FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 11, 1997

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-46

Michael Krinsky
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
740 Broadway at Astor Place
New York, NY 10003-9518

Dear Mr. Krinsky:

This responds to your letter dated November 1, 1996, as supplemented by your letter dated January 13, 1997, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the continuation of a partial reporting exemption for the Socialist Workers Party National Campaign Committee and committees supporting candidates of the Socialist Workers Party ("SWP").

The SWP National Campaign Committee and committees supporting SWP candidates were first granted a partial reporting exemption in a consent decree, dated January 2, 1979, that resolved *Socialist Workers 1974 National Campaign Committee v. Federal Election Commission*, Civil Action No. 74-1338 (D.D.C.). In that case, such committees brought an action for declaratory, injunctive and affirmative relief, alleging that specific disclosure sections of the Act operated to deprive them and their supporters of rights guaranteed by the First Amendment to the Constitution because of the likelihood of harassment resulting from such disclosure. The decree required the committees supporting SWP candidates to maintain records in accordance with the Act and to file reports in a timely manner. It also, however, exempted the committees from the provisions requiring the disclosure of the names, addresses, occupations, and principal places of business of contributors to SWP committees; of political committees or candidates supported by SWP committees; of lenders, endorsers or guarantors of loans to the SWP committees; and of persons to whom the SWP committees made expenditures.[1] The decree stated that its provisions would extend to the end of 1984, and set out a procedure for the SWP committees to apply, prior to that date, for a renewal of the exemptions.

On July 24, 1985, the court approved an updated settlement agreement with the same requirements and partial reporting exemption.[2] The court decree extended the exemption until the end of 1988, and again set out a renewal procedure. The SWP missed the deadline for reapplication for the exemption. In lieu of a renewal obtained from the court, the committees, in July 1990, sought a determination from the Commission of entitlement to the partial reporting exemption through the advisory opinion process.

On August 21, 1990, the Commission issued Advisory Opinion 1990-13, which granted the same exemption provided for in the previous consent decrees. The opinion provided that the exemption would last through the next two presidential election cycles, i.e., through December 31, 1996. The SWP committees could seek a renewal of the exemption by submitting an advisory opinion request by November 1, 1996, that would present information as to harassment of the SWP, or persons associated with the SWP, during the 1990-1996 period. Advisory Opinion 1990-13. The Commission received your request for a renewal on that date. You have asked that the exemption period last through the next two presidential election cycles, i.e., until December 31, 2004.

I. *Applicable Law*

The Act requires political committees to file reports with the Commission that identify individuals and other persons who make contributions over $200, or who come within various other disclosure categories listed above in reference to the consent agreements. 2 U.S.C. 434(b)(3), (5), and (6). See also 2 U.S.C. 431(13). The United States Supreme Court, however, in *Buckley v. Valeo*, 424 U.S. 1 (1976), recognized that, under certain circumstances, the Act's disclosure requirements as applied to a minor party would be unconstitutional because the threat to the exercise of First Amendment rights resulting from disclosure would outweigh the insubstantial interest in disclosure by that entity. 424 U.S. at 71-72. Asserting that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim" for a reporting exemption, the Court stated that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74. The Court elaborated on this standard, stating:

The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.
424 U.S. at 74.

The Court reaffirmed this standard in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982), granting the SWP an exemption from state campaign disclosure requirements. The Court referred to the introduction of proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial in that case. The Court also referred to the long history of Federal governmental surveillance and disruption of the SWP until at least 1976. 459 U.S. at 99-100. Noting the appellants' challenge to

the relevance of evidence of Government harassment "in light of recent efforts to curb official misconduct," the Court concluded that "[n]otwithstanding these efforts, the evidence suggests that hostility toward the SWP is ingrained and likely to continue." 459 U.S. at 101.

The Court in *Brown* also clarified the extent of the exemption recognized in Buckley, stating that the exemption included the disclosure of the names of recipients of disbursements as well as the names of contributors. The Court characterized the view that the exemption pertained only to contributors' names as "unduly narrow" and "inconsistent with the rationale for the exemption stated *in Buckley*."
459 U.S. at 95.

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

> [W]e note that Buckley did not impose unduly strict or burdensome requirements on the minority group seeking constitutional exemption. A minority party striving to avoid FECA's disclosure provisions does not carry a burden of demonstrating that harassment will certainly follow compelled disclosure of contributors' names. Indeed, when First Amendment rights are at stake and the spectre of significant chill exists, courts have never required such a heavy burden to be carried because 'First Amendment freedoms need breathing space to survive.' (Citations omitted.) Breathing space is especially important in a historical context of harassment based on political belief. Our examination of the treatment historically accorded persons identified with the Communist Party and a survey of statutes still extant reveal that the disclosure sought would have the effect of restraining the First Amendment rights of supporters of the Committee to an extent unjustified by the minimal governmental interest in obtaining the information.
> 678 F.2d at 421-422.

