



BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Spirit of America and Garrett Lott, as treasurer) **MUR 5181**
Ashcroft 2000 and Garrett Lott, as treasurer)

**STATEMENT OF REASONS
VICE CHAIRMAN BRADLEY A. SMITH***

I. Introduction

On September 30, 2003, the Commission voted 5-1 to find probable cause to believe that Spirit of America and Ashcroft 2000 had violated federal contribution limits.¹ I voted against the probable cause finding that received the Commission's support, because I disagreed with the "excessive contribution" legal theory on which it was based. Since I did agree that there was a violation, based on my conclusion that the committees were affiliated, I voted in favor of the conciliation agreement.²

II. Summary of this Statement of Reasons

I write separately to show the complex web of issues raised in this matter, and to explain my preference for an affiliation analysis in this specific case. Respondents here allegedly transferred a Spirit of America ("SOA") mailing list to Ashcroft 2000, Senator John Ashcroft's authorized committee for his 2000 campaign. Our investigation revealed that, through a series of agreements, the list comprised of responses to SOA mailings became in Respondents' view the personal property of Ashcroft. These agreements, as

* Commissioner Michael E. Toner joins those portions of this Statement of Reasons that discuss an affiliation analysis.

¹ Minutes of an Executive Session of the Federal Election Commission, Sept. 30, 2003, at 4 (motion to find probable cause violation of 2 U.S.C. 441a(a)(2)(A), 441a(f) and 434(b) carried 5-1, Commissioners Mason, McDonald, Thomas, Toner and Weintraub voting affirmatively, Commissioner Smith dissented) (hereafter "Minutes"). I voted in favor of finding probable cause based on my conclusion that the respondents were affiliated committees, but this motion failed 2-4. Minutes, at 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).

² Minutes, at 22 (motion to approve conciliation agreements as amended approved 5-1, Commissioners Mason, McDonald, Smith, Thomas, and Toner voting affirmatively, Commissioner Weintraub dissented.) Cf. *Common Cause v. FEC*, No. 94-02104 (D.D.C. 1996) at 19 (finding arbitrary and capricious Commission dismissal of violation when five Commissioners found violation but disagreed on penalty). See note 36 *infra* regarding my support of the conciliation agreement.

Respondents understood them, permitted Ashcroft's agents to direct the use of the lists, including the right to receive rents, to either SOA or his campaign committee.

This case required us to apply two areas of our rules that were being revised at the very time this MUR was pending –“Leadership PACs” and mailing lists. Our decisions in the past applying these rules have not been a model of clarity. Here, we faced the choice whether SOA and Ashcroft 2000 were affiliated -- allowing unlimited transfers of assets (like lists) between them, but applying one contribution limit to both committees. Alternatively, we could determine that they were not affiliated. Then we faced the challenge of determining whether the mailing list agreements and related activities were commercially reasonable, or whether some excessive contribution had been made by SOA to Ashcroft 2000.

I believe, for the reasons set out at length below, that an affiliation theory better fits these facts. I arrived at this conclusion given that the committees operated essentially as a unit, and not because of any acts of Mr. Ashcroft individually. I recognize that Respondents and others like them might find affiliation a bit of a surprise, given our enforcement record. It may be that other political committees have made similar agreements, believing them to be sound interpretations of the law in this area. Accordingly, had my preference carried the day, I would have considered this legal uncertainty as a substantial mitigating factor when setting a proposed penalty. For that reason, the General Counsel's recommendation under the affiliation theory far exceeded what I believe would have been appropriate.

III. Background of this Matter

This matter was opened after the National Voting Rights Institute, Alliance for Democracy, Common Cause and two individuals filed a complaint against Ashcroft 2000 and SOA on March 8, 2001. The complaint relied upon a *Washington Post* article published the day the U.S. Senate voted to confirm Ashcroft's appointment as Attorney General, in which the author concluded (based upon a review of FEC reports) that SOA gave Ashcroft 2000 a list of donors, which Ashcroft 2000 then used and rented to others.³ The complaint offered only the article as evidence. Although Respondents asserted that the Complaint was politically motivated,⁴ the Commission takes seriously all allegations, and activated the matter pursuant to its Enforcement Priority System.

