ashcroft 2000, violated 2 U.S.C. § 441b.

After conducting an investigation into the matter and reviewing the materials submitted by respondents, the Office of General Counsel prepared a report for Commission consideration analyzing the pertinent factual and legal issues. The Office of General Counsel recommended that the Commission find probable cause to believe Spirit of America made, and Ashcroft 2000 received, excessive in-kind contributions totaling $254,917 through the mailing list and its use. More specifically, the Office of General Counsel concluded that Spirit of America made an excessive contribution of $192,962 in the form of list rental income earned by Spirit of America that was provided to Ashcroft 2000:

Payments redirected in December of 1999	$66,662.22
"Accounts receivables"- the right to collect payment from persons who had rented Spirit of America's list—sold by Ashcroft 2000 to outside vendor	$46,299.83
The approximate share of the $121,254.98 income paid through outside vendor to Ashcroft 2000 that is attributable to the Spirit of America mailing list	$80,000.00
Total list rental income	$192,962.05

In addition, the Office of General Counsel found an excessive contribution of $61,955 in the form of Ashcroft 2000's use of Spirit of America names in Ashcroft 2000 mailings. The Office of General Counsel also recommended that the Commission find probable cause to believe the two committees violated 2 U.S.C. § 434(b) by failing to report certain contributions and receipts.

On September 30, 2003, the Commission considered the General Counsel's probable cause recommendations. Commissioners Mason, Smith and Toner supported only two of the four excessive contribution recommendations made by the General Counsel. These excessive contributions consisted of: (1) $66,662.22 in list rental income received by Spirit of America but then given to Ashcroft 2000, and (2) $46,299.83 in additional income received by Ashcroft 2000 when it sold the right to collect payments from persons who had rented the Spirit of America mailing list from Spirit of America.

In addition to the $112,962 in excessive contributions identified above, Commissioners McDonald, Thomas, and Weintraub supported the two other excessive contribution findings recommended by the General Counsel. These excessive contributions included the $80,000 for the share of the list rental income paid to Ashcroft 2000 and $61,955 for the use of the Spirit of America mailing list by Ashcroft 2000.

Because there were not four votes to find probable cause and pursue these additional excessive contributions, *see* 2 U.S.C. § 437g(a)(4)(A)(i), the Commission found probable cause only with respect to the $112,962 in excessive contributions and the attendant reporting violations found in 2 U.S.C. § 434(b). On December 11, 2003, this Commission entered into a conciliation agreement whereby respondents, *inter alia*, agreed to pay a civil penalty of $37,000. We believe the civil penalty amount should have been higher under the Act, however, "the Commission may not enter into a conciliation agreement . . . except pursuant to an affirmative vote of 4 of its members." 2 U.S.C. § 437g(a)(4)(A)(i).

II.

All agree that Spirit of America, as an unauthorized political committee, could not directly give its mailing list and the income generated from its rental to Ashcroft 2000. The Act limits the amount a multicandidate committee may contribute to candidates and their campaign committees to $5,000 per election. Obviously, the value of the Spirit of America mailing list and the list rental income exceeded the $5,000 contribution limit by a significant amount.

At issue in this matter is whether Spirit of America and Ashcroft 2000 could evade these contribution limits by doing indirectly what they could not do directly. In *Buckley v. Valeo*, 424 U.S. 1, 52 (1976), the Supreme Court struck down as unconstitutional a limitation on contributions by a candidate for the candidate's own campaign. By first transferring the mailing list to John Ashcroft who, in turn, gave it to his campaign committee, the receipt of the mailing list by Ashcroft 2000 was portrayed as a legal contribution from the candidate rather than an excessive contribution from Spirit of America.

We believe the Act cannot be so easily evaded. The General Counsel's Report recognized this and found that Spirit of America made nearly $255,000 in excessive contributions to Ashcroft 2000. We fully agree with the reasoning set forth in the General Counsel's Brief at 19-35 (which we incorporate here by reference), supporting the General Counsel's probable cause to believe recommendations and wish only to emphasize several key points.

If John Ashcroft had negotiated a deal with his own leadership PAC whereby he acquired, at no cost, the PAC's most valuable asset for his personal use and profit, that would raise serious concerns. There is no evidence to suggest that he did so. In fact, his own statements lead to the opposite conclusion. Most important, in our view, is the apparent admission by Mr. Ashcroft himself that he did not own the mailing list or the income generated from that list. In his *United States Senate Public Financial Disclosure Reports* for 1998 and 1999, John Ashcroft does not disclose the mailing list as an asset, nor does he disclose any rental income generated by the mailing lists. The mailing list asset and income are significant and not easily forgotten. Similarly, although the FEC did not subpoena Mr. Ashcroft's personal income tax records, neither did respondents produce those tax records as evidence that Mr. Ashcroft treated the rental income as personal income.