Commission agreement to the consent decrees granting the previous exemptions to the SWP committees has been based upon the long history of systematic harassment of the SWP and those associating with it and the continuation of harassment. The Commission has required only a "reasonable probability that the compelled disclosure" would result in "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. In addition, the Commission has agreed to the application of this standard to both contributors and recipients of disbursements.

Advisory Opinion 1990-13 noted that, in agreeing to the granting of the exemption and its renewal, the Commission had considered both "present" and historical harassment. The 1979 Stipulation of Settlement refers to the fact that the Commission had been ordered "to develop a full factual record regarding the present nature and extent of harassment of the plaintiffs and their supporters resulting from the disclosure provisions." According to the 1985 Stipulation of

Settlement, the renewal was based on evidentiary materials regarding the nature and extent of harassment during the previous five years. As referred to above, Advisory Opinion 1990-13 based its grant on the evidence of harassment since 1985. The very nature of the periodic extensions indicates that, after a number of years, it is necessary to reassess the SWP's situation to see if the reasonable probability of harassment still exists.[3]

II. *Facts Presented*

In the request for the exemption granted in Advisory Opinion 1990-13 and in your present request, you have presented facts indicating SWP's status as a minor party since its founding in 1938. Despite running a presidential candidate in every election since 1948 and numerous other candidates for Federal, state, and local offices, no SWP candidate has ever been elected to public office in a partisan election. You have presented data from the 1992 and 1994 elections indicating very low vote totals for SWP presidential and senatorial candidates.

Advisory Opinion 1990-13 discusses the long history of governmental harassment of the SWP. The opinion describes FBI investigative activities lasting from 1941 to 1976 that included the extensive use of informants to gather information on SWP activities and on the personal lives of SWP members, warrantless electronic surveillance, surreptitious entry of SWP offices, other disruptive activity, including attempts to embarrass SWP candidates and to foment strife within the SWP and between the SWP and others, and frequent interviews of employers and landlords of SWP members.[4]

The advisory opinion also referred to statements made by Federal governmental officials in several agencies expressing the need for information about the SWP based on the officials' unfavorable perceptions of the SWP. These statements were made in affidavits submitted during 1987 in connection with *Socialist Workers Party v. Attorney General*, 666 F. Supp. 621 (S.D.N.Y. 1987), in which the court granted an injunction preventing the government from using, releasing, or disclosing information on the SWP unlawfully obtained or developed from unlawfully obtained material, except in response to a court order or an FOIA request.[5]

The opinion also discussed incidents of private and local governmental harassment of the SWP and those associating with it during the period from 1985 through the beginning of 1990. These included private threats and private acts of violence and vandalism, as well as harassment by local police.

As evidence of continuing private and governmental harassment of the SWP and those associated with the SWP during the 1990-1996 period, you have provided descriptions with supporting signed declarations or other documentation as to approximately 70 incidents. Incidents of harassment from private sources included (but were not limited to) acts of vandalism against SWP offices and SWP-related bookstores; threats and acts of violence from persons identifying themselves as members of the Ku Klux Klan; threats and acts of violence by anti-Castro activists; negative actions by, or statements from, employers against persons apparently as a result of those persons' association with the SWP; and abusive behavior toward SWP candidates or other persons publicly associating with the SWP.

Specific examples of the above-described activities area as follows: (1) The windows of SWP headquarters in Detroit, St. Louis, Kansas City, and Chicago were broken, in two cases from thrown objects (a piece of asphalt and a rock). A bullet was fired through the window of the Des Moines headquarters in 1992. A swastika and a "White Power" slogan were spray-painted on the building that housed SWP offices and the Pathfinder bookstore in Birmingham (AL) in 1991. (2) In 1994, the SWP office in Philadelphia (PA) received an abusive letter that was clearly intended to intimidate from a person representing himself as the Grand Dragon of the Pennsylvania KKK (with letterhead stating "The Revolutionary Knights of the Ku Klux Klan," and a mailing address of the state headquarters, as well as a card with the same information). In 1990 and 1991, threatening phone messages were left on the SWP answering machine in Greensboro (NC) by persons identifying themselves as with the KKK. In 1991, two threatening stickers, one purportedly from the KKK, were placed on the entrances of the SWP's Greensboro offices. (3) Anti-Castro activists in Miami overturned SWP informational tables in Miami in 1993 and 1996, and physically assaulted SWP personnel at informational tables in New Jersey in 1995 and 1993. The SWP headquarters in Miami received a number of threatening phone calls in Spanish after radio appearances by SWP candidates in 1993.[6] (4) In 1995, a woman, who was a politically active socialist and had been an SWP congressional candidate, was denied employment at a mine in Utah. The Employee Relations Director had informed her of his investigation of her socialist political activities, and they appear to have been a disqualifying factor. (5) In several cities, individuals who were known as SWP supporters were subject to insults, written threats, and vandalism, from co-workers, related to their political stances and activities.

