

March 25, 2003

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-02 is available for public comments under this procedure. It was requested by counsel, Michael Krinsky and Jaykumar Menon on behalf of The Socialist Workers Party ("SWP") and the SWP National Campaign Committee. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-02 will be on the Commission's agenda for its public meeting of Thursday April 3, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EST) on April 2, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

CONTACTS

Press inquiries: Ron Harris (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2003-02 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
Rosemary C. Smith, Acting Associate General Counsel, (202) 694-1650.

ADDRESSES

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 25, 2003

AGENDA ITEM

For Meeting of: 04-03-03

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

James A. Kahl
Deputy General Counsel

Rosemary C. Smith *RCS*
Acting Associate General Counsel

Mai Dinh *MD*
Acting Assistant General Counsel

Michael Marinelli *MM*
Staff Attorney

SUBJECT: Advisory Opinion 2003-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the Agenda for April 3, 2003.

Attachment

1 ADVISORY OPINION 2003-02

2
3 Michael Krinsky
4 Jaykumar Menon
5 Rabinowitz, Boudin, Standard, Krinsky & Lieberman
6 740 Broadway, Fifth Floor
7 New York, NY 1002-9518

DRAFT

8
9 Dear Mr. Krinsky and Mr. Menon:

10
11 This refers to your letters dated October 31, 2002 and February 14, 2003,
12 requesting an advisory opinion concerning the application of the Federal Election
13 Campaign Act of 1971, as amended, ("the Act") and Commission regulations to the
14 continuation of a partial reporting exemption for the Socialist Workers Party National
15 Campaign Committee and committees supporting candidates of the Socialist Workers
16 Party ("SWP").¹

17 **PROCEDURAL BACKGROUND**

18 *Judicial origins of the exemption*

19
20 The SWP National Campaign Committee and committees supporting SWP
21 candidates were first granted a partial reporting exemption in a consent decree, dated
22 January 2, 1979, that resolved *Socialist Workers 1974 National Campaign Committee v.*
23 *Federal Election Commission*, Civil Action No. 74-1338 (D.D.C. 1979). In that case,
24 such committees brought an action for declaratory, injunctive and affirmative relief,
25 alleging that specific disclosure sections of the Act operated to deprive them and their
26 supporters of rights guaranteed by the First Amendment to the Constitution because of the
27 likelihood of harassment resulting from such disclosure. The consent decree required the

¹ The completed advisory request materials were not received until February 14. However, the date of your initial submission is accepted for purposes of tolling the time for the request of a continuation of the partial reporting exemption.

1 committees supporting SWP candidates to maintain records in accordance with the Act
2 and to file reports in a timely manner. It also, however, exempted these committees from
3 the provisions requiring the disclosure of: 1) the names, addresses, occupations, and
4 principal places of business of contributors to SWP committees; 2) political committees
5 or candidates supported by SWP committees; 3) lenders, endorsers or guarantors of loans
6 to the SWP committees; and 4) persons to whom the SWP committees made
7 expenditures.² The decree stated that its provisions would extend to the end of 1984, and
8 established a procedure for the SWP committees to apply, prior to that date, for a renewal
9 of the exemptions listed above.

10 On July 24, 1985, the court approved an updated settlement agreement with the
11 same requirements and partial reporting exemption.³ The court decree extended the
12 exemption until the end of 1988, and again included a renewal procedure. However, the
13 SWP missed the deadline for reapplication for the exemption.

14 *Renewal of the exemptions through advisory opinions*

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

² 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 to proceed, the Commission could apply to the court for an order requiring the production of such information.

³ 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 assets to operating expenditures, and persons providing any dividend, interest or other receipts.

1 through December 31, 1996. Additionally, the SWP committees could seek a renewal of
2 the exemption by submitting an advisory opinion request by November 1, 1996 to present
3 information as to harassment of SWP, or persons associated with SWP, during the 1990-
4 1996 period. Advisory Opinion 1990-13.

