

January 15, 2004

The Honorable James Comey
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Comey:

We are writing to formally request that the U.S. Department of Justice appoint an outside special counsel to investigate potential criminal actions involving United States Attorney General John D. Ashcroft, his 2000 Senate campaign committee (Ashcroft 2000), and his leadership PAC (Spirit of America). These actions, outlined in this letter based on newly-released documents from the Federal Election Commission (FEC),¹ raise serious questions about the integrity of the Office of the Attorney General. They demand a thorough and impartial criminal investigation by an outside special counsel to ensure that any violations of the law be prosecuted to the fullest extent, including any violations committed by the nation's chief law enforcement officer.

Specifically, the FEC documents present clear and convincing evidence that Attorney General Ashcroft knowingly accepted, during his 2000 Senate re-election campaign, a fundraising mailing list, developed at a cost of \$1.7 million, constituting an illegal, excessive campaign contribution of at least \$255,000, in violation of 2 U.S.C. § 441a(f); that his leadership PAC illegally funneled \$192,965 in rental income derived from that mailing list to his campaign committee, in contravention of 2 U.S.C. § 441a(a)(2)(A); that his campaign committee derived an additional \$61,955 in illegal, excessive campaign contributions by using the mailing list to solicit other contributions, in violation of 2 U.S.C. § 441a(f); that his leadership PAC and campaign committee failed to disclose the transfer of the mailing list as a campaign contribution, in violation of 2 U.S.C. §§ 434 (a)-(b); that he committed a felonious act of criminal conspiracy by conspiring -- along with his leadership PAC and his campaign committee -- to defraud the government of the United States by disrupting and impeding its agent, the FEC, from carrying out its statutorily prescribed duties to enforce campaign financing and disclosure laws and to provide the public with accurate information regarding the source and use of contributions to federal candidates, in violation of 18 U.S.C. § 371; and that he filed false statements with the FEC, thereby committing a felony violation of 18 U.S.C. § 1001.

In the alternative, if the Department of Justice finds that Mr. Ashcroft did in fact take ownership of the mailing list through private agreements with his leadership PAC on July 17, 1998, and with his campaign committee on January 1, 1999, then the facts demonstrate that Mr. Ashcroft failed to disclose the mailing list as an asset in his United States Senate Public Financial Disclosure Reports for 1998 and 1999, in violation of 5

¹ All released FEC documents referenced herein are available at www.fec.gov, by selecting the "Enforcement Query System" link, typing the number "5181" in the "Case #" field, selecting "Case # 5181," and selecting the word "Documents."

U.S.C. Appx. § 101 et seq., of the Ethics in Government Act, and the facts present probable cause to suspect that he also failed to disclose this asset in his 2000 Senate Termination Report (in violation of 5 U.S.C. Appx. § 101 et seq.) and in his Executive Branch Personnel Public Financial Disclosure Reports for 2001, 2002, and 2003, as the sitting United States Attorney General, in violation of 5 U.S.C. Appx. § 101 et seq. Moreover, this knowing and willful omission of such a substantial asset on his Senate and Executive Branch disclosure forms presents probable cause to suspect that Attorney General Ashcroft similarly failed to disclose income earned from said asset on his income tax returns filed with the Internal Revenue Service (IRS), in contravention of applicable laws against tax evasion.

As you are no doubt aware, the aforementioned felonies and misdemeanors carry penalties including fines in excess of the \$37,000 civil fine already levied by the FEC against Mr. Ashcroft's leadership PAC and campaign committee, and imprisonment on the felony conspiracy and false statement counts of up to five (5) years.

You are no doubt also aware of the appearance of impropriety that would arise if, in light of the facts laid out in the FEC General Counsel's Brief, the Department of Justice either were to refuse to investigate evidence of felonies and misdemeanors committed by the Attorney General, his former campaign committee, and his leadership PAC, or were to allow the Attorney General to investigate himself and his campaign officials. In order to avoid such appearance of impropriety, and to ensure that the Department of Justice demonstrates credibility and integrity in its enforcement of the nation's campaign finance laws, we urge you to immediately appoint an outside special counsel to investigate these matters.

