



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office *seef*

DATE: February 13, 2013

SUBJECT: Comment on Draft AO 2012-38
(Socialist Workers Party)

Attached is a timely submitted comment submitted by Allen Dickerson, Legal Director, and Zac Morgan, Staff Attorney, on behalf of the Center for Competitive Politics.

Attachment



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February 13, 2013

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Via Facsimile

Federal Election Commission
Attn: Office of the Commission Secretary
999 E Street, NW
Washington, DC 20453

RE: Public Comments on Draft Advisory Opinions 2012-38 ("Socialist Workers")

Dear Commissioners:

Founded in 2005, the Center for Competitive Politics ("CCP") is a non-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. CCP's mission, through litigation, public engagement, and scholarly research, is to defend the constitutional rights of speech, assembly, and petition. CCP submits this comment to the Federal Election Commission ("Commission") urging adoption of Draft A of Advisory Opinion 2012-38.

In the seminal campaign finance case of *Buckley v. Valeo*, the U.S. Supreme Court rejected an absolute minor party exemption to FECA's disclosure and registration requirements, and instead found an exemption for groups threatened by harassment and intimidation.¹ However, the Court "recognized that [if] unduly strict requirements of proof of such harassment or intimidation were required, "it could impose a heavy burden" on grassroots organizations."² Accordingly, the Court mandated that groups seeking an exemption "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."³ For evidentiary purposes, a "pattern of threats or specific manifestations of public hostility may be sufficient."⁴

¹ *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

² 424 U.S. at 74.

³ *Id.* (emphasis supplied).

⁴ *Id.*

There Is No Cognizable Government Interest in the SWP's Disclosures.

It is uncontested that the amount of public and private harassment and intimidation directed toward the Socialist Workers Party ("SWP") has decreased since the conclusion of COINTELPRO and the Cold War. But requiring the Socialist Workers Party to continually demonstrate the high levels of harassment and intimidation the party faced before 1990 would unquestionably pose the "heavy burden" the Court expressly disclaimed in *Buckley*.

Consequently, the Commission ought to defer to the allegations of the SWP and ensure that the party maintains the "breathing space" to be able to engage in the public debate.⁵ "Just as confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy, so too is citizen participation in these processes, which necessarily entails political speech and association under the First Amendment."⁶

The government interest in regulating the SWP is negligible. Despite running a candidate for President every four years since 1948, as well as a varying numbers of state and local candidates, the SWP has never elected a single person to elected office. Other minor parties, such as the Constitution Party or the Libertarian Party, have managed to elect individuals to state legislative office—or even to local city councils. Yet, the SWP has failed to elect even a single member of its party to so much a local water board. There is simply no risk of corruption or the appearance of corruption when contributors are donating to a party with a 60-year history of total defeat.

Perhaps recognizing this point, Draft B posits that "the SWP could be used in the future as a vehicle for diversion."⁷ That is, Draft B suggests that some other major party or major interest might fund the SWP to prop up a candidate which could peel off votes from a major party candidate.

First of all, this is entirely speculative—no past incident of diversion has been so much as alleged, while past harassment and reprisals are matters of historical record. Furthermore, why anyone would seek to use the SWP for such purposes is unclear. As both drafts admit, the SWP's support in previous national elections has dramatically fallen, from approximately 10,000 votes in both 2004 and 2008 to a mere 3,509 votes in 2012. The evidence in the record suggests that the SWP's

⁵ See *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

⁶ *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Thomas, J., dissenting) (internal citations and italics omitted).

⁷ Draft B at 21.

activities mostly consist of grassroots action such as tabling and passing out party literature—and even this has resulted in confrontations with local law enforcement.⁸ The SWP is hardly an organization ripe for clandestine politicking.

The Socialist Workers are a plainly unpopular vehicle, and would be a poor choice for a stalking horse. And of course, if any evidence to the contrary emerged, such as a suspiciously well-funded SWP candidate rising in the polls, any interested party could petition the Commission for a reconsideration of the SWP's status.

On balance, there is simply no governmental interest supporting a change in SWP's status.

The Risks of Reprisal, Harassment, and Intimidation are Disproportionately High for the SWP.

Additionally, as Draft A points out, the levels of alleged harassment and reprisal are particularly high *given the low numbers of SWP activists*. Only 118 people contributed to the committee in 2012, yet the SWP reports "45 incidents of alleged harassment or intimidation."⁹ In other words, there are nearly half as many reported incidents as there are contributors.

Likewise, the SWP's reports of alleged employment terminations suggests that there may be a 3.4 percent chance any given contributor to the party will face terminated employment. While the facts surrounding these terminations are not crystal clear, this is a staggeringly high number. If terminations are at 3.4 percent while SWP enjoys its exemption, there is a real risk that this number would increase further if more names were revealed. All Americans ought to be able to engage in political activity without fear that an employer will punish them for merely engaging in advocacy "at the core of the First Amendment."¹⁰

These examples, and the others listed in the SWP's petition and Draft A, surely qualify as a "pattern of threats or specific manifestations of public hostility" for the purpose of shielding the SWP from mandatory disclosures.¹¹

"The Constitution protects against the compelled disclosure of political associations and beliefs" and may "only [be permitted] if there is a substantial relation between the information sought and an overriding and compelling state interest."¹² Neither

⁸ Draft A at 9-10.

⁹ Draft A at 15.

¹⁰ See *Knox v. SEIU*, 132 S. Ct. 2277, 2288 (2012).

¹¹ *Buckley*, 424 U.S. at 74.

¹² *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982).

exists here, and accordingly the exemption ought to be continued until the end of 2015.

* * *

CCP appreciates the opportunity to comment on Advisory Opinion Request 2012-38. If the Commission has any questions or requires anything further, please do not hesitate contact the undersigned at (703) 894-6800 or by electronic mail at adickerson@campaignfreedom.org.

Respectfully submitted,



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