5 On November 1, 1996, the committees again requested through the advisory
6 opinion process a renewal of the exemption. In Advisory Opinion 1996-46, the
7 Commission agreed to the renewal after examination of the evidence presented in
8 affidavits that described the continuing harassment of SWP and its supporters. However,
9 the Commission added a new condition to the renewal. This modification required that
10 each committee entitled to the exemption must assign a code number to each individual
11 or entity from whom it receives one or more contributions aggregating in excess of \$200
12 in a calendar year.⁴ See Advisory Opinion 1996-46. This modified renewal extended the
13 partial reporting exemption for the next six years, i.e., through December 31, 2002. The
14 advisory opinion specified that at least sixty days prior to the expiration date, the
15 requestor could submit a new advisory opinion request seeking another renewal of the
16 exemption.

17 ACT AND COMMISSION REGULATIONS

18 The Act requires political committees to file reports with the Commission that
19 identify individuals and other persons who make contributions over \$200 during the

⁴ The Commission required that the code number must be included in FEC reports filed by each committee in the same manner that full contributor identification would otherwise be disclosed. The committee's records were required to correlate each code number with the name and other identification data of the contributor who is represented by that code.

1 applicable time periods, or who come within various other disclosure categories listed
2 above in reference to the consent agreements. 2 U.S.C. 434(b)(3), (5), and (6); *see also*
3 2 U.S.C. 431(13). However, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States
4 Supreme Court recognized that, under certain circumstances, the Act's disclosure
5 requirements as applied to a minor party would be unconstitutional because the threat to
6 the exercise of First Amendment rights resulting from disclosure would outweigh the
7 insubstantial interest in disclosure by that entity. 424 U.S. at 71-72. Reasoning that
8 "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a
9 fair consideration of their claim" for a reporting exemption, the Court stated that "[t]he
10 evidence offered need show only a reasonable probability that the compelled disclosure of
11 a party's contributors' names will subject them to threats, harassment, or reprisals from
12 either Government officials or private parties." *Id.* at 74. The Court elaborated on this
13 standard, stating:

14
15 The proof may include, for example, specific evidence of past or present
16 harassment of members due to their associational ties, or of harassment
17 directed against the organization itself. A pattern of threats or specific
18 manifestations of public hostility may be sufficient. New parties that have
19 no history upon which to draw may be able to offer evidence of reprisals
20 and threats directed against individuals or organizations holding similar
21 views.

22
23 *Id.* at 74; *see also McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

24
25 The Supreme Court reaffirmed this standard in *Brown v. Socialist Workers '74*
26 *Campaign Committee (Ohio)*, 459 U.S. 87 (1982), granting SWP an exemption from state
27 campaign disclosure requirements. The Court referred to the introduction of proof of
28 specific incidents of private and government hostility toward SWP and its members

1 within the four years preceding the trial in that case. The Court also referred to the long
2 history of Federal governmental surveillance and disruption of SWP until at least 1976.
3 *Brown*, 459 U.S. at 99-100. Noting the appellants' challenge to the relevance of evidence
4 of Government harassment "in light of recent efforts to curb official misconduct," the
5 Court concluded that "[n]otwithstanding these efforts, the evidence suggests that hostility
6 toward the SWP is ingrained and likely to continue." *Id.* at 101.

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

12 The United States Court of Appeals for the Second Circuit also applied the
13 *Buckley* standard in exempting the campaign committee of the Communist Party
14 presidential and vice presidential candidates from the requirements to disclose the
15 identification of contributors and to maintain records of the name and addresses of
16 contributors. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*,
17 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983). The court described the
18 applicability of the standard, stating:

19 [W]e note that *Buckley* did not impose unduly strict or burdensome
20 requirements on the minority group seeking constitutional exemption. A
21 minority party striving to avoid FECA's disclosure provisions does not
22 carry a burden of demonstrating that harassment will certainly follow
23 compelled disclosure of contributors' names. Indeed, when First
24 Amendment rights are at stake and the specter of significant chill exists,
25 courts have never required such a heavy burden to be carried because 'First
26 Amendment freedoms need breathing space to survive.' (Citations
27 omitted.) Breathing space is especially important in a historical context of

1 harassment based on political belief. Our examination of the treatment
2 historically accorded persons identified with the Communist Party and a
3 survey of statutes still extant reveal that the disclosure sought would have
4 the effect of restraining the First Amendment rights of supporters of the
5 Committee to an extent unjustified by the minimal governmental interest
6 in obtaining the information.

