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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2009 MAR 12 P 4: 30

AGENDA ITEM
For Meeting of: 3-19-09

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

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Subject: Draft AO 2009-01

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 19, 2009.

Attachment

2009 MAR 12 P 4: 30

1 ADVISORY OPINION 2009-01

2

3 Michael Krinsky, Esq.

4 Lindsey Frank, Esq.

5 Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.

6 111 Broadway

7 Eleventh Floor

8 New York, NY 10006-1901

9

10 Dear Messrs. Krinsky and Frank:

11 We are responding to your advisory opinion request, on behalf of the Socialist Workers

12 Party, the Socialist Workers National Campaign Committee, other Socialist Workers Party

13 committees, and authorized committees of Federal candidates of the Socialist Workers Party

14 (collectively “the SWP” or “SWP committees”), concerning the application of the Federal

15 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the

16 continuation of a partial reporting exemption for the SWP. Based on the long history of

17 systematic harassment of the SWP, and some evidence of harassment after 2002, the

18 Commission is renewing the partial reporting exemption until December 31, 2012.

19 The facts presented in this advisory opinion are based on your letters received on October

20 31, 2008, and January 14, 2009, publicly available materials, and telephone conversations with a

21 Commission attorney.

22 **I. Background**

23 *A. Socialist Workers Party Litigation*

24 The SWP was first granted a partial reporting exemption in a consent decree that resolved

25 *Socialist Workers 1974 National Campaign Committee v. Federal Election Commission*, Civil

26 Action No. 74-1338 (D.D.C. 1979). In that case, the SWP brought an action for declaratory,

27 injunctive, and affirmative relief, alleging that specific disclosure sections of the Act deprived

28 the SWP and their supporters of their First Amendment rights because of the likelihood of

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1 harassment resulting from mandatory disclosure of contributors and vendors. The consent
2 decree exempted the SWP from the Act's requirements to disclose: 1) the names, addresses,
3 occupations, and principal places of business of contributors to the SWP committees; 2) other
4 political committees or candidates to which the SWP committees made contributions; 3) lenders,
5 endorsers, or guarantors of loans to the SWP committees; and 4) persons to whom the SWP
6 committees made expenditures. It also, however, required the SWP to maintain records in
7 accordance with the Act and to file reports in a timely manner. The decree extended to the end
8 of 1984, and established a procedure for the SWP committees to apply for a renewal of these
9 exemptions.

10 On July 24, 1985, the court approved an updated settlement agreement with the same
11 requirements and partial reporting exemption.¹ The 1985 court decree extended the exemption
12 until December 31, 1988, and again included a renewal procedure. However, the SWP missed
13 the deadline for reapplication for the exemption.

14 B. *Renewal of SWP's exemptions through advisory opinions*

15 In July 1990, the SWP sought an extension of the partial reporting exemption through the
16 advisory opinion process in lieu of obtaining a court decree. On August 21, 1990, the
17 Commission issued Advisory Opinion 1990-13 (SWP), which granted the same exemption
18 provided by the previous consent decrees. The advisory opinion provided that the exemption
19 would be in effect through the next two presidential election cycles, *i.e.*, through December 31,
20 1996.

¹ The 1985 agreement also exempted the SWP from reporting the identification of persons providing rebates, refunds or other offsets to operating expenditures, and persons providing any dividend, interest, or other receipt.

1 In response to the SWP's subsequent requests in 1996 and 2002, the Commission issued
2 advisory opinions renewing the partial reporting exemptions, each advisory opinion covering the
3 next six years. The Commission granted these renewals after examining the evidence presented
4 in affidavits and other documents describing the continuing harassment of the SWP and its
5 supporters during the six years preceding each request. *See* Advisory Opinions 2003-02 (SWP)
6 and 1996-46 (SWP). The renewed exemption granted in 2003 also reflected amendments to the
7 Act's reporting requirements since Advisory Opinion 1996-46.

8 The current exemption applies to reports covering committee activity up to December
9 31, 2008. Advisory Opinion 2003-02 specified that no later than sixty days prior to that date, the
10 SWP could submit a new advisory opinion request seeking another renewal of the exemption.²

11 **II. Case Law**

12 The Act requires political committees to file reports with the Commission that identify
13 individuals and other persons who make contributions over \$200 during the calendar year or
14 election cycle (depending upon the type of committee), or who come within various other
15 disclosure categories listed above in reference to the consent agreements. 2 U.S.C. 434(b)(3),
16 (5), and (6); *see also* 2 U.S.C. 431(13). However, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the
17 United States Supreme Court recognized that, under certain circumstances, the Act's disclosure
18 requirements as applied to a minor party would be unconstitutional because the threat to the
19 exercise of First Amendment rights resulting from disclosure would outweigh the government's
20 insubstantial interest in disclosure by that particular entity. 424 U.S. at 71-72. Reasoning that
21 "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair

² A complete advisory request was received on January 14, 2009. However, SWP's initial submission of October 31, 2008, met the deadline for applying for a renewal of the partial reporting exemption.

