ORAL ARGUMENT SCHEDULED FOR MAY 9, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5312

JOHN HAGELIN, *et al.*

Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

SUMMARY OF ARGUMENT

Appellees (collectively "Hagelin") have not shown that the Federal Election Commission's ("FEC" or "Commission") dismissal of their administrative complaint was arbitrary, capricious, or contrary to law. Judicial review of the FEC's exercise of its prosecutorial discretion finding that there was no "reason to

believe" that the Commission on Presidential Debates ("CPD") violated the Federal Election Campaign Act is highly deferential. Contrary to Hagelin's argument, there is no reason to ignore binding precedent and lower the deference afforded to the Commission in this case.

Hagelin cannot meet his burden of demonstrating that the Commission abused its discretion when it found that the evidence before it was insufficient to find "reason to believe" that CPD acted out of partisanship when it made a general decision to exclude non-debating candidates from the audience of the 2000 presidential debates. Both Hagelin and the district court mistakenly approached this lawsuit as if the court should make its own determination about CPD's motivation. The relevant standard, however, is whether the FEC's finding was a reasonable interpretation of the evidence before it, not whether the agency's determination was the only one, or even the best one, that could have been made.

The parties and the district court all agree that CPD feared disruption during the debates from Ralph Nader and Patrick Buchanan, and then made a general decision in response to exclude all of the non-debating candidates from the audience of the debate. The parties disagree about what inferences should be drawn from these facts. The FEC found CPD's decision to be a general response to a perceived threat of disruption of the live, televised debates. The Commission did not ignore evidence in the administrative record; it relied upon the same

deposition testimony that the district court discussed, but simply drew different inferences from that evidence. The Commission was not required to discuss every piece of evidence before it, and the General Counsel's Report implicitly acknowledged that all of the non-debating candidates had not made threats of disruption. Hagelin's insistence that CPD's action can only been interpreted as a partisan maneuver, and that the FEC ignored evidence dispositive of such a conclusion, is nothing more than conclusory ipse dixit.

Hagelin's heavy reliance upon Buchanan v. FEC, 112 F.Supp. 2d 58 (D.D.C. 2000), is misplaced. Even if that district court decision were binding precedent, there is nothing in it that would require the Commission to find "reason to believe" against CPD in this case. The decision of the district court should be reversed.

ARGUMENT

The Federal Election Commission ("Commission" or "FEC") did not abuse its discretion when it found that there was no "reason to believe" that the Commission on Presidential Debates ("CPD") had violated the Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. 431-55. In his brief before this Court, Hagelin fails to explain how CPD's decision to exclude from the debate audience candidates who had already been lawfully excluded from participating in the 2000 presidential debates was an action that "endorse[d], support[ed] or oppose[d] political candidates or political parties," which is the standard in the FEC's

regulation governing debate sponsoring organizations. 11 C.F.R. 110.13(a). Like the district court below, Hagelin mischaracterizes what is really at issue in this case, i.e., the courts' deference to the Commission's application of its own statute and regulation in its exercise of prosecutorial discretion, not a de novo evaluation of the wisdom of CPD's efforts to avoid disruption of the live, televised debates.

I. THE APPLICABLE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL

Although Hagelin concedes (Br. at 5) that "substantial deference" is to be afforded the Commission's decision to dismiss his administrative complaint, Hagelin nevertheless attempts to dilute the deference owed to the Commission. None of his arguments, however, has merit.[1] Under 2 U.S.C. 437g(a)(8), "[a] court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the Act … or was arbitrary or capricious, or an abuse of discretion.'" Common Cause v. FEC, 108 F.3d 413, 415

[1] While Hagelin does not contest that this Court reviews the district court's grant of summary judgment de novo (see FEC Br. at 12), he asserts (Br. at 6 n.1) that this case is different because "[i]n this proceeding, the key facts were disputed…." This argument "misunderstand[s] the role the district court plays when it reviews agency action[; t]he district court sits as an appellate tribunal … [and] the entire case on review is a question of law, and only a question of law." Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1225-26 (D.C. Cir. 1993). What Hagelin characterizes as a factual dispute is actually a disagreement between the parties about what inferences may be drawn from the facts in the administrative record, a question of law this Court reviews de novo. See infra pp. 13-19.

(D.C. Cir. 1997) (quoting Orloski v. FEC, 795 F.2d 156, 161 (D.C. Cir. 1986)); FEC Br. at 13-15. The "arbitrary and capricious" standard is a highly deferential one, as often stated in judicial opinions reviewing challenges to many different types of agency actions.