7
8 678 F.2d at 421-422.

9
10 Commission agreement to the consent decrees granting the previous exemptions
11 to the SWP committees has been based upon the long history of systematic harassment of
12 the SWP and those associating with it and the continuation of harassment. The
13 Commission has required only a "reasonable probability that the compelled disclosure"
14 would result in "threats, harassment, or reprisals from either Government officials or
15 private parties." *Buckley*, 424 U.S. at 74. In addition, the Commission has agreed to the
16 application of this standard to both contributors and recipients of disbursements.

17 The Commission in Advisory Opinions 1996-46 and 1990-13 noted that, in
18 agreeing to the granting of the exemption and its renewal, it considered both "present"
19 and historical harassment. The 1985 Stipulation of Settlement refers to the fact that the
20 Commission had been ordered, "to develop a full factual record regarding the present
21 nature and extent of harassment of the plaintiffs and their supporters resulting from the
22 disclosure provisions." 1985 Stipulation of Settlement, p. 2. According to the 1985
23 Stipulation of Settlement, the renewal was based on evidentiary materials regarding the
24 nature and extent of harassment during the previous five years. As referred to above,
25 these two Advisory Opinions based their grant, in part, on the evidence of harassment
26 since 1985. The very nature of the periodic extensions indicates that, after a number of

1 years, it is necessary to reassess the SWP's situation to see if the reasonable probability of
2 harassment still exists.⁵

3
4 **EXAMINATION OF FACTUAL BACKGROUND**

5
6 *Electoral status of SWP*

7 In the request for the exemption granted in the past two advisory opinions and in
8 your present request, you have presented facts indicating SWP's status as a minor party
9 since its founding in 1938. Despite running a presidential candidate in every election
10 since 1948 and numerous other candidates for Federal, State and local offices, no SWP
11 candidate has ever been elected to public office in a partisan election. You have
12 presented data from the 2000 election indicating very low vote totals for SWP
13 presidential and other Federal candidates.⁶ Further, unlike several other minor parties,
14 you state that SWP has never applied or qualified for national committee status. See 2
15 U.S.C 431(14) and Advisory Opinions 2001-13, 1998-2, 1995-16 and 1992-30.

16 *History of government harassment*

17 The request for the exemptions must be seen in the context of the relationship
18 between the SWP and various Federal enforcement authorities, as well as SWP's

⁵ In addition, 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.

⁶ The evidence you present, 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 8,746 votes nationwide in 1996 and only 10,644 votes nationwide in 2000. Further, no SWP candidates on the ballot for U.S. Senate or House of Representatives received more than 15,000 votes in any election during that period, with the vast majority (thirty-five of thirty-seven candidates) receiving not even 5,000 votes. Additionally, the request provides information of a survey conducted by party leadership of the local campaign committees (of which 17 existed) that supported a candidate in 2000. According to this survey, only 354 people nationwide contributed funds to those committees, for an average of approximately twenty contributors per committee. There was only one contribution nationwide to that committee that was over \$300.

1 relationship with other enforcement authorities and private parties. It is against this
2 backdrop that the request and the supporting materials can properly be understood.
3 Advisory Opinions 1996-46 and 1990-13 made reference to the long history of
4 governmental harassment of the SWP. The advisory opinions described FBI investigative
5 activities between 1941 and 1976 that included the extensive use of informants to gather
6 information on SWP activities and on the personal lives of SWP members, warrantless
7 electronic surveillance, surreptitious entry of SWP offices, other disruptive activities
8 including attempts to embarrass SWP candidates and to foment strife within SWP and
9 between SWP and others, and frequent interviews of employers and landlords of SWP
10 members.

11 The advisory opinions also referred to statements made by Federal governmental
12 officials in several agencies expressing the need for information about the SWP based on
13 the officials' unfavorable perceptions of the SWP. These statements were made in
14 affidavits submitted during 1987 in connection with *Socialist Workers Party v. Attorney*
15 *General*, 666 F. Supp. 621 (S.D.N.Y. 1987), in which the court granted an injunction
16 preventing the government from using, releasing, or disclosing information on the SWP
17 that was unlawfully obtained or developed from unlawfully obtained material, except in
18 response to a court order or a Freedom of Information Act request. The opinion also
19 discussed incidents of private and local governmental harassment of SWP and those
20 associating with it during the period from 1985 through 1996. These included private
21 threats and acts of violence and vandalism, as well as harassment by local police.

22

1 ***Organization of current evidentiary record***

2 In your current request you present over 80 exhibits including statements from
3 various Party members and candidates, sometimes corroborated by local newspaper
4 articles, police reports, court documents or other materials. The statements come from
5 SWP members from different regions of the United States and are dated from 1997 to
6 2002. These statements are meant to attest to the hostility directed toward the SWP.
7 They can be divided into three categories: 1) statements attesting to the fear possible
8 SWP supporters have of providing identification when expressing SWP support, 2)
9 statements and material attesting to hostility from private parties to SWP activity, and 3)
10 statements and materials attesting to hostility from law enforcement sources to SWP
11 activities.

12 ***Fears expressed by party supporters***

13 The request contains eight statements by SWP officials relating the concerns of
14 potential SWP supporters regarding public identification with SWP. These include
15 statements by the 2000 Presidential and Vice Presidential SWP candidates describing
16 their experiences while campaigning and talking with potential supporters. It also
17 includes statements from SWP workers who sell subscriptions to SWP newspapers.
18 Several of the statements refer to individuals who expressed reluctance to buy
19 subscriptions for fear of finding their names on lists maintained by enforcement
20 authorities such as the FBI. See Exhibits L, M, and N. Your request also notes the
21 refusal in 1997 of the Seattle Elections Commission to grant an exemption from its

1 reporting requirements.⁷ You provide statements from several SWP workers noting that
2 several long-time contributors expressed reluctance to contribute again because now their
3 names, addresses and professions would be public. See Exhibits H and I.

4 *Harassment and violence from private sources*

5 The largest number of exhibits in the request, over forty, consists of examples of
6 harassment of SWP workers and candidates by private individuals and businesses. These
7 are signed statements by SWP workers and candidates that concern their experiences
8 while giving out SWP literature or selling SWP newspapers or gathering signatures for
9 petitions. They include violence and threats of violence directed toward SWP workers
10 and displays. See, for example, Exhibits 4, 19, 20, and 38. The request also includes
11 well-documented accounts of attacks and vandalism against SWP headquarters and
12 property. See Exhibit 5 (District of Columbia); Exhibit 12 (Houston, Texas); Exhibit 22
13 (Des Moines, Iowa); and Exhibit 50 (San Francisco, California). Your request also
14 describes the receipt of hostile or threatening email, notes or phone messages at various
15 SWP headquarters. See Exhibits 31, 64, and 74.

16 Additionally, you provide statements of SWP candidates who faced pressure or
17 hostility at the work place once their employers became aware of their political activities.
18 Some of the exhibits involve situations where rules concerning political activity in the
19 workplace were violated. However, in several situations, employees faced sanctions
20 simply because of their affiliation with SWP or their affirmation of its political beliefs.

⁷ Your request includes a 1998 decision of the Washington State Public Disclosure Commission, which by contrast, granted a reporting exemption to the SWP in regard to statewide activity by its sole statewide candidate.

1 The most striking and well-documented example was the firing in 2001 of the SWP
2 candidate for mayor of Miami. See Exhibit 15.

3 *Relations with law enforcement authorities*

4 The request also includes 25 exhibits describing interactions between SWP
5 workers and local law enforcement authorities. The majority of these involve police or
6 other law enforcement officials forcing SWP personnel to remove campaign and/or
7 literature tables from streets or sidewalks or to cease the hand distribution of campaign or
8 SWP materials. In one instance, local police charged SWP supporters manning a
9 literature table with disorderly conduct and unlicensed vending. A judge later suspended
10 the charges. See Exhibit 24. It is not certain that animus against SWP was the motivating
11 factor in all these situations since it is not clear whether SWP workers were violating the
12 laws of the localities. Nevertheless, prejudice against SWP is indicated in at least some
13 of exhibits since there are cases where SWP activity was, according to evidence provided
14 along with reports of the incidents, legal or protected within the jurisdiction involved.
15 See Exhibits 25, 40, 41, 55, and 70. In one case, SWP successfully challenged in federal
16 district court the constitutionality of a permit regulation as it was applied to SWP
17 activities. See Exhibit 65.

18 In Advisory Opinion 1996-46, SWP presented less than a handful of incidents that
19 related to SWP interaction with governmental officials other than local police. In your
20 2002 request, you present only one such situation. Exhibit 43 describes an individual
21 who, as a SWP member and SWP Presidential elector, applied for a position as a census
22 worker and received a very high score in the Census Bureau's standardized test. The
23 SWP member states that his file was forwarded to the FBI for a security evaluation and

1 that other applicants had their files reviewed by the FBI. You assert that he would have
2 been hired but for the lack of action on his file by the FBI because of its stated inability to
3 locate his file. With respect to the incident, you do not present evidence similar to the
4 affidavits submitted by Federal officials with regard to previous determinations.
5 Consequently, it is difficult to assess whether administrative mischance or actual
6 prejudice played a role in the loss of the file. However, it could be seen as significant, in
7 view of past actions by the FBI with regard to the SWP and its supporters.⁸

8 **ANALYSIS AND CONCLUSIONS**

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

⁸ Beginning in 1941, the FBI began a generalized investigation of the SWP that was to last at least until 1976. See Final Report of Special Master Judge Breitl in *Socialist Workers Party v. Attorney General*, 73 Civ. 3160 (TPG) (S.D.N.Y., February 4, 1980). Between the years 1960 and 1976, the FBI employed approximately 1300 informants who reported on the activities, discussions and debates of the SWP. In addition to reporting on what the Special Master described, with some qualifications, as "peaceful, lawful political activity" by the SWP and its adjunct, the Young Socialist Alliance ("YSA"), the informants also provided information as to the names, addresses, places and changes of employment of SWP members, and such personal data as information on "marital or cohabitational status, marital strife, health, travel plans, and personal habits." 642 F. Supp. at 1379-1381.

In the 1960's and 1970's, the SWP was the subject of FBI Counterintelligence Programs "designed to disrupt the SWP on a broad national basis." 642 F. Supp. at 1384. The disruption under these programs included attempts to embarrass SWP candidates, foment racial strife within the SWP, and cause strife between the SWP and others in a variety of political movements. 642 F. Supp. at 1385-1389. For a number of years, the FBI also conducted warrantless electronic surveillance of the SWP on an extensive basis and at least 204 surreptitious entries of SWP offices, principally to photograph or remove documents. The court noted that "there is no indication that the FBI obtained any documents showing any violence or any action to overthrow the Government." 642 F. Supp. at 1394.

Over a period of many years, the FBI maintained a list known successively as the Custodial Detention List, the Security Index, and the Administrative Index. The persons on this list were to be considered for apprehension and detention in time of war or national emergency. The FBI intended to include all SWP members on this list. The list was maintained by frequent interviews of landlords and employers of the members. 642 F. Supp. at 1395.

1 SWP candidates, the Commission concludes that SWP continues to be a minor party.
2 Having satisfied the minor party threshold, the Commission must balance three factors in
3 analyzing your request. The first is the history of violence or harassment, or threats of
4 violence or harassment, directed at the SWP or its supporters by Federal, state, or local
5 law enforcement agencies or private parties. Second is evidence of continuing violence,
6 harassment, or threats directed at the SWP or its supporters by these same organizations
7 or persons since the last advisory opinion in 1996. These two factors must be balanced
8 against the governmental interest in obtaining the information by determining whether the
9 impact of the activities of the SWP and its supporters in connection with Federal
10 elections is diminished by the low probability of the SWP winning an election. *See Hall-*
11 *Tyner, 678 F.2d at 422.*

12 As evidenced by the various court cases and the information submitted in
13 connection with previous advisory opinion requests and described briefly above, there is a
14 long history of threats, violence, and harassment against the SWP and its supporters by
15 Federal, state, or local law enforcement agencies and private parties. There is a sufficient
16 record to establish that this history continues to have a chilling effect on possible
17 membership in or association with SWP. One indication of this is the refusal of
18 individuals to purchase or subscribe to SWP literature or circulations for fear of being
19 included in lists maintained by the government identifying them as SWP supporters. *See*
20 *Exhibits L, M, and N.*

21 A review of the information you have presented in connection with this AOR
22 indicates that the SWP and persons publicly associated with it have experienced
23 significant harassment from private sources in the 1997-2002 period. Such harassment

1 appears to have been intended to intimidate the SWP and persons associated with it from
2 engaging in their political activities and in expressing their political views. There is also
3 some evidence of continuing harassment by local police, although here the evidence is not
4 as great as that presented for the harassment from private parties and it is more difficult to
5 evaluate. Based on the evidence presented, the hostility from other governmental sources
6 still exists but continues to abate. As indicated above, massive Federal governmental
7 surveillance and disruption were discontinued well before 1990. The incident involving
8 the census position is difficult to assess without complete information, although it does
9 present at least the possibility of a chilling effect on public association with the SWP.
10 However, as stated above, the history of governmental harassment continues to have a
11 present-day chilling effect that is not diminished by the abatement of governmental
12 harassment.

13 As noted earlier, it must be stressed that the evidence presented in your request
14 does not need to indicate a certainty that harassment would follow a revocation of the
15 partial reporting exemption. The standard established in Advisory Opinions 1990-13 and
16 1996-46 and based on the case law cited earlier is that there only be "a reasonable
17 probability that compelled disclosure" would result in "threats, harassment, or reprisals
18 from *either* Government offices *or* private parties" (emphasis added). The Commission
19 considers the totality of the evidence for the 1997-2002 period, especially the evidence of
20 continued harassment from private parties, and concludes that there is a reasonable
21 probability that contributors to and vendors doing business with SWP and committees
22 supporting SWP candidates would face threats, harassment, or reprisal if their names and
23 information about them were disclosed.

1 Information provided in your request states that SWP and committees supporting
2 its candidates receive very small total amounts of contributions and very low vote totals
3 in partisan elections in which they are candidates. These low numbers indicate that the
4 activities of SWP, its candidates, and committees supporting its candidates have little, if
5 any, impact on Federal elections. Thus the governmental interest in obtaining the names
6 and addresses of contributors to and vendors doing business with SWP and committees
7 supporting SWP candidates in connection with Federal elections is diminished by the low
8 probability of an SWP candidate winning an election.

9 As a result of its finding that SWP and the committees supporting SWP
10 candidates have satisfied the factors established in the case law and prior advisory
11 opinions, the Commission grants SWP and the committees supporting SWP candidates a
12 further continuation of the partial reporting exemption provided for in the consent
13 agreements as continued by Advisory Opinions 1990-13, and 1996-46. The condition
14 established by the 1996-46 Opinion will also continue with the partial reporting
15 exemption.⁹

16 Your request notes that the Act was amended in 1999, 2000, and 2002. You ask
17 that the partial reporting exemption be applied to any new reporting obligations arising
18 from these changes that may require SWP or committees supporting SWP candidates to

⁹ Therefore, each unauthorized 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. Similarly, each authorized committee of a SWP candidate should assign a code number to each individual or entity from whom it receives one or more contributions aggregating in excess of \$200 during the election cycle. 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 identifying data of the contributor who is represented by that code.

1 disclose the names of their contributors and vendors. You identify the amended or new
2 provisions as 2 U.S.C. 434(a)(6)(B) (candidate's notification of expenditure from
3 personal funds), 434(a)(11)(B) (electronic availability of reports), 434(a)(12) (electronic
4 filing standards), 434(e) (reporting by political committees), 434(f) (electioneering
5 communication disclosure), 434(g) (independent expenditure reporting), and 434(h)
6 (inaugural committee reporting). The Commission agrees that the partial exemption
7 applies to SWP and candidate committees to the extent they are required to report the
8 names of contributors and vendors under the amended or new sections of the Act that you
9 identify¹⁰ except for 2 U.S.C. 434(a)(6)(B)¹¹ and 434(h).¹² Please note that SWP and the
10 committees supporting SWP candidates must still comply with all other reporting
11 obligations such as electronic filing and reporting their independent expenditures while
12 omitting the names and information concerning contributors, donors and vendors.
13

¹⁰ If SWP or any committee supporting its candidates do not qualify as political committees and make an electioneering communication that must be reported under 2 U.S.C. 434(f), they must disclose the name of the broadcaster even though they would be exempt from disclosing names and addresses of donors and all other vendors. Additionally, your request concerns the granting of the partial exemption to both SWP and candidate committees. The partial exemption does not extend to individual SWP members 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).

¹¹ If a SWP candidate for the United States House of Representative or United States Senate makes sufficient expenditures from personal funds to require disclosure under 2 U.S.C. 434(a)(6)(B), the candidate must file FEC Form 10. This form does not require the candidate to disclose contributors other than the candidate nor does it require disclosure of vendors and therefore, is beyond the scope of the partial reporting exemption. Additionally, it is important for the SWP candidate to file this FEC Form 10 because it affects the opposing candidates' ability to accept contributions in excess of the contribution limitations under the Millionaires' Amendment at 2 U.S.C. 441a(i) and 441a-1.

¹² If the SWP or any candidate of the SWP is in a position to organize an inaugural committee, the analysis, and therefore the conclusion, of this advisory opinion would no longer be applicable.

1 **Consistent with the length of the exemptions granted in 1990 and 1996, this**
2 **partial reporting exemption applies to reports covering the next six years, i.e., through**
3 **December 31, 2008. At least sixty days prior to December 31, 2008, the SWP may**
4 **submit a new advisory opinion request seeking a renewal of the partial reporting**
5 **exemption. If a request is submitted, the Commission will consider the factual**
6 **information then presented as to harassment after 2002, or the lack thereof, and will make**
7 **a decision at that time as to the renewal.**

8 **As in Advisory Opinion 1990-13 and 1996-46, the Commission emphasizes that**
9 **the committees supporting the Federal candidates of the SWP must still comply with all**
10 **of the remaining requirements of the Act and Commission regulations. The committees**
11 **must file reports containing the information required by 2 U.S.C. 434(b) with the**
12 **exception of the information specifically exempted, and the committees must keep and**
13 **maintain records as required under 2 U.S.C. 432 with sufficient accuracy so as to be able**
14 **to provide information, otherwise exempt from disclosure, in connection with a**
15 **Commission investigation. In addition to complying with the requirements of the consent**
16 **decrees, the committees must file all reports required under 2 U.S.C. 434(a) in a timely**
17 **manner. The committees must also comply with the provisions of the Act governing the**
18 **organization and registration of political committees. See, e.g., 2 U.S.C. 432 and 433.**
19 **Adherence to the disclaimer provisions of 2 U.S.C. 441d is also required. Finally, the**
20 **committees must comply with the Act's contribution limitations and prohibitions.**
21 **2 U.S.C. 441a, 441b, 441c, 441e, 441f, 441g, 441i, and 441k.**

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

4

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Sincerely,

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7

Ellen L. Weintraub

8

Chair

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10 Enclosures: AOs 2001-13, 1998-2, 1996-46, 1995-16, 1992-30 and 1990-13