FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 21, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-13

Edward Copeland
Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C.
740 Broadway at Astor Place
New York, NY 10003-9518

Dear Mr. Copeland:

This responds to your letters dated July 2 and July 9, 1990, requesting an advisory opinion on behalf of the Socialist Workers Party National Campaign Committee and committees supporting candidates of the Socialist Workers Party ("the SWP") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to its eligibility for reporting exemptions granted in consent orders issued in Socialist Workers 1974 National Campaign Committee v. Federal Election Commission, Civil Action No. 74-1338 (D.D.C.).

In the above-captioned case, committees supporting candidates of the Socialist Workers Party brought an action against the Commission for declaratory, injunctive and affirmative relief, alleging that specific disclosure sections of the Act operate 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 case was resolved by a consent decree entered into by the plaintiffs and the Commission on January 2, 1979. This decree required the committees supporting SWP candidates to maintain records in accordance with the Act and to file reports in a timely manner. The agreement 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. It also expressly permitted the SWP committees to apply for an extension of the provisions.

On July 24, 1985, the court approved an updated settlement agreement with the same requirements and exemptions[2/] and provisions for extension of the reporting exemption. The exemptions were extended until the end of 1988. The SWP missed the deadline for reapplication for the exemption and, instead, is seeking an advisory opinion wherein the Commission determines whether the SWP committees remain entitled to the reporting exemptions.

I. The Applicable Law

Although the United States District Court has been the forum for the granting and extension of the reporting exemption to the requester, the Commission can consider a request for the application of an exemption to prospective behavior by the SWP, i.e., the filing of disclosure reports. See 11 CFR 112.1(b). The Commission may not grant a renewal of an exemption that could have been granted by the court. The Commission may, however, consider whether, under the facts presented by the requester, it should grant a new exemption.

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. 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 such 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.

In agreeing to the granting of the exemption and its renewal, the Commission has considered both "present" and historical harassment. The 1979 Stipulation of Settlement refers to the fact that the Commission was 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. 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 resultant harassment still exists. 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 provisions of laws directed against the Communist Party.

II. The Facts Presented

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 describe the long history of FBI and other governmental harassment of the SWP set out 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.

Beginning in 1941, the FBI began a generalized investigation of the SWP that was to last at least until 1976. With respect to informants, you enclose the report of the Special Master who was appointed to review the FBI's substantial informant files in connection with the ongoing litigation leading up to the above-described decision. 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).[3/] 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. The SWP was also included on the Attorney General's list of subversive, communist, or fascist organizations whose members, under the Employee Loyalty Program, would be subject to a full field investigation if applying for or holding any civilian Federal governmental position. 642 F. Supp. at 1396-1400.

You maintain that there is still Federal governmental hostility toward the SWP. You refer to 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. You have enclosed affidavits submitted during 1987 in connection with this case by officials of the Office of Personnel Management, the State Department, the Immigration and Naturalization Service, and the Defense Investigative Service expressing the need for the information on the SWP based on certain unfavorable perceptions of the SWP. The OPM official stated that the information was important because the SWP and YSA "in the past were opposed to our form of Government and the national interest." The representative of the State Department characterized the SWP as a "hostile organization which has consistently posed a threat to free governments."

The court in this 1987 decision, and in the companion 1986 decision (at 642 F. Supp.), conceded the propriety of the type of inquiry proposed by the government officials, wherein SWP membership would not be dispositive but might be a reasonable basis for questioning the person as to whether he or she should be entrusted with sensitive data pertaining to national security. 666 F. Supp. at 623; 642 F. Supp. at 1427-1428. However, the court in the companion 1986 decision warned that "where information about the SWP or YSA is considered relevant, there must be a rigorous regard for the facts about these organizations" and "[a]ny indication that the SWP or YSA has a current program of carrying out violent revolution or acts of violence or terrorism would not reflect the presently known facts." 642 F. Supp. at 1428. The court in that case referred a number of times to the generally peaceful and lawful nature of SWP's activities, if not its ideology. 642 F. Supp. at 1370-75, 1380, 1416. The statements in the affidavits were made even after the court had made these assessments of SWP's activities.