Concurrent with our investigation, the complainants filed suit 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. So, as the Commission's enforcement staff

³ See Complaint, available at www.commoncause.org/publications/march01/030801c.htm (copy of complaint); W. Pincus, *Possible Ashcroft Campaign Violation*, Wash. Post (Feb. 1, 2001) at A4.

⁴ One of the complainants in this matter submitted and then released publicly a letter to the Senate Judiciary Committee opposing Ashcroft's nomination as Attorney General two weeks before the publication of the article that formed the basis for the complaint. See Letter to The Honorable Patrick Leahy from Common Cause and Democracy 21, Jan. 16, 2001 available at www.commoncause.org/publications/jan01/0116011.htm; see also *John Ashcroft's Campaign Finance Record Requires a Full Investigation*, Common Cause News Release, Feb. 1, 2001, available at www.commoncause.org/publications_jan01/020101.htm (discussing *Washington Post* article).

investigated and briefed this case, its litigation staff defended our pursuit of the matter. Accordingly, there has been more publicity during the investigation – not all of it accurate – than is usually the case, since the Commission itself is bound by the confidentiality requirements of 437g(a)(12).⁵

IV. Facts

It might be hard to understand why a complaint about an in-kind contribution of a mailing list, filed in 2001, was concluded in September 2003. For the public to appreciate the legal issues presented, I will recite the key facts in this case.

A. Chronology

SOA is what is popularly called a Leadership PAC. While “Leadership PAC” is not defined in our Act or regulations, generally Leadership PACs are separate political committees established by an elected official, to support other candidates, support party committees, and fund other political pursuits of the officeholder apart from his own reelection.⁶ In January 1998, SOA began direct mail prospecting using Ashcroft’s name and signature. This mailing program continued under a March 1998 agreement with SOA’s direct mail vendor that specified SOA’s ownership of the names of people who responded to the prospecting mailings. Through its direct mail program, SOA built a “housefile” of names and addresses. In May 1998, SOA began to market its list to other groups.

John Ashcroft could also claim an ownership interest in the list. On July 17, 1998, Ashcroft and SOA entered into a Work Product Agreement giving Ashcroft personal ownership of the lists in return for SOA’s use of Ashcroft’s name and likeness in its activities. One witness explained that this was the written representation of an oral agreement about ownership that extended back to the beginning of the prospecting activities.⁷ Others involved in the transactions understood generally that Ashcroft and SOA jointly owned the lists of names responding to SOA mail featuring Ashcroft’s name/signature.⁸ The list was rented to others, and the rents were paid to SOA.

⁵ See *FEC May Adopt Air Travel Rule*, BNA Money & Politics Rep. (Oct. 2, 2003) (discussing Spirit of America/Ashcroft matter); *Morning Business*, Roll Call, July 23, 2003 (discussing judge’s refusal to dismiss NVRI case); *Federal Judge Orders FEC to Answer Questions in Campaign Finance Case on Ashcroft’s 2000 Senate Campaign*, NVRI News Release, July 22, 2003, available at http://www.nvri.org/press/Ashcroft_Release.pdf; *Seeking Enforcement of Campaign Finance Law Against the Ashcroft 2000 Senate Campaign*, NVRI Update, Summer 2003, available at www.nvri.org/updates/summer_2003/newsletter_summer03_ashcroft.html; Amy Keller, *Ashcroft Complaint Languishes at the FEC*, Roll Call, Feb. 6, 2003; Walter Pincus, *Group Asks Ashcroft to Release Records of Probe by FEC*, Wash. Post, Oct. 23, 2002 at A06; *Alliance Sues FEC for Failure to Investigate Ashcroft Campaign Violations*, available at www.thealliancefordemocracy.org/html/end/1238-AA.shtml.

⁶ See *Leadership PACs: Notice of Proposed Rulemaking*, 67 Fed. Reg. 78,753, 78,754 (Dec. 26, 2002) (background and description of Leadership PACs). Precandidacy expenditures by Leadership PACs (and other multicandidate committees) for certain expenses incurred in presidential campaigns may be in-kind contributions under a regulation recently promulgated by the Commission. See *Public Financing of Presidential Candidates and Nominating Conventions: Final Rule*, 68 Fed. Reg. 47,387, 47,414 & 47,419 (Aug. 8, 2003) (revisions to 11 C.F.R. 110.2; 9034.10).

⁷ Oliver Dep. at 45-47.

⁸ Oliver Dep. at 45; Speck Dep. at 90, 139; Lott Dep. (9:00 am) at 36; Eberle Dep. (3/28) at 62; see also Respondent’s Reply Br. at 4 n. 3.

According to witnesses, SOA owed vendors for its prospecting activities and renting the list was a way to earn funds to pay the debt.⁹

On January 1, 1999, John Ashcroft entered into a licensing agreement with his campaign committee, Ashcroft 2000. The campaign could use Ashcroft's "mailing/contact list" for five years, with resulting "work product" (i.e the list of responses) apparently becoming the joint property of Ashcroft 2000 and Ashcroft personally. Also, on or about January 5, Ashcroft announced he would not seek the Presidency. Staffing changes also took place – Jack Oliver departed SOA for Ashcroft 2000, and Garrett Lott became SOA's Executive Director, as well as serving as Ashcroft 2000's Assistant Treasurer.

Through 1999, SOA continued to rent its list and receive income. On December 10, 1999, Garrett Lott instructed list vendors to 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 March 2000, Lott assigned accounts receivables owed on SOA lists held by one vendor to a second vendor for \$46,299, apparently because a controversy surrounding the first vendor made Ashcroft 2000's staff sensitive about receive funds from that source.¹⁰

Ashcroft 2000 received rents through 2000. Ashcroft lost his Senate election on November 8, 2000, but on February 1, 2001 was confirmed by the U.S. Senate to serve as Attorney General. The complaint in this matter was filed March 8, 2001.

B. The Brief's Contentions About Ashcroft's Role

Before discussing my legal reasoning in this case, I should indicate that I depart from the General Counsel's fact discussion in some respects. The General Counsel's Brief argues that a key fact supporting affiliation was Ashcroft's significant personal role in establishing and managing both Committees. The Brief states: "Mr. Ashcroft had, and at times exercised, control over each committee analogous to that of an officer."¹¹ The Brief asserts that Ashcroft "directed and exerted control over activities such as the receipt of list rental income, direct mail solicitations, and list rental" and that the evidence contradicts Repondent's argument that Ashcroft merely served as an "Honorary Chairman" with little day-to-day control.¹²

The General Counsel's Brief also contends that Ashcroft controlled which entities rented the Spirit of America list. But it cites as evidence not any information gained in this investigation but instead Ashcroft's testimony before the United States Senate in his confirmation hearings. According to the Brief, under questioning by Senator Patrick

⁹ See Oliver Dep. at 100, Oliver Ex. 12; Eberle Dep. (3/28) at 26.

¹⁰ 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).

¹¹ General Counsel's Brief (Apr. 23, 2003) at 11.

¹² Brief at 12.

Leahy, Ashcroft stated that once he learned that the Spirit of America list had been rented by the Linda Tripp and Paula Jones Legal Defense Funds “I directed that the lists no longer be rented to these organizations.”¹³ The Brief also describes how Ashcroft “controlled” the content of the PAC’s direct mail solicitations, by passing along edits to the direct mail contractor via Jack Oliver, who was at one time the PAC’s executive director.¹⁴

The Brief also argues that Ashcroft obtained authority to direct key SOA activities through various agreements into which he entered. It cites two agreements with Eberle and Associates, a “No-Risk Interim Agreement” and a “Direct Mail Fundraising Counsel Agreement.” Under the first agreement, Ashcroft had the authority to grant permission to Eberle to use his or SOA’s name, logo or likeness, and under the second, Eberle could not bind SOA to an obligation except as provided in the Agreement or as authorized by Ashcroft or Jack Oliver.¹⁵ The Brief concludes from this that Ashcroft had “a significant degree of control over the PAC’s activities and its relations with its vendors.”¹⁶

C. The Evidence Regarding Ashcroft’s Role

In general, I do not adopt the Counsel’s analysis of Ashcroft’s personal role as the key factor in finding SOA and Ashcroft 2000 affiliated. I would not dispute that Ashcroft was kept apprised of the committees’ activities, and the information generated in this case indicates that he did intervene personally on a few isolated occasions. But the weight of the evidence is instead that others were responsible for most decisions.

I did not find persuasive the Counsel’s argument regarding Ashcroft’s control over rental of SOA’s list. While he acknowledged in his Senate confirmation testimony his directing that certain groups no longer rent the list, implicit in this statement is a point I believe undermines the Brief’s argument – Ashcroft did not control the rental to these groups in the first instance. He could only react to the fact that controversial groups had obtained his list by asking that the episode not be repeated.

I also found the Counsel’s argument that Ashcroft controlled SOA mail unavailing. As the Brief notes, Ashcroft signed Spirit of America mailings as Chairman of that group. Apparently he read what he was being asked to sign and then sent to the public in his name. In one case we know that Ashcroft wanted the copy of “his” letter altered. Given the shape of our regulation of Leadership PACs at this time (May of 1998) as I see it we would be churlish to allow elected officials to form separate Leadership PACs, and serve as the titular head of such entities, but not allow those officials to edit the words attributed to them in mailings -- lest this Commission declare the PAC affiliated with the officeholder’s principal campaign committee.

¹³ Brief at 12-13.

¹⁴ Brief at 13.

¹⁵ Brief at 13-14.

¹⁶ Brief at 15.

On the issue of Ashcroft's personal control over SOA, as I read the record the weight of the deposition evidence supports a contrary conclusion. It appears to me that Ashcroft did not personally direct or control SOA. Rather, senior staff managed the entities. Jack Oliver, who began as SOA's Executive Director then later worked for Ashcroft 2000, stated that he hired and set salaries for SOA staff.¹⁷ Oliver also reviewed the text of mailings.¹⁸ Ashcroft, as Chairman, "traveled around the country on behalf of candidates, campaigns, state parties, county parties, local parties for like minded conservatives . . . signed mail [and] appeared at PAC fund-raising events."¹⁹

Kimberly Bellissimo, a direct mail fundraiser, testified that her regular contacts were with senior staff at Spirit of America, including Jack Oliver, Gretcher Purser, Garrett Lott, Don Trigg and David Ayres, but made no mention of Senator Ashcroft.²⁰ Similarly, direct mail consultant Bruce Eberle testified that there was never any contact with Senator Ashcroft either from Eberle and Associates or from Omega, but that they worked with Jack Oliver, David Ayres and Don Trigg.²¹

Garrett Lott's testimony concurs, testifying that in January 1999 when Lott joined the staff at SOA, Ashcroft was "honorary chairman" and "really didn't have much of a role." Asked "Did you ever discuss with him anything about the PAC?" Lott replied "No."²² Regarding Ashcroft's alleged control over rental of his list, Rosann Garber, a list manager, testified that she brought any question she had about whom to rent SOA's list to Garrett Lott.²³ Garrett Lott stated that he, not Ashcroft, acted for the PAC to terminate one contractor and assign associated receivables to another contractor.²⁴ This testimony undermines the Brief's assertion that Ashcroft directed the rental of these lists.

¹⁷ Oliver Dep. at 23

¹⁸ Oliver Dep. at 29, 37-38, 42, 53.

¹⁹ Oliver Dep. at 26.

²⁰ Bellissimo Dep. at 22

²¹ Eberle (3/28) at 39.

²² Lott Dep. 2/28/03 (9:00 am) at 12

²³ Garber testified as follows:

Q. And on those occasions when you spoke to Garrett Lott what were the types of things that you would discuss with him, like --

A. I guess an example would be an organization wants to rent this list, do you have an issue with them, because it might be one that I wasn't familiar with or something.

Q. So -- so prior to renting the list PLI would contact Spirit of America to let them know who the interested party was and to seek approval on the renting?

A. Only on rare exceptions.

Q. Okay. And when you say only on rare exceptions how would you know that this was a rare exception that you should contact?

A. My understanding, initially, when the list was put on the market, was to use my judgment. And if there was ever a time when I was unsure, if it would be a mailer that I would personally not -- that I would question whether I would rent a list to or not, that I was to contact Garrett.

And that's why it was just -- I can't even tell you how few times it was, but it did occur. Does that make sense now?

Q. Would you say you may have contacted him around five times?

A. If that.

Garber Dep. at 75.

²⁴ Lott Dep. 2/28/03 (9:00 am) at 34.

When questioned about the No Risk Interim Agreement, Bruce Eberle was asked about a clause that granted rights only “as otherwise expressly directed by Senator Ashcroft . . .” and stated that Ashcroft never personally directed them, but that they obtained approvals under that agreement from David Ayres, Don Trigg and Jack Oliver.²⁵ Again, the Brief makes statements that I believe do not adequately reflect the deposition record.

Notwithstanding my view that the weight of the evidence demonstrates Ashcroft was not personally involved in the management of these entities, I still concluded that SOA and Ashcroft 2000 were affiliated. My reasons for finding affiliation thus do not rest with the reasoning in the General Counsel’s Brief, but instead are based on the evidence that the entities operated essentially as one unit. I offer a lengthy discussion of this point because I believe the violation in this case does not rise from the actions of John Ashcroft, but from the structure of the enterprise.

V. Legal Analysis

MUR 5181 presented the Commission with a campaign finance law “perfect storm.” Our interpretation of both Leadership PAC rules and mailing list rules were under reconsideration during our consideration of this matter in separate rulemakings.²⁶ In fact, the Commission’s public hearing on the draft rule related to mailing lists was held one day after we voted to find probable cause in MUR 5181.

As we noted in the Notice of Proposed Rulemaking related to mailing lists, we sought in the rulemaking to “provide candidates and political committees with more comprehensive guidance on commercial transactions involving mailing lists.”²⁷ When we enter into a rulemaking, it is often in part an admission that the case-by-case regulatory approach we use in Advisory Opinions and MURs may not be working. Since the Commission itself has observed the need to clarify rules, it is fair to conclude that respondents and potential-respondents may not have good notice of what the rules are in these areas.

A. Theories of Liability

Specifically, MUR 5181 could be approached in good faith under several alternative and mutually exclusive legal theories.

1. Personal Ownership

The facts could support a theory that would credit Ashcroft with exclusive personal ownership of the lists generated from mailings, and the income from those lists.

²⁵ Eberle Dep. (3/25/03) at 18.

²⁶ *Leadership PACs: Notice of Proposed Rulemaking*, 67 Fed. Reg. 78,753 (Dec. 26, 2002), *Final Rules*, 68 Fed. Reg. 67,013 (Dec. 1, 2003); *Mailing Lists of Political Committees: Notice of Proposed Rulemaking*, 68 Fed. Reg. 52,531 (Sept. 4, 2003), *Notice of Disposition; Termination of Rulemaking*, 68 Fed. Reg. 64,571 (Nov. 14, 2003).

²⁷ 68 Fed. Reg. at 52,532.

Under this view, use of the list by SOA and Ashcroft 2000, and rents received by the committees, were contributions from Ashcroft. Contributions by Ashcroft to SOA would be governed by the \$5,000 annual limit in 2 USC 441a(a)(1)(C), and contributions to his own campaign would be reportable, but not limited.

Ashcroft's exclusive ownership appears to be the economic reality behind the transactions. However, the General Counsel did not raise this theory, and as far as I am aware this approach has not been applied to any other respondent in any similar enforcement matter.²⁸

2. Excessive Contribution

Another legal theory would conclude that Ashcroft 2000 and SOA were separate and unaffiliated committees. To the extent the list and its income belonged to SOA, Ashcroft 2000's acceptance of them would be a contribution subject to reporting requirements and limits.²⁹ This is essentially the theory under which 5 members of the commission voted to find probable cause in MUR 5181, although they were not of one mind on the scope of the violation, as later votes demonstrated.³⁰

I did not join in the vote to find probable cause under this theory, because I observe several weaknesses in this approach. First of all, it requires the Commission to find that several business agreements were not bona fide, yet our General Counsel was not able to find an impartial expert who could render such an opinion for us.³¹ At least one witness provided testimony in the public hearing regarding our proposed rules on mailing lists -- the day following our vote in MUR 5181 -- to the effect that candidates should be able to exercise personal ownership over "their" lists.³²

Moreover, I am uncomfortable with a rule that turns upon such details. Because it required the Commission to make such judgments, the scope of the violation became an area of dispute. One colleague in our discussion contended that the violation amounted about five-fold the scope of the violation as argued by the General Counsel.³³ That motion was based upon evidence that this was the cost of developing the list. This Commissioner did not consider that, during list prospecting, the entity is also raising some money from solicitations, so the net expense to compile the list is considerably less than the gross costs, as another of my colleagues ably noted. Other Commissioners

²⁸ Accordingly, this approach would not interpret the Work Product Agreement as simply a means to facilitate a contribution to Ashcroft 2000. *See* General Counsel's Brief at 24 n. 35, *see also* 2 U.S.C. 432(e)(2) (candidate who receives a contribution "for use in connection with the campaign for such candidate" receives such as agent of authorized committee).

²⁹ Unless Ashcroft 2000 paid the usual and normal charge for the list (and the right to rent it to others), SOA would have made a contribution. *See* 2 U.S.C. 431(8)(A)(i); 11 C.F.R. 110.7(a)(1)(iii)(A) & (B); *see also* FEC Advisory Opinion 2002-14 (Libertarian Party).

³⁰ *See* Minutes at 5-8.

³¹ General Counsel's Report #4 (June 30, 2003) at 3.

³² Transcript, Candidate Travel, Multi-Candidate Committee Status, Biennial Contribution Limits, and Mailing Lists Public Hearing (Oct. 1, 2003) at 68-69 (testimony of Robert F. Bauer).

³³ That motion failed on a vote of 1-5. *See* Motion of Commissioner McDonald on behalf of Chair Weintraub, Minutes at 5 (proposing excessive contribution amount equal to \$1,700,000)(Commissioner Weintraub voting affirmatively, Commissioners Mason, McDonald, Smith, Thomas and Toner dissented).

supported divergent theories that nevertheless required list valuation and our application of unclear rules and evidence.³⁴

The Commission adopted an approach that I believe yielded an appropriate penalty, including in the violation only the redirected income from list rentals, and the receipts earned by selling the accounts receivable on uncollected rents.³⁵ I supported this, though it was based on an excessive contribution theory with which I disagree.³⁶ I saw this solution as taking the Commission out of the position of second-guessing the list agreements, when we lack both regulations that dictate what is permissible, and the evidence to conclude what the usual and normal charge should be.

In my view the excessive contribution theory does not comport with the relationship between SOA and Ashcroft 2000. That theory must characterize the two entities as independent, but I am persuaded from the evidence before us that they operated as a unit. The same group of senior staff made decisions, the same vendors executed those decisions, and most importantly, the list income was treated as an asset equally accessible to either entity at the discretion of management.

3. Affiliation

Given the real world relationship between these entities, I supported a third liability theory, determining that Ashcroft 2000 and SOA were affiliated. Affiliated committees may make unlimited transfers between one another, subject to reporting requirements. Affiliated committees share contribution limits, so donors to Ashcroft 2000 who gave the limit would not be able to contribute to SOA.³⁷ Accordingly, the use of the lists by either entity, or the receipt of income from list rentals, would be permitted. Looking backward we could find that donors who gave to both committees had made excessive contributions, and we could permit reattribution and redesignation of excessive contributions.³⁸

I realize that our enforcement history presents notice problems to Respondents, were we to find them affiliated here. The Commission has considered Leadership PAC matters in the past where it has not found affiliation. But I believe these previous decisions differ from MUR 5181.³⁹

³⁴ Motion of Commissioner Thomas, Minutes at 6 (proposing approval of General Counsel's recommendation in Attachment 2 of Report #4) (Commissioners McDonald, Thomas and Weintraub voting affirmatively, Commissioners Mason, Smith and Toner dissented).

³⁵ Motion of Commissioner Toner, Minutes at 7-8 (Commissioners Mason, McDonald, Smith, Thomas and Toner voting affirmatively, Commissioner Weintraub dissented).

³⁶ This scope of the violation rendered a penalty I consider fair in light of the character of the violations and the unclear nature of our rules.