1 consideration of their claim” for a reporting exemption, the Court stated that “[t]he evidence
2 offered need show only a reasonable probability that the compelled disclosure of a party's
3 contributors' names will subject them to threats, harassment, or reprisals from either Government
4 officials or private parties.” *Id.* at 74. The Supreme Court elaborated on this standard, stating:

5 The proof may include, for example, specific evidence of past or present
6 harassment of members due to their associational ties, or of harassment directed
7 against the organization itself. A pattern of threats or specific manifestations of
8 public hostility may be sufficient.
9

10 *Id.* at 74; *see also McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).
11

12 The Supreme Court reaffirmed this standard in *Brown v. Socialist Workers '74 Campaign*
13 *Committee (Ohio)*, 459 U.S. 87 (1982), granting the SWP an exemption from state campaign
14 disclosure requirements. The Court noted the evidence of specific incidents of private and
15 government hostility toward the SWP and its members within the four years preceding the trial
16 in that case. The Court also noted the long history of Federal governmental surveillance and
17 disruption of the SWP until at least 1976. *Brown*, 459 U.S. at 99-100. Noting the appellants'
18 challenge to the relevance of evidence of government harassment “in light of recent efforts to
19 curb official misconduct,” the Supreme Court concluded that “[n]otwithstanding these efforts,
20 the evidence suggests that hostility toward the SWP is ingrained and likely to continue.” *Id.* at
21 101.

22 The Supreme Court in *Brown* also clarified the extent of the exemption recognized in
23 *Buckley*, stating that the exemption included the disclosure of the names of recipients of
24 disbursements as well as the names of contributors. The Court characterized the view that the
25 exemption pertained only to contributors' names as “unduly narrow” and “inconsistent with the
26 rationale for the exemption stated in *Buckley*.” *Id.* at 95.

1 The United States Court of Appeals for the Second Circuit also applied the *Buckley*
2 standard in exempting the campaign committee of the Communist Party presidential and vice
3 presidential candidates from the requirements to disclose the identification of contributors and to
4 maintain records of the names and addresses of contributors. *Federal Election Commission v.*
5 *Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S.
6 1145 (1983). The court described the applicability of the standard, stating:

7 [W]e note that *Buckley* did not impose unduly strict or burdensome
8 requirements on the minority group seeking constitutional exemption. A minority
9 party striving to avoid FECA's disclosure provisions does not carry a burden of
10 demonstrating that harassment will certainly follow compelled disclosure of
11 contributors' names. Indeed, when First Amendment rights are at stake and the
12 specter of significant chill exists, courts have never required such a heavy burden
13 to be carried because "First Amendment freedoms need breathing space to
14 survive." (Citations omitted.) Breathing space is especially important in a
15 historical context of harassment based on political belief. Our examination of the
16 treatment historically accorded persons identified with the Communist Party and a
17 survey of statutes still extant reveal that the disclosure sought would have the
18 effect of restraining the First Amendment rights of supporters of the Committee to
19 an extent unjustified by the minimal governmental interest in obtaining the
20 information.

21
22 678 F.2d at 421-422.³

23
24 The Commission's agreement to the consent decrees granting the previous exemptions to
25 the SWP committees has been based upon the long history of systematic harassment of the SWP
26 and those associating with it and the continuation of harassment. The Commission has required
27 only a "reasonable probability that the compelled disclosure" would result in "threats,
28 harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S.

³ In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which was issued after Advisory Opinion 2003-02, the Supreme Court addressed the challenge by plaintiffs to certain disclosure requirements for electioneering communications. In discussing the importance of such disclosure and possible exemptions to the Act's disclosure requirements, the Court reiterated the standards set forth in *Buckley* and *Brown* that have formed the legal basis for past exemptions for the SWP. See *McConnell*, 540 U.S. at 198-199.

1 at 74. In addition, the Commission has agreed to the application of this standard to both
2 contributors and recipients of disbursements.