Your request includes descriptions and documentation of approximately 20 incidents involving police interactions with SWP workers. Many of these incidents entailed demands by police to remove informational tables or to cease other activities involving petition-signing or the distribution of printed materials in public places. The police would assert that the SWP workers were obstructing pedestrian traffic or acting without a permit or peddler's license. They would sometimes arrest or give citations to the SWP workers. In almost all of those cases, the local prosecutor would drop the charges or the cases would be dismissed. These incidents sometimes appear to involve actions by the police that were apparently motivated by a hostile feeling toward the SWP or the views expressed by the SWP.

Two examples of these cases are as follows: (1) In 1996, three SWP workers who were petitioning for the placement of SWP candidates for president and vice president on the state ballot were taken to the police station by the New York City Parks Department Police and charged with unlawful solicitation and illegal assembly. Their materials, including the petitions, were held by the police for a week and returned after protests by NYCLU and the SWP. The charges were later dismissed in court. (2) According to a 1991 letter from counsel for the New Jersey chapter of the ACLU to the Newark Corporation Counsel, three policemen, two of them mounted, intimidated SWP workers who had set up a literature table outside of local SWP headquarters. The officers blocked access to the table and the book store for over one-half hour and threatened and verbally abused the workers (including comments related to their political views). The workers decided to take down the table.

You present only a few incidents that relate to SWP interaction with governmental officials other than local police. The two most significant events relate to the job status of SWP members: (1) A

civilian employee at the Alameda Naval Aviation Depot was investigated by the Office of Special Counsel (OSC) for violations of the Hatch Act because he ran for the San Francisco Board of Supervisors in 1992, distributed campaign literature for candidates running in partisan elections, and held positions in the SWP. Although candidates for the Board of Supervisors did not run under party labels, OSC noted that the employee accepted the endorsement and support of the SWP. Even though OSC concluded that violations occurred, it decided not to seek disciplinary action against the employee while noting that subsequent violations would be considered knowing and willful. The employee maintained that he should not have been considered a partisan candidate, that the investigation occurred only after his superiors at Alameda became concerned with the content of his views, and that other employees thought to have violated the Hatch Act were merely warned without a referral to OSC. (2) In 1991, the security clearance of an Air Force enlisted man was suspended, and he was transferred from his job as a computer programmer with the nuclear targeting staff to a job as a clerk at the base housing office. The airman was a member of the SWP's affiliate, the Young Socialist Alliance (YSA). The suspension occurred on the day he returned to work from a YSA convention. A subsequent Air Force letter notified the airman of the opening of a security investigation (to resolve the question of his clearance) based on his involvement in socialist organizations, unreported contact with a foreign national (referring to contact at the convention), and perceived questionable loyalty, honesty, and reliability in his previous workcenter. In reply to this letter, the airman disputed the charge as to the foreign national and noted his favorable reviews by supervisors and his initiative on the job. The airman resigned before the end of the investigation as a result of his inability to obtain a promotion in the field under which he enlisted, which would have required regaining his security clearance.

A review of the information presented by you indicates that the SWP and persons publicly associated with it have experienced a significant amount of harassment from private sources in the 1990-1996 period. Such harassment appears to have been intended to intimidate the SWP and persons associated with it from engaging in their political activities and in expressing their political views. There is also evidence of continuing harassment by local police, similar to incidents discussed in the 1990 opinion.

Based on the evidence presented, the hostility from other governmental sources appears to have abated. As indicated above, massive Federal governmental surveillance and disruption was discontinued well before 1990. Moreover, you do not present evidence similar to the affidavits filed by Federal officials in 1987, referred to above, indicating negative attitudes toward the SWP and the need to gather information on it. The incidents involving the naval employee and the airman are difficult to assess without complete information, although the airman's situation presents the possibility of a chilling effect on public association with the SWP.