Obviously, Mr. Ashcroft cannot have it both ways: he cannot, on the one hand for FEC purposes, sign a Work Product Agreement by which terms he receives ownership of the mailing list but then, on the other hand for Senate financial disclosure report purposes,

claim not to own the mailing list. Given that Mr. Ashcroft signed the *United States Senate Public Financial Disclosure Reports* for 1998 and 1999 and certified the *Reports* were "true, complete, and correct," we think it is clear that Mr. Ashcroft did not own the mailing list nor did he consider the rental receipts from that mailing list as personal income. Accordingly, we agree with the General Counsel that all of the list rental income received by Ashcroft 2000 and the value of its use of the mailing list should be viewed as an in-kind contribution from Spirit of America to Ashcroft 2000.

In reaching this conclusion, we cannot accept that the "Work Product Agreement" and the "List Licensing Agreement" give the candidate ownership of the mailing lists and Ashcroft 2000 a right to use these lists. The committees wanted to make it appear as if the list really wasn't owned by Spirit of America which, in fact, created the mailing list and paid for all of its development costs. Rather, they tried through the Work Product Agreement and the List Licensing Agreement to make it look as if Mr. Ashcroft, in fact, owned the list and that would allow him to give that list (without limitations as to amount or value) to his principal campaign committee. In our view, the Senate Financial Disclosure Report, certified as "true, complete, and correct" by Mr. Ashcroft, is persuasive evidence that Mr. Ashcroft did not own the mailing list.

To the extent that Mr. Ashcroft "received" the mailing list and the resulting rental income from Spirit of America, we believe that he could only have received them as an agent of his campaign. Under the Act:

> Any candidate . . . who receives a contribution, or any loan for use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, *shall be considered, for purposes of this Act, as having received the contribution* or loan, or as having made the disbursement, as the case may be, *as an agent of the authorized committee or committees of such candidate.*

2 U.S.C. § 432(e)(2)(emphasis added). The mailing list given to Mr. Ashcroft was used by Ashcroft 2000 in 1999 and 2000 to solicit campaign contributions for Mr. Ashcroft's Senate campaign. As a result, we believe Spirit of America made, and Mr. Ashcroft received a contribution to Ashcroft 2000 as an agent of Ashcroft 2000.

In reaching this conclusion, we do not accept the argument that Mr. Ashcroft received this mailing list as part of a legitimate business transaction. After a thorough analysis of the initial Work Product Agreement and the later List Licensing Agreement, *see* General Counsel's Brief at 19-27, the General Counsel found that the Work Product Agreement "was not an arm's length transaction and was not an exchange of equal value,

[and] Mr. Ashcroft received an asset of far greater value than he gave in the form of the use of his name." *Id*. at 27. We agree with the General Counsel's conclusion: "Because Mr. Ashcroft was a candidate for reelection at the time the transactions took place (the WPA [Work Product Agreement] as well as the LLA [List Licensing Agreement]), and because the only plausible explanation for the transactions was to facilitate use of the PAC's [Spirit of America's] lists by Ashcroft 2000, Mr. Ashcroft, by operation of law, acted as Ashcroft 2000's agent when he received this asset. 2 U.S.C. § 432(e)(2)." *Id.*

Our colleagues agree with a portion of the General Counsel's probable cause recommendations, but disagree with the General Counsel over the largest violations. In particular, they agree that $112,961 in list rental income constituted an excessive contribution from Spirit of America to Ashcroft 2000. These excessive contributions represented the redirection of list rental income ($66,662.22) where "checks for income from rental of [Spirit of America's] lists *that had already been sent to [Spirit of America]* were returned to one of [Spirit of America's] list management vendors with instructions that they be returned to Ashcroft 2000," General Counsel's Report at 9 (emphasis in the original), and instances where "Ashcroft 2000 received additional income ($46,299.83) during the year 2000 by selling the right to collect payment from persons who had rented [Spirit of America's] list from [Spirit of America] itself." General Counsel's Brief at 30. Our colleagues reject, however, the General Counsel's probable cause recommendations regarding list rental monies deposited directly into the campaign treasury of Ashcroft 2000 ($80,000) and the use of the mailing list for certain mailings by Ashcroft 2000 ($61,955).