I. Felonies and Misdemeanors Committed By Attorney General Ashcroft, His Leadership PAC, and His Campaign Committee in Violation of Federal Campaign Finance Law

A. Attorney General Ashcroft Knowingly Accepted Illegal Campaign Contributions

From January to July 1998, Mr. Ashcroft's leadership PAC "actively raised funds and developed its fundraising mailing list at a cost of \$1.7 million."² Mr. Ashcroft "was the founder and Chairman of the PAC and was actively involved in its fundraising solicitations."³ Over the course of his 2000 re-election campaign for the U.S. Senate, Mr. Ashcroft entered into two transactions—one with his leadership PAC, and one with his campaign committee--through which he illegally transferred the fundraising mailing list and rental income derived therefrom from the PAC to the campaign committee, in clear violation of federal campaign contribution limits.

On July 17, 1998, Mr. Ashcroft entered into a "Work Product Agreement" (WPA) with his leadership PAC, Spirit of America, which both Mr. Ashcroft and Jack Oliver, the

² Commissioner Weintraub, Statement of Reasons, December 12, 2003, p. 2.

³ Id.

Executive Director of the PAC, signed.⁴ For the nearly seven months prior to the agreement, Mr. Ashcroft had neither requested nor received any compensation from his leadership PAC in exchange for its use of his likeness and signature in its efforts to fundraise on his behalf.⁵ However, the WPA abruptly altered this arrangement by giving Mr. Ashcroft exclusive rights to all work product resulting from the PAC's activity, including its mailing lists, in exchange for the use of his likeness and signature.

The purpose behind this unusual agreement became clear on January 1, 1999, when Mr. Ashcroft entered into a second agreement, called the "List License Agreement" (LLA), with his campaign committee. The LLA granted Mr. Ashcroft's campaign committee, Ashcroft 2000, the right to use the fundraising list that he had obtained from the WPA.

As you know, 2 U.S.C. § 441a(a)(2)(A) prohibits "multicandidate political committee[s]," such as Mr. Ashcroft's leadership PAC, Spirit of America, from making any contributions which, in the aggregate, exceed \$10,000 per election cycle. On June 30, 1999, Spirit of America made the maximum contribution, \$10,000, to Ashcroft 2000.⁶ Consequently, any additional contribution, either of money or in-kind, such as a mailing list, would constitute an illegal, excessive contribution under the law.⁷

In this case, the mailing list at issue cost \$1.7 million to develop,⁸ generated \$192,962 in rental income when rented out to other list-users,⁹ and generated \$61,955 when used by Ashcroft 2000, according to the General Counsel for the FEC.¹⁰ The FEC General Counsel's Office consequently found that Mr. Ashcroft's campaign committee received nearly \$255,000 in illegal, excessive campaign contributions from his leadership PAC, related to this mailing list.¹¹ These figures demonstrate that the list had significant value to the Ashcroft 2000 campaign committee. Thus, Spirit of America's transference of its list to Ashcroft 2000 violated 2 U.S.C. § 441a(a)(2)(A), Ashcroft 2000's knowing acceptance of this illegally excessive contribution violated 2 U.S.C. § 441a(f), and Mr. Ashcroft's use of the WPA and LLA to conceal the donation of the mailing list from the FEC makes clear that he, too, had knowledge of the illegal contribution, making him liable under 2 U.S.C. § 441a(f).¹² Further proof that Mr. Ashcroft, his leadership PAC, and his campaign committee committed these acts knowingly can be found in the fact

⁴ Id. at p. 2.

⁵ Id. at p. 3. See also General Counsel's Brief, April 23, 2003, at pp. 26-27.

⁶ See General Counsel's Brief, April 23, 2003, at p. 20.

⁷ See First General Counsel's Report, July 10, 2002, at pp. 2-3.

⁸ See Commissioner Weintraub, Statement of Reasons, December 12, 2003, p. 1.

⁹ See Commissioners Weintraub, Thomas, and McDonald, Statement of Reasons, December 12, 2003, p. 3.

¹⁰ Id. at p. 4.

¹¹ Id. at p. 3-4.

¹² According to the then-Chair of the FEC, Commissioner Weintraub, Mr. Ashcroft's use of the WPA and the LLA to illegally shift money from his leadership PAC to his campaign committee, in an amount far in excess of the \$10,000 legal limit, "is inconsistent with the practice of every other politician who raises money for political committees." See Commissioner Weintraub, Statement of Reasons, December 12, 2003, p. 3. What makes Mr. Ashcroft's attempt at campaign money laundering so significant is that it would create a new and unprecedented loophole whereby leadership PACs could funnel money into campaign committees through the politician himself. See also Commissioners Weintraub, Thomas, and McDonald, Statement of Reasons, December 12, 2003, p. 5.

that Garrett Lott, the Treasurer of Ashcroft 2000, assured the list vendors, Omega List Company and Bruce W. Eberle & Associates, that they would be “held harmless” in the event that this transaction was found to be illegal.¹³

While, according to 2 U.S.C. § 437c(b)(1), the Federal Election Commission (FEC) has exclusive jurisdiction with respect to the civil enforcement of 2 U.S.C. § 441a(a)(2)(A) and 2 U.S.C. § 441a(f), the Department of Justice (DOJ) has jurisdiction to prosecute crimes committed under those sections. Under 2 U.S.C. § 437g(d)(1)(A)(i), where, as here, the violations of the law were knowing and willful, and where the value of the illegal contribution is valued at \$25,000 or more in a calendar year, the violator shall be fined under Title 18, United States Code, or imprisoned for up to 5 years, or both.

As you know, failing to investigate transactions made by the Attorney General that were neither arms-length nor for any purpose other than evading campaign contribution limits would likely cause other campaigns to engage in similar money-laundering activities. In so doing, you would render meaningless 2 U.S.C. § 441a(a)(2)(A) and 2 U.S.C. § 441a(f), both of which are pillars of the campaign finance laws passed by Congress which the Department of Justice is sworn to enforce.

B. Attorney General Ashcroft’s Leadership PAC and Campaign Committee Failed to Report Campaign Contributions in Violation of Applicable Federal Law

In furtherance of their attempt to hide the illegal contributions, both Mr. Ashcroft’s leadership PAC and his campaign committee failed to report both the mailing list and the \$192,962 in rental income derived therefrom.¹⁴ This bald attempt to avoid disclosure violated 2 U.S.C. § 434(a)-(b), which mandates that such contributions be reported to the FEC.

Pursuant to 2 U.S.C. § 434(a)(6)(D) and 2 U.S.C. § 437c(b)(1), the Federal Election Commission (FEC) has exclusive jurisdiction with respect to the civil enforcement of 2 U.S.C. § 434(a)-(b). However, the Department of Justice (DOJ) has jurisdiction to prosecute crimes committed under those sections. Under 2 U.S.C. § 437g(d)(1)(A)(i), where, as here, the violations of the law were knowing and willful, and where the value of the illegal contribution is valued at \$25,000 or more in a calendar year, the violator shall be fined under Title 18, United States Code, or imprisoned for up to 5 years, or both.

C. Attorney General Ashcroft, His Leadership PAC, and His Campaign Committee Unlawfully Conspired to Defraud the Government of the United States

¹³ See General Counsel’s Brief, April 23, 2003, at p. 17.

¹⁴ See Commissioners Weintraub, Thomas, and McDonald, Statement of Reasons, December 12, 2003, p. 3.

Attorney General Ashcroft, his leadership PAC, and his campaign committee conspired to defraud the United States government by disrupting and impeding its agent, the FEC, from carrying out its statutorily prescribed duties to enforce campaign finance and disclosure laws, and to provide the public with accurate information regarding the source and use of contributions to federal candidates. Under 18 U.S.C. § 371, it is a felony to conspire to defraud the federal government, and this section is especially applicable to campaign finance laws where, as here, a core violation of the Federal Election Campaign Act (FECA) is at issue.¹⁵

As you are aware, knowing and willful violation of federal anti-conspiracy law for campaign financing in excess of \$25,000 per calendar year subjects the violators to a felony count punishable by a fine, up to five (5) years imprisonment, or both. 2 U.S.C. § 437g(d)(1)(A)(i), 18 U.S.C. § 371.

D. Attorney General Ashcroft, His Leadership PAC, and His Campaign Committee Willfully and Knowingly Committed a Felony by Making False Statements to the FEC

By failing to disclose the illegal and excessive campaign contributions in violation of 2 U.S.C. § 434(a)-(b), and by willfully and knowingly contriving the WPA and LLA as an unprecedented attempt to disguise them,¹⁶ Mr. Ashcroft, his leadership PAC, and his campaign committee made materially false statements to the FEC in felony violation of 18 U.S.C. § 1001.¹⁷

As you are aware, knowing and willful violation of federal law prohibiting false statements on documents required by law carries a penalty of a fine, imprisonment up to five (5) years, or both. 18 U.S.C. § 1001(a).

II. If Attorney General Ashcroft Was the True Owner of the Mailing List, Then He Violated Federal Law by Failing to Disclose That Asset on the Public Financial Disclosure Reports Required of all United States Senators and Attorneys General

In the alternative, if the Department of Justice concludes that the July 17, 1998 “Work Product Agreement” (“WPA”) granting Mr. Ashcroft exclusive rights to all work product resulting from his leadership PAC’s activity in exchange for the use of his likeness and signature in its fundraising was, in fact, an arms-length transaction involving an exchange of equal value and was consistent with federal campaign finance law, then the evidence demonstrates that Mr. Ashcroft has committed violations of financial disclosure

¹⁵ See Practising Law Institute, Corporate Political Activities 2001: Complying with Campaign Finance, Lobbying & Ethics Laws, 1270 PLI/Corp 1019, 1134-1137.

¹⁶ See Commissioners Weintraub, Thomas, and McDonald, Statement of Reasons, December 12, 2003, p. 3.

¹⁷ See Practising Law Institute, Corporate Political Activities 2001: Complying with Campaign Finance, Lobbying & Ethics Laws, 1270 PLI/Corp 1019, 1134-1137.

requirements of the Ethics in Government Act, 5 U.S.C. Appx. § 101 et seq., and the evidence presents probable cause to suspect that Mr. Ashcroft has committed violations of federal tax law. See Statement of Reasons, Weintraub at p. 2 (describing the terms of the WPA). See also General Counsel’s Brief of April 23, 2003 at p. 27 (noting that “Mr. Ashcroft’s *United States Senate Public Financial Disclosure Reports* for 1998 and 1999...do not disclose any income related to mailing lists.”) See also Statement of Reasons, Weintraub, Thomas, and McDonald at p. 6 (“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.”)

Mr. Ashcroft, like all United States Senators, was required to make certain financial disclosures pursuant to the Ethics in Government Act of 1978, as amended, including disclosure of the mailing list allegedly obtained through the WPA. FEC documents reveal that Mr. Ashcroft failed to disclose the fundraising mailing list as an asset in his United States Senate Public Financial Disclosure Reports for 1998 and 1999, in violation of 5 U.S.C. Appx. § 101 et seq. See Statement of Reasons, Weintraub, Thomas, and McDonald at p. 5. These documents also present probable cause to suspect that Mr. Ashcroft failed to disclose this asset in his 2000 Senate Termination Report (in violation of 5 U.S.C. Appx. § 101 et seq.) and in his Executive Branch Personnel Public Financial Disclosure Reports for 2001, 2002, and 2003, as the sitting United States Attorney General, in violation of 5 U.S.C. Appx. § 101 et seq.

Knowing and willful falsification or failure to file can give rise to a civil fine of up to \$10,000, under 5 U.S.C. appx. 104(a), and a criminal fine and imprisonment for up to five (5) years, under 18 U.S.C. § 1001(a).

III. If Attorney General Ashcroft Was the True Owner of the Mailing List, Then His Failure to Disclose that Asset on Past Public Financial Disclosure Reports Necessitates an Investigation Into Whether He Committed Violations of Federal Tax Law

According to the General Counsel of the FEC, “Mr. Ashcroft’s *United States Senate Public Financial Disclosure Reports* for 1998 and 1999...do not disclose any income related to mailing lists.”¹⁸ While these findings do not appear surprising, in our view, because the WPA and LLA look more like sham transactions set up by Mr. Ashcroft to launder campaign money than they do like arms-length business transactions, they do belie Mr. Ashcroft’s ostensible belief that the mailing list was his personal asset. Taking Mr. Ashcroft at his word, however, requires an investigation of his tax returns, because, under Mr. Ashcroft’s own formulation of the mailing list as his personal asset, any willful failure to disclose income earned from said asset on his tax returns would constitute a false statement to the IRS under 26 U.S.C. § 7206(1), and any willful failure to pay taxes on income earned from said asset would constitute tax evasion pursuant to 26 U.S.C. § 7201. Further, Mr. Ashcroft’s claim that his name and likeness constitutes a like-kind exchange for the mailing list is not consistent with federal tax law. 26 U.S.C. § 1031.

¹⁸ See General Counsel’s Brief, April 23, 2003, at p. 27.

As you know, making a false statement to the IRS in violation of 26 U.S.C. § 7206(1) is a felony punishable by a fine of up to \$100,000, and imprisonment for up to three years. Tax evasion under 26 U.S.C. § 7201 is also a felony, and carries a fine of up to \$100,000, and imprisonment for up to five (5) years.

IV. The Appointment of a Special Prosecutor Is Required

Under the Department of Justice's regulations, the Attorney General is required to appoint a special counsel when 1) a "criminal investigation of a person or matter is warranted," 2) the investigation "by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department," and 3) "it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter." 28 C.F.R. § 600.1 (2002).

On December 30, 2003, the Department announced the appointment of a special counsel to investigate the leak of an undercover CIA officer's identity. In making this announcement at a news conference that day, you stated: "The issue surrounding the attorney general's recusal is not one of actual conflict of interest that arises normally when someone has a financial interest or something. The issue that he was concerned about was one of appearance... That's the reason he decided, really in an abundance of caution, that he ought to step aside." *The Washington Post*, "Ashcroft Recuses Self From Leak Case: U.S. Attorney To Oversee Probe," December 31, 2003, A1.

The evidence outlined in this letter presents an "actual conflict of interest" for Attorney General Ashcroft, a conflict which includes a "financial interest." There can be no doubt that the appointment of an outside special counsel is required in this case to fully investigate potential criminal actions implicating the United States Attorney General himself. Failure to appoint an outside special counsel in this case would send the dangerous message to the American people that the nation's chief law enforcement officer is above the law.

We look forward to promptly hearing from you on this serious matter.

Sincerely,

John C. Bonifaz
Executive Director
National Voting Rights Institute

Melanie Sloan
Executive Director
Citizens for Responsibility
and Ethics in Washington

Nick Nyhart
Executive Director

Joan Claybrook
President

Public Campaign Action Fund

Public Citizen

Stephanie Moore
Executive Director
Fannie Lou Hamer Project

cc: Glenn Fine, Inspector General

Noel Hillman, Chief, Public Integrity Section

Christopher Wray, Assistant Attorney General
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