³⁷ 11 CFR 110.3(a)(1). Under recent revisions made to our rules that do not apply to this MUR, Leadership PACs and authorized committees could not be found affiliated. 68 Fed. Reg. 67,013, 67,018 (Dec. 1, 2003) (amending 11 C.F.R. 100.5(g)(5)).

³⁸ See 11 CFR 110.1(b) and 110.1(k); *see also* General Counsel's Report #5, MUR 5238 (Schumer '98) at 12-13.

³⁹ See MUR 1870 (Waxman); MUR 2081 (Kemp, Campaign for Prosperity); MUR 2161 (Antonovich); MUR 2897 (Arney, Policy Innovation PAC); MUR 3367 (Haig, Committee for America); MUR 3740 (Rostenkowski, America's Leaders Fund). In many of these cases, the General Counsel presented no affiliation analysis at all. *See* MUR 2081,

In the MUR before us, OGC argues that affiliation should be found based upon Ashcroft's significant role in establishing both Committees, Ashcroft's dual roles with the PAC and Ashcroft 2000, the existence of common officers, employees and volunteers, mutual support between the entities by SOA providing the list to Ashcroft 2000, and (re)direction of list rental income from SOA to Ashcroft 2000. As I argued above, I believe the evidence does not support such contentions based upon Ashcroft's personal involvement. Moreover, common officers and employees are evident in other cases where affiliation theories were rejected.⁴⁰ Given our precedents, neither Ashcroft's shared role nor overlapping staff or vendors, are sufficient to make the committees affiliated.

But here we see these factors, and something else -- a shared income stream available to either recipient.⁴¹ In my view, this factor places this MUR in a different context from other Leadership PAC MURs. As far as I know, the Commission has not been presented before with facts like these. I concluded that the best answer was that SOA and Ashcroft 2000 were affiliated as of January 1999. At that time, Ashcroft announced he would not seek the Presidency, and the focus of SOA activity moved from supporting those exploratory activities to supporting Ashcroft's Senate campaign.⁴² Staff changed, as Jack Oliver moved to Ashcroft's campaign committee and Garrett Lott became executive director and deputy treasurer of SOA as well as comptroller and assistant treasurer of Ashcroft 2000. The list license agreement was entered into at this time. This is also the date after which Lott declared Ashcroft 2000 should receive SOA rental income. I would consider the committees disaffiliated after Election Day in November 2000, when they no longer shared the common purpose of electing Ashcroft to the Senate.

I appreciate that the Commission's application of affiliation here would be a departure from the Commission's history of not finding affiliation in Leadership PAC cases. Had we moved forward under an affiliation theory, I would have advocated that we reduce our proposed penalty in mitigation for the lack of notice afforded Respondents.

VI. Conclusion

I could not persuade my colleagues that the affiliation approach better fit the facts of this case, or provided a more persuasive legal basis for finding a violation. Their

MUR 3367. In others, it notes that Leadership PAC issues are analyzed applying an "excessive contribution" theory, not affiliation, in accord with MUR 2161. See MUR 2897, MUR 3740.

⁴⁰ See e.g. MUR 3740.

⁴¹ *Contra* General Counsel's Report MUR 2901 at 8 ("Although there is a question of overlapping personnel (in addition to the candidate), this Office has discovered no transactions between the two committees and the activities of the two appear to be entirely separate. For these reasons, in the particular context of Leadership PACs, this office recommends that the Commission find no reason to believe . . .").

⁴² See, e.g. *Final Rule, Public Financing of Presidential Candidates and Nominating Conventions*, 68 Fed. Reg. at 47,407 (Explanation and Justification for 11 C.F.R. 9034.10)(describing Leadership PAC activity on behalf of exploratory presidential efforts, and setting rules for when such expenditures are contributions to the presidential candidate).

reluctance is due in part to our enforcement history in this area, and in part to their different reading of the statute.

I remain convinced that, under then-applicable law, affiliation is a better basis for liability in MUR 5181. It reflects the character of the relationship between the two committees, which seemingly operated as a unit. Affiliation also avoids the problematic debate regarding the scope of the violation, where we must evaluate the bona fides of business agreements, and opine about the usual and normal charge in a particular industry, in my opinion without an adequate foundation.

December 12, 2003

Bradley A. Smith
Vice Chairman