3 In Advisory Opinions 2003-02, 1996-46, and 1990-13, the Commission noted that, in
4 granting and renewing the exemption, it considered both current and historical harassment. The
5 1985 Stipulation of Settlement refers to the fact that the Commission had been ordered, “to
6 develop a full factual record regarding the present nature and extent of harassment of the
7 plaintiffs and their supporters resulting from the disclosure provisions.” 1985 Stipulation of
8 Settlement, p. 2. According to the 1985 Stipulation of Settlement, the renewal was based on
9 evidentiary materials regarding the nature and extent of harassment during the previous five
10 years. The renewals granted in Advisory Opinions 1990-13, 1996-46, and 2003-02 were based,
11 in part, on the evidence of harassment since 1985, 1990, and 1997, respectively. The very nature
12 of the periodic extensions indicates that, after a number of years, it is necessary to reassess the
13 SWP's situation to see if the reasonable probability of harassment still exists.⁴

14 **III. Facts Presented**

15 *A. Status as a Minor Party*

16
17 The SWP's current request presents facts demonstrating that it has been a minor party
18 since its founding in 1938. Despite running a presidential candidate in every election since 1948
19 and numerous other candidates for Federal, State and local offices, no SWP candidate has ever
20 been elected to public office in a partisan election. Data from the 2004, 2006, and 2008 elections

⁴ Similarly, the courts in *Brown* and *Hall-Tyner* rendered their decisions with reference to recent events or factors, as well as a history of harassment, *i.e.*, recent incidents of harassments against the SWP and extant statutes directed against the Communist Party.

1 show very low vote totals for SWP presidential and other Federal candidates.⁵ Information
2 presented in the request and available on the Commission's website indicates a low level of
3 financial activity by SWP political committees.⁶ Further, unlike committees of several other
4 minor parties, the SWP National Campaign Committee has never applied or qualified for
5 national committee status.⁷ *See* 2 U.S.C 431(14), 11 CFR 100.13; *cf.* Advisory Opinions 2001-
6 13 (Green Party of the United States), 1998-2 (Reform Party USA), and 1995-16 (U.S.
7 Taxpayers Party).

8 B. *History of government harassment*

9 The SWP's request for the exemptions must be evaluated in the context of the
10 relationship between the SWP and various Federal, State, and local law enforcement authorities,
11 and private parties. Advisory Opinions 2003-02, 1996-46 and 1990-13 discussed the long
12 history of Federal government harassment of the SWP. Advisory Opinion 1990-13 described
13 FBI investigative activities between 1941 and 1976 that included the extensive use of informants

⁵ The evidence presented, as well as information publicly available, indicates that no SWP candidate has come close to winning a Federal election in the six years since the last exemption was granted. SWP candidates for U.S. President received only 10,791 votes nationwide in 2004 and 9,827 votes (not yet including write-ins) nationwide in 2008. Further, in 2004, 2006, and 2008, no SWP candidates on the ballot for U.S. Senate (two in 2004 and 2006, and one in 2008) received more than 15,000 votes. Similarly, no SWP candidate on the ballot for the House of Representatives (two in 2004 and 2006, and three in 2008) received more than 4,600 votes in any election during that period. Information on non-Federal elections in 2008 indicates a similar lack of success for SWP candidates. *See* Exhibits D and S.

⁶ A declaration submitted by the treasurer of the SWP National Campaign Committee states that, up to October 25, 2008, only 243 people had contributed to the committee in 2008, and that, in 2004, 321 people contributed to the committee. Commission records indicate that 26 persons contributed over \$200 per calendar year to the committee in 2007-2008 and that 76 persons contributed over \$200 per calendar year to the committee in 2003-2004. In anticipation of the implementation of the Honest Leadership and Open Government Act of 2007 ("HLOGA"), the committee treasurer stated that the SWP has not received any "bundled" contributions that would require disclosure as such under HLOGA, and does not foresee receiving any such contributions. *See* Exhibit E.

⁷ According to Commission records, no SWP party committee other than the National Campaign Committee was registered with the Commission during the 2006 and 2008 election cycles and only two other SWP party committees, both State committees, were registered during the 2004 cycle. During the 2008 election cycle, no authorized committee of any SWP candidate was registered with the Commission.

1 to gather information on SWP activities and on the personal lives of SWP members, warrantless
2 electronic surveillance, surreptitious entry of SWP offices, other disruptive activities including
3 attempts to embarrass SWP candidates and to foment strife within the SWP and between the
4 SWP and others, and frequent interviews of employers and landlords of SWP members. The
5 description of these activities was set out in the Final Report of Special Master Judge Breitel in
6 *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., February 4, 1980)
7 and *Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357 (S.D.N.Y. 1986); *see also*
8 Advisory Opinion 2003-02, n.8, for a description of FBI activities between 1941 and 1976.

9 The advisory opinions also referred to statements made in affidavits submitted by Federal
10 governmental officials in several agencies expressing the need for information about the SWP
11 based on the officials' unfavorable perceptions of the SWP. These affidavits were submitted in
12 connection with *Socialist Workers Party v. Attorney General*, 666 F. Supp. 621 (S.D.N.Y. 1987),
13 in which the court granted an injunction preventing the Federal government from using,
14 releasing, or disclosing information about the SWP that was unlawfully obtained or developed
15 from unlawfully obtained material, except in response to a court order or a Freedom of
16 Information Act request. The advisory opinions also discussed the statements of SWP workers
17 and candidates and media reports, among other sources, describing incidents of private threats
18 and acts of violence and vandalism, harassment by local police, and difficulties with other
19 governmental authorities experienced by the SWP and those associating with it from 1985
20 through 2002.

21

22

1 C. *Current evidentiary record*

2 The SWP's current request includes approximately 90 exhibits attesting to incidents of
3 harassment or intimidation, or fears expressed by potential SWP supporters. Each exhibit
4 includes at least one sworn statement from an individual associated with the SWP, sometimes
5 accompanied by news accounts from the SWP's newspaper, *The Militant*, or from a local
6 newspaper, police reports, correspondence, or other materials. The statements come from SWP
7 members, candidates, campaign workers, or supporters from different regions of the United
8 States and are dated from late 2002 to 2008. Generally, these statements fall into four categories:
9 (1) statements attesting to the fear that potential SWP supporters have of being identified as an
10 SWP supporter; (2) statements and materials attesting to alleged hostility from private parties to
11 SWP activities; (3) statements and materials attesting to alleged hostility from local government
12 law enforcement sources to SWP activities; and (4) statements attesting to other alleged
13 governmental intimidation. The requestor indicates that the compilation of incidents "is not
14 meant to be exhaustive, as acts of intimidation and harassment against the SWP and its
15 supporters are frequent enough that they often go unreported to any central body."

16 1. Fears expressed by SWP supporters

17 The SWP's request contains 15 statements (Exhibits 63-71 and 86-90 and Exhibit Q) by
18 SWP candidates and campaign workers relating the concerns expressed by potential SWP
19 supporters regarding public identification with the SWP. These include statements by the 2008
20 SWP presidential and vice presidential candidates and the National Campaign Committee Chair
21 describing their experiences while campaigning and talking with potential supporters, and
22 statements by SWP workers asking individuals to sign candidate ballot petitions and selling

1 subscriptions to *The Militant*. Individuals expressed fear that putting their names and addresses
2 on public petitions or on subscription lists would result in further scrutiny of them by
3 governmental authorities such as the FBI, CIA, the Department of Homeland Security, or
4 immigration authorities (even if they were legal residents).

5 Some of the statements referred to individuals' explicitly stating a concern as to recent
6 increased government surveillance. See Exhibits Q, 65, and 68. In addition, the sworn statement
7 by the National Campaign Committee's Chair (Exhibit Q) indicates that he has met an increasing
8 number of individuals who are attracted to the SWP but are afraid of public involvement for fear
9 of "harassment or victimization by the authorities or right-wing vigilantes." The Chair states that
10 these expressed fears were greater in 2008 than in 2004.⁸

11 2. Hostility from private parties

12 The SWP submitted approximately fifty exhibits consisting of attestations as to incidents
13 of harassment, threats, or violence by private individuals or businesses. These exhibits are
14 described below.

15 Thirteen exhibits described acts of violence or vandalism against SWP workers, property,
16 or materials, including an incident in 2004 when a brick wrapped in incendiary material was
17 thrown through the window of a local SWP headquarters early in the morning, setting the front
18 part of the building on fire and causing considerable damage. See Exhibit 1. Other exhibits

⁸ In both the October 2008 and January 2009 letters, and accompanying lettered exhibits, the SWP raises the issue of recent changes in the Attorney General's Guidelines for Domestic FBI Operations. These guidelines, which concern FBI investigations and information gathering relating to threats to national security, are less restrictive than the guidelines issued in the 1970s. The FBI has also recently issued guidance to local law enforcement agencies about "suspicious" activity to be shared with Federal authorities, including information as to "extremist organizations." The SWP notes the general public concern as to the new guidelines and practices, and expresses its concern that the recently expanded governmental authority may lead to the renewal of "the very type of practices and excesses that characterized the FBI's long history of harassment of the SWP." October 30, 2008 Letter, pp. 23-24. See also January 13, 2009 Letter, pp. 14-16, and Exhibits F, G, H, M, N, and O.