Your request makes reference to a number of incidents over the past five years indicating primarily private harassment of the SWP and those associating with it.

You enclose an article published in the Midlands Business Journal of April 21-27, 1989, promoting a security firm's services in labor disputes and urging companies to screen their employees. According to the article, the firm has compiled "an extensive data base and information index on violent domestic organizations and communist and Marxist groups." The firm referred to its work during the Hormel strike, stating that the local union was "absolutely infiltrated" by the SWP and that, following the strike, the firm started compiling names and photographs of "agitators." The firm claimed that, in another case involving product sabotage, it checked its index and found several names of persons "involved" with the SWP.

You also make reference to a series of incidents involving threats or violence against the SWP and SWP offices. These include: (1) threatening phone calls in February 1990 to the local office of the SWP in New York City (located on the same premises as the Pathfinder bookstore) the

night before a public forum on Cuba was to be held at SWP offices; (2) threatening phone calls in January 1990 to a Pathfinder bookstore where the local SWP headquarters in Kansas City are located, followed by a rock through the store window, after a meeting on Panama sponsored by the SWP newsweekly, The Militant, was held on the premises; (3) bricks thrown through the windows of the SWP office in Omaha in March 1989; (4) a demonstration in San Jose in April 1985 outside an SWP-sponsored conference on Vietnam during which demonstrators attempted to intimidate people from attending; and (5) a shot fired through the window of a socialist bookstore and campaign headquarters of an SWP mayoral candidate in Atlanta in May 1985.

You also make reference to local government harassment of persons distributing SWP campaign literature. In April, 1988, an SWP gubernatorial candidate in West Virginia was ordered to remove his literature table in a public park by an officer who, according to the affidavit of the candidate, stated words to the effect of, "I don't like what you have on your table and I order you to take it down." You cite two examples, one in 1987 in Masontown, Pennsylvania, and one in 1986 in Newark, New Jersey, of persons distributing and selling SWP literature who were arrested and convicted for violating peddler's ordinances. On appeal, these convictions were overturned on First Amendment grounds.

You submit a number of documents pertaining to threats, harassment, and violence during the past 10 years in Miami against individuals associated with left-wing views, including the 1983 fire-bombing of the Militant Book Store, which served as a local SWP office. You state that the incidents set forth in these exhibits were submitted to the court in McArthur v. Smith, 716 F. Supp. 592 (S.D.Fla. 1989), in which the court decided that certain Florida campaign disclosure laws were unconstitutional as applied to the SWP in Miami's nonpartisan mayoral race. In that case, although the State of Florida contested the probability of threats by government officials, "[t]he parties mutually conclude[d]... that no material issue of fact exists regarding the danger in Miami of publicly associating with the SWP." 716 F. Supp. at 593.

Based on the foregoing information, it appears that, during the past five years, the SWP has continued to experience harassment from several sources. The recent events cited, along with the history of governmental harassment, indicate that there is a reasonable probability that compelled disclosure of the names, addresses, occupations, and names of employers of those categories of persons listed in the 1979 and 1985 consent agreements will subject them to threats, harassment, or reprisals from governmental or private sources. The Commission, therefore, grants the committees supporting the candidates of the SWP the exemption provided for in the consent agreements. Consistent with the length of the exemption granted in the original 1979 court decree, this exemption is to last through the next two presidential year election cycles, i.e. until December 31, 1996. At least sixty days prior to December 31, 1996, 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 1989, or the lack thereof, and will make a decision at that time as to the renewal.

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. As provided for in the consent agreements, 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.

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)

Lee Ann Elliott
Chairman for the Federal Election Commission

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/ The Special Master's Report was also used as a basis for information by the U.S. District Court in the Brown case and information from the report was cited by the Supreme Court which affirmed the lower court decision. Brown, 459 U.S. at 99.