Nevertheless, the continuation of harassment from private and local police sources during the 1990-1996 period, coupled with the long history of harassment of the SWP, is still sufficient evidence that there is a reasonable probability that the compelled public disclosure of previously exempted information will subject the persons in the exempted categories to threats or harassment from various sources. The Commission, therefore, grants the committees supporting the candidates of the SWP the exemption provided for in the consent agreements and in Advisory Opinion 1990-13, with one new condition described below. Consistent with the length

of the exemption granted in 1990, this exemption is to last for the reports covering the next six years, i.e., through December 31, 2002.[7] At least sixty days prior to December 31, 2002, the SWP may submit a new advisory opinion request seeking a renewal of the exemption. If a request is submitted, the Commission will consider the factual information then presented as to harassment after 1996, or the lack thereof, and will make a decision at that time as to the renewal.

As in Advisory Opinion 1990-13, the Commission emphasizes that the committees supporting the Federal office candidates of the SWP must still comply with all of the remaining requirements of the Act and Commission regulations. The committees must file reports containing the information required by 2 U.S.C. 434(b) with the exception of the information specifically exempted, and the committees must keep and maintain records as required under 2 U.S.C. 432 with sufficient accuracy so as to be able to provide information, otherwise exempt from disclosure, in connection with a Commission investigation. In addition to complying with the requirements of the decrees, the committees must file all reports required under 2 U.S.C. 434(a) in a timely manner. The committees must also comply with the provisions of the Act governing the organization and registration of political committees. See, e.g., 2 U.S.C. 432 and 433. Adherence to the disclaimer provisions of 2 U.S.C. 441d is also required. Finally, the committees must comply with the Act's contribution limitations and prohibitions. 2 U.S.C. 441a, 441b, 441c, 441e, 441f, and 441g.

As indicated above, the Commission adds one new condition to the reporting requirements. In partial reporting exemptions granted to an SWP campaign committee and various SWP candidates for state or local office, the agencies administering campaign disclosure in the States of Washington and Iowa have required that the committees assign a code number to each contributor whose name and address is not being disclosed. The Iowa agency required that the committee keep books and records that would correlate the code numbers with the names and contributions. The Commission believes that a requirement of assigning a code number for each contributor and reporting that code number when disclosing a contribution by that person would enable a reviewer of that report (i.e., either the Commission staff or a member of the public) to determine whether contributions in excess of the limits of 2 U.S.C. 441a are being made. At the same time, such a requirement would not diminish the anonymity that is already given to contributors under Advisory Opinion 1990-13 and the consent decrees. Therefore, each committee entitled to the exemption should 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. 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 should correlate each code number with the name and other identification data of the contributor who is represented by that code.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

John Warren McGarry
Chairman

Enclosure (AO 1990-13)

1 Nevertheless, the agreement also stated that if the Commission found reason to believe that the committees violated a provision of the Act, other than those for which an exemption was specified, but needed the withheld information in order to proceed, the Commission could apply to the court for an order requiring the production of such information.
2 In view of the specific provisions of the 1979 amendments to the disclosure provisions, the agreement also makes reference to an exemption for reporting the identification of persons providing rebates, refunds or other offsets to operating expenditures, and persons providing any dividend, interest or other receipt.
3 In addition, the courts in *Brown and Hall-Tyner* rendered their decisions with reference to recent or current events or factors, as well as a history of harassment, i.e., recent incidents of harassment against the SWP and extant statutes directed against the Communist Party.
4 As noted in the opinion, these activities were set out in the Final Report of Special Master Judge Breitel in *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., February 4, 1980) and in *Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357 (S.D.N.Y. 1986), a case in which the Federal District Court awarded judgment against the United States under the Federal Tort Claims Act for disruption activities, surreptitious entries, and use of informants by the FBI.
5 See Advisory Opinion 1990-13 for a further discussion of the implications of the unfavorable statements.
6 You also provide a declaration from an SWP congressional candidate from Florida who noted that some of her airline co- workers asked that SWP newspapers not be delivered to their homes and that they be hand-delivered at work instead, or that the newspapers be mailed in envelopes.
7 As stated above, you have asked for an exemption period that is similar to the previous period because that period was to last through the next two presidential election cycles. Nevertheless, the more important aspect of this exemption is the actual length of time, and that is why six years, not eight, is being granted. Moreover, in view of the apparent abatement in governmental harassment, a longer time interval between the dates when the Commission reviews its grant of the partial exemption is unwarranted.