1 described other incidents of violence or vandalism, including pouring paint over an SWP vehicle;
2 racist, anti-gay, or anti-immigrant graffiti on the window of SWP campaign offices; a threat of
3 imminent bodily harm to SWP campaigners; a physical assault on an SWP worker at a campaign
4 literature table; a piece of concrete thrown through the window of an SWP office in an attempted
5 break-in; extensive egg-throwing at an SWP headquarters on a street where no other businesses
6 or offices were vandalized; and a former head of personnel at a company engaged in disputes
7 with SWP personnel racing his car at an SWP campaigner. *See* Exhibits 3, 4, 5, 15, 27, 73, 79,
8 81, 82, and 83.

9 Several exhibits described more generalized threats of harm made in person to SWP
10 campaigners, such as a statement by an individual to SWP supporters seeking ballot signatures
11 that he wished to “put a bullet in every one of your heads.” *See* Exhibit 8.

12 Eleven exhibits allege threatening or hostile statements made by mail or by phone. Some
13 of these examples merely involve insulting messages containing harsh language or questioning
14 the SWP’s loyalty to the U.S. They are not out of the ordinary experience of campaigns today.
15 However, there are more alarming allegations, such as a threatening letter containing a syringe
16 mailed to an SWP office. There was also a declaration describing a threat by an individual to
17 shoot SWP workers who came to his door. *See* Exhibits 7 and 76.

18 In four instances, individuals publicly known to be associated with the SWP were
19 terminated from their jobs. Three of these individuals were SWP candidates for public office
20 and one had distributed SWP campaign literature, along with SWP candidates, at the entrance to
21 her company’s parking lot after work. In three of the examples, the official basis used by the
22 company to fire the employee was alleged work-related misconduct and did not pertain to SWP-

1 related activities. However, the requestor relies on the circumstances presented in each exhibit to
2 raise doubts as to these official bases and to indicate the possibility that the employee may have
3 been terminated for SWP-related activities. *See* Exhibits 20, 21, and 22. The fourth situation
4 entailed a firing of an SWP candidate for taking three weeks leave to campaign and to attend a
5 youth conference in Venezuela in fulfillment of a campaign promise. The company had refused
6 to grant such leave, and there had been a history of conflict between the company and the SWP.
7 *See* Exhibit 74.

8 In one described instance, the manager of a bank that was a landlord of an office of the
9 Militant Labor Forum (an SWP entity that sponsors weekly discussion groups on social and
10 political issues) removed a Forum sign from the office's front door and threatened to evict the
11 Forum months before the end of the lease, saying that the Forum was "against a lot of customers
12 that I do business with." (This occurred during a local coal miners' strike in which the Forum
13 was active.) Ultimately, the landlord and the tenant agreed that the tenant would vacate the
14 premises several months before the end of the lease. *See* Exhibit 23.

15 Nineteen exhibits, some of which are referred to above, describe disruption of SWP
16 workers or candidates while they were distributing SWP literature or attempting to obtain ballot
17 petition signatures. According to the descriptions of some of these incidents, personnel of
18 nearby businesses, including company or store security officers, forced, or attempted to force,
19 SWP campaigners to dismantle or move their tables displaying campaign literature and other
20 party materials, or to cease hand distribution of SWP materials while standing in a certain area.
21 According to the exhibits, these incidents often occurred when the table or the campaigner was
22 not on company premises, but only near it, or in shopping mall parking lots. The exhibits

1 indicate that, in some cases, company personnel referred disparagingly to the political orientation
2 of the literature, although it is also possible that concerns as to any political activity on or near
3 private property may have been the impetus for the disruption in a number of situations. The
4 exhibits also described threats by company personnel to call the local police. *See* Exhibits 8, 30,
5 31, 33, 34, 41, 46, 47, 49, 61, 75, and 83.

6 3. Relations with local law enforcement authorities

7
8 The SWP also provides sixteen exhibits describing interactions between SWP workers
9 and local law enforcement authorities in eleven cities or towns in the Northeast, the South, and
10 the Midwest. These often involved police personnel or security police at public institutions who,
11 according to the descriptions in the exhibits, forced SWP campaigners to remove tables
12 displaying campaign materials and other SWP literature from sidewalks or to cease hand
13 distribution of such materials. A substantial number of the described interactions involved
14 questions as to the content of the literature being displayed or distributed, or what appeared to be
15 hostile statements or actions by the police that may have intimidated campaigners and others
16 interested in SWP literature. *See* Exhibit J.

17 For example, the statement in one exhibit described the police in Phillipi, West Virginia
18 seizing some copies of *The Militant* from SWP workers distributing from house to house,
19 frisking the SWP workers, and then demanding that they leave town or risk arrest. The statement
20 in another exhibit described Toledo, Ohio police hostilely confronting SWP campaigners
21 distributing *The Militant*, forcing them to stop, and demanding that they leave the city, asserting
22 that the campaigners could not distribute such material door-to-door. *See* Exhibits 24 and 25.

1 It is not certain that animus against the SWP was the motivating factor in these situations.
2 In some of the situations, the police contended that the SWP campaigners needed permits to have
3 a table on the sidewalks or to distribute literature by hand. The SWP asserts that, in seven of
4 these eleven localities, local ordinances did not require a permit and the SWP campaigners'
5 activities were lawful. (Exhibit K includes copies of relevant ordinances from five of the seven
6 localities.)

7 4. Interactions with other governmental authorities

8 In the current request, the SWP provides exhibits as to three alleged incidents entailing
9 problems with government officials.⁹ The first consisted of an unannounced visit by FBI agents
10 to the home of an SWP Congressional candidate who had just returned from a book-publicizing
11 trip to Cuba. The candidate's statement indicates that, in questioning him, the FBI agents
12 attempted to "bait [him] with accusations of advocating violence" and asked him other questions
13 about his support of unionization in his workplace. The second incident involved what the SWP
14 considered excessive fines for the posting of Militant Labor Forum event flyers on historic city
15 lampposts. The organizers of the event claimed the posting was done without their knowledge.
16 The third incident concerned the possible placement of an SWP activist on a no-fly list. Whether
17 the individual was on the no-fly list is uncertain from his sworn statement, and the individual
18 was permitted to board his flight. *See* Exhibits 19, 58, and 84.

19

20

⁹ In Advisory Opinion 1996-46, the SWP presented evidence of only a few incidents related to SWP interaction with government officials other than local police. The SWP presented only one such situation in Advisory Opinion 2003-02.

1 **IV. Question Presented**

2 *Should the SWP, the Socialist Workers National Campaign Committee, other SWP party*
3 *committees, and authorized committees of candidates of the SWP be granted a continuation of*
4 *their previous partial reporting exemption?*

5 **V. Legal Analysis and Conclusions**

6 Yes, the Commission grants a continuation of the partial reporting exemption for reports
7 covering activity up to December 31, 2012.

8 In applying the standard established by the court cases and court decrees described above
9 for deciding whether to renew the SWP’s partial reporting exemption, the Commission must first
10 determine whether the SWP continues to maintain its status as a minor party. *See Buckley*, 424
11 U.S. at 68-74. As evidenced by the low vote totals for SWP candidates, the lack of success in
12 ballot access, and the small total amounts contributed to SWP committees, the Commission
13 concludes that the SWP continues to be a minor party.¹⁰

14 Next, the Commission must weigh three factors in making its determination. The first
15 factor is the history of violence or harassment, or threats of violence or harassment, directed at
16 the SWP or its supporters by governmental authorities, including law enforcement agencies, or
17 by private parties. The second is evidence of continuing violence, harassment, or threats directed
18 at the SWP or its supporters by these same organizations or persons since the end of 2002.

19 These two factors must be balanced against the third factor, which is the governmental interest in

¹⁰ In fact, the SWP does not even come close to the level of success necessary for a party to be defined as a “minor party” for the purposes of presidential candidate public financing. According to 26 U.S.C. 9002(7), a “minor party” is a political party whose candidate for president in the preceding presidential election received five percent or more but less than 25 percent of the popular vote.

1 obtaining identifying information as contributors and recipients of expenditures. Where the
2 impact of the activities of the SWP and its supporters on Federal elections is minimal because the
3 possibility of winning an election is remote, the government's interest in obtaining such
4 information is diminished. Advisory Opinion 2003-02; *see also Hall-Tyner*, 678 F.2d at 422.

5 First, as evidenced by the various court cases and the information submitted in previous
6 advisory opinion requests, there is a long history of threats, violence, and harassment against the
7 SWP and its supporters by Federal and local law enforcement agencies and private parties.¹¹ In
8 addition, a review of the information presented in the advisory opinion request indicates that the
9 SWP and persons associated with it have likely experienced harassment from private sources
10 from the end of 2002 to the present. Although some of the alleged incidents of harassment may
11 seem minor or subject to differing interpretations based on the circumstances, there are still a
12 number of examples that may legitimately raise concern by those associated with the SWP,
13 particularly when such examples are taken together, rather than viewed in isolation from one
14 another.

15 There are also some allegations of continuing harassment and hostility by local police
16 toward the SWP based on its political views. The evidence presented suggests that harassment
17 of the SWP by other governmental entities since 1990 still exists but has abated and has been
18 significantly lower than other forms of harassment. Nevertheless, the long history of Federal and

¹¹ The Commission has consistently viewed the SWP's requests for exemption from the Act's reporting requirements in light of the "long history of governmental harassment of the SWP." Advisory Opinions 2003-02, 1996-46, and 1990-13. Past courts have described in great detail this history of violence, harassment, surveillance and disruption against the SWP. *See generally, Socialist Workers Party v. Attorney General*, 642 F.Supp. 1357 (S.D.N.Y. 1986); *Socialist Workers Party v. Attorney General*, 666 F.Supp. 621 (S.D.N.Y. 1987). The Supreme Court has previously referred to "the substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 98-99 (1982) (quoting the underlying district court opinion). It is against this backdrop that the present evidence presented by the requesters must be considered. *Buckley*, 424 U.S. at 74.

1 local governmental harassment continues to have some present-day chilling effect despite the
2 abatement of Federal governmental harassment.¹²

3 The Commission notes that the evidence presented does not need to demonstrate a
4 certainty that harassment would follow a revocation of the partial reporting exemption. The
5 standard established in the previous advisory opinions, based on the case law cited earlier, is that
6 there only be “a reasonable probability that compelled disclosure” would result in “threats,
7 harassment, or reprisals from either Government officials or private parties.” *Buckley*, 424 U.S.
8 at 74. Based on its consideration of the evidence from the end of 2002 through 2008, the
9 Commission concludes that there is a reasonable probability that contributors to, and vendors
10 doing business with, the SWP and committees supporting SWP candidates would face threats,
11 harassment, or reprisals if their names and information about them were disclosed.

12 Information provided by the SWP indicates that the SWP and committees supporting its
13 candidates receive very small total amounts of contributions and very low vote totals in partisan
14 elections in which they are candidates. These low vote totals and dollar amounts indicate that
15 the activities of the SWP, its candidates, and committees supporting its candidates have little, if
16 any, impact on Federal elections. The governmental interest in obtaining the names, addresses,
17 and other identifying information of contributors to and vendors doing business with the SWP
18 and committees supporting SWP candidates in connection with Federal elections thus remains
19 very low, and continues to be outweighed by the reasonable probability of threats, harassment, or
20 reprisals resulting from such disclosure.

¹² For example, a number of SWP personnel filed sworn statements as to the reluctance of individuals to sign petitions or subscribe to SWP literature for fear of further scrutiny by governmental authorities, and some of these individuals cited concerns as to recent increased government surveillance.

1 As a result of its finding that the SWP, the SWP's party committees, and the authorized
2 committees of SWP candidates have satisfied the factors established in the case law and applied
3 in prior advisory opinions, the Commission grants the SWP, the SWP's National Campaign
4 Committee, the SWP's other party committees, and the authorized committees of SWP
5 candidates a further continuation of the partial reporting exemption provided for in the consent
6 agreements and continued in previous advisory opinions. As required in previous advisory
7 opinions, each of the SWP committees must assign a code number to each individual or entity
8 from whom it receives one or more contributions aggregating in excess of \$200 in a calendar
9 year or applicable election cycle (depending upon the type of political committee).¹³ See
10 Advisory Opinions 2003-02 and 1996-46.

11 The partial reporting exemption will apply to the following sections of the Act: 2 U.S.C.
12 434(b)(3) (receipts of a political committee); 434(b)(5) and (6) (expenditures and disbursements
13 by a political committee); 434(e) (reporting by political committees), 434(f) (electioneering
14 communication disclosure), and 434(g) (independent expenditure reporting).¹⁴ Please note that
15 the SWP and the committees supporting SWP candidates must still comply with all other

¹³ Each political committee entitled to the exemption must assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of \$200 in a calendar year (if an unauthorized committee) or in excess of \$200 during the election cycle (if an authorized committee). That code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. Consistent with the requirement that the committees comply with the recordkeeping provisions of the Act, the committee's records must correlate each code number with the name and other identifying data of the contributor who is represented by that code.