The FEC's determination whether there is "reason to believe" the law has been violated in a Matter Under Review ("MUR") follows a statutorily-mandated set of procedures that requires evaluation of evidence presented by complainants and respondents, and the Commission's expert interpretation and application of the relevant law. Indeed, both FEC v. Democratic Senatorial Campaign Comm. ("DSCC"), 454 U.S. 27 (1981), and Orloski involved review under 2 U.S.C. 437g(a)(8) of matters dismissed at the "reason to believe" stage of the enforcement process — the same situation presented in this case — and in both of those cases the courts were highly deferential to the Commission's exercise of its prosecutorial discretion. As the Supreme Court noted, the powers that Congress vested in the agency to enforce the FECA, the statutory membership limitation that prevents the six-person Commission from falling under the domination of any one political party (2 U.S.C. 437c(a)(1)), and the agency's experience in "decid[ing] issues charged with the dynamics of party politics, often under the pressure of an impending election[,]" all render the FEC "precisely the type of agency to which deference should presumptively be afforded." DSCC, 454 U.S. at 37. "[J]udges in

court owe large deference to a Commission disposition so long as the FEC (or its General Counsel) supplied reasonable grounds for reaching (or recommending) the disposition." Democratic Congressional Campaign Comm. v. FEC, 831 F.2d 1131, 1134 (D.C. Cir. 1987); see id. at 1135 n.5 ("In the absence of prior Commission precedent …, judicial deference to the agency's initial decision or indecision would be at its zenith"). Thus, contrary to Hagelin's argument (Br. at 8 n.2), this Court has found that "[d]eference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer." Common Cause v. FEC, 842 F.2d 436, 448 (D.C. Cir 1988) (emphasis added).

Thus, Hagelin's attempt (Br. at 6-7) to distinguish a case like AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000), because it stated specific grounds for granting "special deference" to the FCC's decision that may not apply to the FEC, misses the point. In our opening brief, we cited (Br. 12-14) that case and others for their discussion regarding the proper application of the "arbitrary and capricious" standard, not the underlying reasons why it is the appropriate standard for reviewing the decisions of varying agencies. Indeed, in AT&T Corp., the Court's discussion of the "arbitrary and capricious" standard, both as a general matter and as applied in that particular dispute, cited to decisions reviewing actions taken by the Department of Housing and Urban Development (Kisser v. Cisneros, 14 F.3d

615, 619 (D.C. Cir. 1994)), the Secretary of the Army (Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989)), and the National Labor Relations Board (Patrick Thomas v. NLRB, 213 F.3d 651, 657 (D.C. Cir. 2000)).

Hagelin also attempts to dilute the effect of the "arbitrary and capricious" standard in this case by claiming (Br. at 7-8) that other cases cited in our opening brief are inapplicable because they "arose out of evidentiary hearings" and are "far removed" from the FEC's statutory enforcement proceedings. As we just explained, however, both DSCC and Orloski involved review of the Commission's decisionmaking at the "reason to believe" stage in the enforcement process; deferential review was found fully applicable in those cases despite the absence of evidentiary hearings, and it is equally applicable here. Notably, Hagelin cites no cases for his implied proposition that an agency must conduct an evidentiary hearing in reaching its decision in order to merit deference under the "arbitrary and capricious" standard.[2]

Finally, in his attempt to avoid the clear precedent that courts afford special

[2] Hagelin summarily dismisses (Br. at 7) as "a laundry list of other decisions" a number of precedents that undermine his arguments to this Court. Those uncontested principles include: that a reviewing court should not substitute its alternative findings where an agency's findings are supported by substantial evidence, that an agency's explanation of its decision need not note each piece of evidence that was part of the record and reviewed during the administrative proceeding, and that an agency is entitled to a presumption of regularity in its decisionmaking. FEC Br. at 24-26.

deference when an agency construes its own regulations, Hagelin claims (Br. at 8-9) that his administrative complaint (and presumably the FEC's dismissal decision), was based on alleged violations of the governing statute as well as Commission regulations. Of course, any case that involves an agency's construction of its own regulations indirectly involves that agency's authority derived from the underlying statutory provisions that give an agency the power to regulate. But here, the FECA does not contain any provision that explicitly addresses sponsors of candidate debates. It is only the Commission's regulation (11 C.F.R. 110.13) that sets the requirements that debate sponsors must meet, and that is the core provision at issue in this case.[3]

Hagelin has not challenged the validity of the debate regulation; he complains only that the FEC incorrectly applied that regulation to CPD. Indeed, it was only because the Commission found no reason to believe CPD failed to comply with the debate regulation that it in turn found that "there [was] no reason to investigate the CPD's alleged violations of the Act's contribution and expenditure prohibitions and limitations, or its alleged failure to register and report

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[3] The Commission's regulation, 11 C.F.R. 110.13(a), explains how "nonpartisan activity designed to encourage individuals to vote or to register to vote," 2 U.S.C. 431(9)(B)(ii), is to be evaluated in the context of the sponsorship of candidate debates. Congress has explicitly deferred to those regulations in exempting debates that satisfy them from the new statutory restraints on electioneering communications. See FEC Br. at 5 n.1.

as a political committee." JA 249. The Commission's construction and application of that regulation is thus the dispositive legal issue in this case. Therefore, the cases cited by the Commission (Br. at 14-15) regarding the higher deference afforded to an agency's interpretation of its own regulations are fully apposite.

In sum, