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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

February 17, 1997

**AGENDA ITEM**  
For Meeting of: 3-6-97

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Jonathan M. Levin  
Senior Attorney

Subject: Draft AO 1996-46

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 6, 1997.

Attachment

1 ADVISORY OPINION 1996-46

2  
3 Michael Krinsky  
4 Rabinowitz, Boudin, Standard,  
5 Krinsky & Lieberman  
6 740 Broadway at Astor Place  
7 New York, NY 10003-9518

**DRAFT**

8  
9 Dear Mr. Krinsky:

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

16 The SWP National Campaign Committee and committees supporting SWP  
17 candidates were first granted a partial reporting exemption in a consent decree, dated  
18 January 2, 1979, that resolved *Socialist Workers 1974 National Campaign Committee v.*  
19 *Federal Election Commission*, Civil Action No. 74-1338 (D.D.C.). In that case, such  
20 committees brought an action for declaratory, injunctive and affirmative relief, alleging  
21 that specific disclosure sections of the Act operated to deprive them and their supporters  
22 of rights guaranteed by the First Amendment to the Constitution because of the likelihood  
23 of harassment resulting from such disclosure. The decree required the committees  
24 supporting SWP candidates to maintain records in accordance with the Act and to file  
25 reports in a timely manner. It also, however, exempted the committees from the  
26 provisions requiring the disclosure of the names, addresses, occupations, and principal  
27 places of business of contributors to SWP committees; of political committees or  
28 candidates supported by SWP committees; of lenders, endorsers or guarantors of loans to  
29 the SWP committees; and of persons to whom the SWP committees made expenditures.<sup>1</sup>

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<sup>1</sup> 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.

1 The decree stated that its provisions would extend to the end of 1984, and set out a  
2 procedure for the SWP committees to apply, prior to that date, for a renewal of the  
3 exemptions.

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

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

#### 19 1. *Applicable Law*

20 The Act requires political committees to file reports with the Commission that  
21 identify individuals and other persons who make contributions over \$200, or who come  
22 within various other disclosure categories listed above in reference to the consent  
23 agreements. 2 U.S.C. §434(b)(3), (5), and (6). See also 2 U.S.C. §431(13). The United  
24 States Supreme Court, however, in *Buckley v. Valeo*, 424 U.S. 1 (1976), recognized that,  
25 under certain circumstances, the Act's disclosure requirements as applied to a minor party  
26 would be unconstitutional because the threat to the exercise of First Amendment rights  
27 resulting from disclosure would outweigh the insubstantial interest in disclosure by that

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<sup>2</sup> 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.

1 entity. 424 U.S. at 71-72. Asserting that "[m]inor parties must be allowed sufficient  
2 flexibility in the proof of injury to assure a fair consideration of their claim" for a  
3 reporting exemption, the Court stated that "[t]he evidence offered need show only a  
4 reasonable probability that the compelled disclosure of a party's contributors' names will  
5 subject them to threats, harassment, or reprisals from either Government officials or  
6 private parties." 424 U.S. at 74. The Court elaborated on this standard, stating:

7 The proof may include, for example, specific evidence of past or present  
8 harassment of members due to their associational ties, or of harassment  
9 directed against the organization itself. A pattern of threats or specific  
10 manifestations of public hostility may be sufficient. New parties that have  
11 no history upon which to draw may be able to offer evidence of reprisals  
12 and threats directed against individuals or organizations holding similar  
13 views.  
14

15 424 U.S. at 74.

16 The Court reaffirmed this standard in *Brown v. Socialist Workers '74 Campaign*  
17 *Committee (Ohio)*, 459 U.S. 87 (1982), granting the SWP an exemption from state  
18 campaign disclosure requirements. The Court referred to the introduction of proof of  
19 specific incidents of private and government hostility toward the SWP and its members  
20 within the four years preceding the trial in that case. The Court also referred to the long  
21 history of Federal governmental surveillance and disruption of the SWP until at least  
22 1976. 459 U.S. at 99-100. Noting the appellants' challenge to the relevance of evidence  
23 of Government harassment "in light of recent efforts to curb official misconduct," the  
24 Court concluded that "[n]otwithstanding these efforts, the evidence suggests that hostility  
25 toward the SWP is ingrained and likely to continue." 459 U.S. at 101.

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

31 The United States Court of Appeals for the Second Circuit used the *Buckley*  
32 standard as a basis for exempting the campaign committee of the Communist Party

1 presidential and vice-presidential candidates from the requirements to disclose the  
2 identification of contributors and to maintain records of the name and addresses of  
3 contributors. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*,  
4 678 F.2d 416 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983). The court described the  
5 applicability of the standard, stating:

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

21  
22 678 F.2d at 421-422.

23  
24 Commission agreement to the consent decrees granting the previous exemptions  
25 to the SWP committees has been based upon the long history of systematic harassment of  
26 the SWP and those associating with it and the continuation of such harassment. The  
27 Commission has required only a "reasonable probability that the compelled disclosure"  
28 would result in "threats, harassment, or reprisals from either Government officials or  
29 private parties." *Buckley*, 424 U.S. at 74. In addition, the Commission has agreed to the  
30 application of this standard to both contributors and recipients of disbursements.

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

1 evidentiary materials regarding the nature and extent of harassment during the previous  
2 five years. As referred to above, Advisory Opinion 1990-13 based its grant on the  
3 evidence of harassment since 1985. The very nature of the periodic extensions indicates  
4 that, after a number of years, it is necessary to reassess the SWP's situation to see if the  
5 reasonable probability of continued harassment still exists.<sup>3</sup>

## 6 II. *Facts Presented*

7 In the request for the exemption granted in Advisory Opinion 1990-13 and in your  
8 present request, you have presented facts indicating SWP's status as a minor party since  
9 its founding in 1938. Despite running a presidential candidate in every election since  
10 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 1992 and 1994 elections indicating very low vote totals for SWP  
13 presidential and senatorial candidates.

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

21 The advisory opinion also referred to statements made by Federal governmental  
22 officials in several agencies expressing the need for information about the SWP based on  
23 the officials' unfavorable perceptions of the SWP. These statements were made in  
24 affidavits submitted during 1987 in connection with *Socialist Workers Party v. Attorney*  
25 *General*, 666 F. Supp. 621 (S.D.N.Y. 1987), in which the court granted an injunction

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<sup>3</sup> 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.

<sup>4</sup> 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.

1 preventing the government from using, releasing, or disclosing information on the SWP  
2 unlawfully obtained or developed from unlawfully obtained material, except in response  
3 to a court order or an FOIA request.<sup>5</sup>

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

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

18 Specific examples of the above-described activities area as follows: (1) The  
19 windows of SWP headquarters in Detroit, St. Louis, Kansas City, and Chicago were  
20 broken, in two cases from thrown objects (a piece of asphalt and a rock). A bullet was  
21 fired through the window of the Des Moines headquarters in 1992. A swastika and a  
22 "White Power" slogan were spray-painted on the building that housed SWP offices and  
23 the Pathfinder bookstore in Birmingham (AL) in 1991. (2) In 1994, the SWP office in  
24 Philadelphia (PA) received an abusive letter that was clearly intended to intimidate from  
25 a person representing himself as the Grand Dragon of the Pennsylvania KKK (with  
26 letterhead stating "The Revolutionary Knights of the Ku Klux Klan," and a mailing  
27 address of the state headquarters, as well as a card with the same information). In 1990  
28 and 1991, threatening phone messages were left on the SWP answering machine in

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<sup>5</sup> See Advisory Opinion 1990-13 for a further discussion of the implications of the unfavorable statements.

1 Greensboro (NC) by persons identifying themselves as with the KKK. In 1991, two  
2 threatening stickers, one purportedly from the KKK, were placed on the entrances of the  
3 SWP's Greensboro offices. (3) Anti-Castro activists in Miami overturned SWP  
4 informational tables in Miami in 1993 and 1996, and physically assaulted SWP personnel  
5 at informational tables in New Jersey in 1995 and 1993. The SWP headquarters in  
6 Miami received a number of threatening phone calls in Spanish after radio appearances  
7 by SWP candidates in 1973.<sup>6</sup> (4) In 1995, a woman, who was a politically active  
8 socialist and had been an SWP congressional candidate was denied employment at a mine  
9 in Utah. The Employee Relations Director had informed her of his investigation of her  
10 socialist political activities, and they appear to have been a disqualifying factor. (5) In  
11 several cities, individuals who were known as SWP supporters were subject to insults,  
12 written threats, and vandalism, from co-workers, related to their political stances and  
13 activities.

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

24 Two examples of these cases are as follows: (1) In 1996, three SWP workers who  
25 were petitioning for the placement of SWP candidates for president and vice president on  
26 the state ballot were taken to the police station by the New York City Parks Department  
27 Police and charged with unlawful solicitation and illegal assembly. Their materials,

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<sup>6</sup> 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.



1 including the petitions, were held by the police for a week and returned after protests by  
2 NYCLU and the SWP. The charges were later dismissed in court. (2) According to a  
3 1991 letter from counsel for the New Jersey chapter of the ACLU to the Newark  
4 Corporation Counsel, three policemen, two of them mounted, intimidated SWP workers  
5 who had set up a literature table outside of local SWP headquarters. The officers' horses  
6 blocked access to the table and the book store for over one-half hour and threatened and  
7 verbally abused the workers (including comments related to their political views). The  
8 workers decided to take down the table.

9       You present only a few incidents that relate to SWP interaction with  
10 governmental officials other than local police. The two most significant events relate to  
11 the job status of SWP members: (1) A civilian employee at the Alameda Naval Aviation  
12 Depot was investigated by the Office of Special Counsel (OSC) for violations of the  
13 Hatch Act because he ran for the San Francisco Board of Supervisors in 1992, distributed  
14 campaign literature for candidates running in partisan elections, and held positions in the  
15 SWP. Although candidates for the Board of Supervisors did not run under party labels,  
16 OSC noted that the employee accepted the endorsement and support of the SWP. Even  
17 though OSC concluded that violations occurred, it decided not to seek disciplinary action  
18 against the employee while noting that subsequent violations would be considered  
19 knowing and willful. The employee maintained that he should not have been considered a  
20 partisan candidate, that the investigation occurred only after his superiors at Alameda  
21 became concerned with the content of his views, and that other employees thought to  
22 have violated the Hatch Act were merely warned without a referral to OSC. (2) In 1991,  
23 the security clearance of an Air Force enlisted man was suspended, and he was  
24 transferred from his job as a computer programmer with the nuclear targeting staff to a  
25 job as a clerk at the base housing office. The airman was a member of the SWP's  
26 affiliate, the Young Socialist Alliance (YSA). The suspension occurred on the day he  
27 returned to work from a YSA convention. A subsequent Air Force letter notified the  
28 airman of the opening of a security investigation (to resolve the question of his clearance)  
29 based on his involvement in socialist organizations, unreported contact with a foreign  
30 national (referring to contact at the convention), and "perceived questionable loyalty,

1 honesty, and reliability in [his] previous workcenter." In reply to this letter, the airman  
2 disputed the charge as to the foreign national and noted his favorable reviews by  
3 supervisors and his initiative on the job. You present no information as to the final  
4 disposition of the matter.

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

11 Based on the evidence presented, the hostility from other governmental sources  
12 appears to have abated. As indicated above, massive Federal governmental surveillance  
13 and disruption was discontinued well before the previous six-year period. Moreover, you  
14 do not present evidence similar to the affidavits filed by Federal officials during the 1985-  
15 1989 period, referred to above, indicating negative attitudes toward the SWP and the need  
16 to gather information on it. The incidents involving the naval employee and the airman  
17 are difficult to assess without complete information, although the airman's situation may  
18 present the possibility of a chilling effect on public association with the SWP.

19 Nevertheless, the continuation of harassment from private and local police sources  
20 during the previous six-year period, coupled with the long history of harassment of the  
21 SWP, is still sufficient evidence that there is a reasonable probability that the compelled  
22 public disclosure of previously exempted information will subject the persons in the  
23 exempted categories to threats or harassment from various sources. The Commission,  
24 therefore, grants the committees supporting the candidates of the SWP the exemption  
25 provided for in the consent agreements and in Advisory Opinion 1990-13, with one new  
26 condition described below. Consistent with the length of the exemption granted in 1990,  
27 this exemption is to last for the reports covering the next six years, i.e., through  
28 December 31, 2002.<sup>7</sup> At least sixty days prior to December 31, 2002, the SWP may

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<sup>7</sup> 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

1 submit a new advisory opinion request seeking a renewal of the exemption. If a request  
2 is submitted, the Commission will consider the factual information then presented as to  
3 harassment after 1996, or the lack thereof, and will make a decision at that time as to the  
4 renewal.

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

19 As indicated above, the Commission adds one new condition to the reporting  
20 requirements. In partial reporting exemptions granted to an SWP campaign committee  
21 and various SWP candidates for state or local office, the agencies administering  
22 campaign disclosure in the States of Washington and Iowa have required that the  
23 committees assign a code number to each contributor whose name and address is not  
24 being disclosed. The Iowa agency required that the committee keep books and records  
25 that would correlate the code numbers with the names and contributions. The  
26 Commission believes that a requirement of assigning a code number for each contributor  
27 and reporting that code number when disclosing a contribution by that person would  
28 enable a reviewer of that report (i.e., either the Commission staff or a member of the

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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

1 public) to determine whether contributions in excess of the limits of 2 U.S.C. §441a are  
2 being made. At the same time, such a requirement would not diminish the anonymity  
3 that is already given to contributors under Advisory Opinion 1990-13 and the consent  
4 decrees. Therefore, each committee entitled to the exemption should assign a code  
5 number to each individual or entity from whom it receives one or more contributions  
6 aggregating in excess of \$200 in a calendar year. That code number must be included in  
7 FEC reports filed by each committee in the same manner that full contributor  
8 identification would otherwise be disclosed. Consistent with the requirement that the  
9 committees comply with the recordkeeping provisions of the Act, the committee's  
10 records should correlate each code number with the name and other identification data of  
11 the contributor who is represented by that code.

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

15  
16 Sincerely,  
17  
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19  
20 John Warren McGarry  
21 Chairman  
22

23 Enclosure (AO 1990-13)  
24  
25