¹⁴ If an SWP committee does not qualify as a political committee and makes an electioneering communication that must be reported under 2 U.S.C. 434(f), it must disclose the name of the broadcasting station even though it would be exempt from disclosing names and addresses of donors and all other vendors. Additionally, the SWP's request concerns the granting of the partial exemption to both SWP party and candidate committees. The partial exemption does not extend to individual SWP supporters who, as individuals, engage in activity that might require them to file reports of their own, for example, the filing of reports of electioneering communications under 2 U.S.C. 434(f) and independent expenditures under 2 U.S.C. 434(g).

1 reporting obligations such as electronic filing and reporting their independent expenditures while
2 omitting the names and identifications of contributors, donors, and vendors.

3 Since the issuance of Advisory Opinion 2003-02, Congress has enacted the Honest
4 Leadership and Open Government Act of 2007 (“HLOGA”) which requires disclosure of the
5 names, addresses, and employers of lobbyists/registrants who provide bundled contributions in
6 excess of \$15,000 (as indexed under 2 U.S.C. 441a(c)) to an authorized committee, leadership
7 PAC, or party committee during a reporting period. *See* 2 U.S.C. 434(i); 11 CFR 104.22. The
8 SWP indicates that it has not received, and does not anticipate receiving, any such bundled
9 contributions that would require disclosure, but nevertheless requested an exemption from this
10 requirement. In the absence of any indication that contributions received by the SWP or
11 committees supporting its candidates would be bundled by lobbyists/registrants and would also
12 reach the current \$16,000 threshold for triggering the requirements of HLOGA, the Commission
13 concludes that this question is hypothetical.

14 Based on the record presented, the Commission grants this partial reporting exemption to
15 reports covering the next four years, *i.e.*, through December 31, 2012, instead of the next six
16 years as had been granted in previous advisory opinions. Although the evidence presented by the
17 requestor demonstrates some continued incidents of violence and harassment, those incidents
18 appear to be of lesser magnitude than those referenced in court opinions and prior AOs granting
19 the exemption. The interest of disclosure, however, is weighed against both the historical and
20 present day evidence of violence and harassment. As the number of severe incidents decline, it
21 may become more difficult for the requestor to demonstrate a “reasonable probability that
22 compelled disclosure” will result in “threats, harassment, or reprisals from either Government

1 officials or private parties.” *Buckley*, 424 U.S. at 74. The shorter exemption will allow the
2 Commission to reassess the conditions presented by requestors against the interest of disclosure
3 at that time. At least sixty days prior to December 31, 2012, the SWP may submit a new
4 advisory opinion request seeking a renewal of the exemption. If a request is submitted, the
5 Commission will consider the factual information then presented as to harassment after
6 December 31, 2008, or the lack thereof, and will make a decision at that time as to the renewal.

7 The Commission emphasizes that the SWP committees must still comply with all of the
8 remaining requirements of the Act and Commission regulations. These committees must file
9 reports containing the information required by 2 U.S.C. 434(b) with the exception of the
10 information specifically exempted, and they must keep and maintain records as required under 2
11 U.S.C. 432 with sufficient accuracy so as to be able to provide information, otherwise exempt
12 from disclosure, in connection with a Commission investigation. In addition to complying with
13 the requirements of the consent decrees, the SWP committees must file all reports required under
14 2 U.S.C. 434(a) in a timely manner. The SWP committees must also comply with the provisions
15 of the Act governing the organization and registration of political committees. *See, e.g.*,
16 2 U.S.C. 432 and 433. Finally, the SWP committees must comply with the Act’s contribution
17 limitations, prohibitions, and disclaimer provisions. 2 U.S.C. 441a, 441b, 441c, 441d, 441e,
18 441f, 441g, and 441i.

19 This response constitutes an advisory opinion concerning the application of the Act and
20 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
21 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
22 assumptions presented, and such facts or assumptions are material to a conclusion presented in

1 this advisory opinion, then the requester may not rely on that conclusion as support for its
2 proposed activity. Any person involved in any specific transaction or activity which is
3 indistinguishable in all its material aspects from the transaction or activity with respect to which
4 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).
5 Please note that the analysis or conclusions in this advisory opinion may be affected by
6 subsequent developments in the law including, but not limited to, statutes, regulations, advisory
7 opinions and case law. All cited advisory opinions are available on the Commission's website at
8 <http://saos.nictusa.com/saos/searchao>.

9 On behalf of the Commission,

10
11 Steven T. Walther
12 Chairman