In our view, if the redirection of income from the list created by Spirit of America was wrong, so too were the direct deposits of list rental monies into the treasury of Ashcroft 2000 and Ashcroft 2000's free use of the mailing list. Redirection of rental income was improper because it was income of right for Spirit of America, which the PAC wrongly sought to provide to Ashcroft 2000 through Mr. Ashcroft. This was not an asset of Mr. Ashcroft to give to his campaign committee; it was an asset of Spirit of America. If this theory applies to amounts clearly redirected, as our colleagues agree, it similarly applies to the General Counsel's probable cause recommendations regarding the other two excessive contributions.

Finally, it is important to point out that the excessive contributions in this matter arguably are far greater than the $255,000 contained in the General Counsel's probable cause recommendations. For example, Spirit of America spent hundreds of thousands of dollars in mailings promoting Mr. Ashcroft. These mailings were coordinated with Mr. Ashcroft and went out under his signature. Moreover, Spirit of America spent $1.7 million to develop the mailing list that was given to Ashcroft 2000. Either the cost of the mailing or the development costs of the list could have been viewed as an in-kind

contribution from Spirit of America to Ashcroft 2000. The General Counsel chose not to pursue either of those expansive approaches. Instead, the Counsel's probable cause recommendation focused only on those excessive contributions that were established under the most conservative analysis. We believe that the Commission, at a minimum, should have accepted the Counsel's recommendation to find probable cause as to the full $255,000 in excessive contributions.

III.

As an alternative theory, the General Counsel also discussed an approach treating Spirit of America and Ashcroft 2000 as affiliated committees. Under the Act and the Commission's regulations, contributions by or to committees established, financed, maintained, or controlled by the same person or group of persons are treated as if by or to a single committee. *See* 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 100.5(g)(3) and 110.3(a)(1). Under this theory, the Office of General Counsel recommended the Commission find probable cause to believe Spirit of America and Ashcroft 2000 received contributions of $85,790 and made contributions of $30,697 in excess of shared contribution limits in violation of 2 U.S.C. §§ 441a(f) and 441a(a)(1)(A). In addition, under the affiliation theory, the Office of General Counsel recommended the Commission find probable cause to believe the committees failed to disclose their affiliated status in violation of 2 U.S.C. § 433(b) and failed to report the transfer of the mailing lists and the receipt of the list rental income in violation of 2 U.S.C. § 434(b). *See* General Counsel's Brief at 8-18. On September 30, 2003, a motion to approve the affiliation alternative theory failed by a vote of 2-4 with Commissioners Smith and Toner voting affirmatively. Commissioners Mason, McDonald, Thomas and Weintraub voted against the motion.

Through the years, the Commission has struggled with deciding under what particular circumstances to consider a leadership PAC to be affiliated with the leader's authorized committee. In general, when a leadership PAC was created in order to help other candidates as its main function, the Commission declined to find that leadership PAC was an affiliated committee of the leader's authorized committee.

The Commission chose this enforcement approach even when there was substantial evidence that a particular candidate or officeholder established, financed, maintained or controlled the leadership PAC in question. *See, e.g.,* MUR 3740 (America's Leaders' Fund, Rostenkowski for Congress), First General Counsel's Report at 7-10 (Oct. 20, 1993); MUR 3367 (Committee for America, Haig for President), First General Counsel's Report at 3-7 (April 26, 1993).

Given the Commission's practice in this area, we did not believe it was appropriate to begin a new enforcement approach without prior notice. This is particularly appropriate where, as here, the Commission was in the middle of a rulemaking addressing this difficult issue. *See* Notice of Proposed Rulemaking, 67 FR 78760 (December 26, 2002). Moreover, there was no analysis done at any point to

suggest that Spirit of America served as nothing more than another authorized committee of Mr. Ashcroft. In light of these considerations, we could not support the General Counsel's alternative theory of affiliation in this matter.

IV.

For all the above reasons, we supported the General Counsel's probable cause to believe recommendations regarding the excessive contribution theory and opposed the General Counsel's alternative theory of affiliation.

12/12/03	/ s /
Date	Ellen L. Weintraub Chair
12/12/03	/ s /
Date	Scott E. Thomas Commissioner
12/12/03	/ s /
Date	Danny Lee McDonald Commissioner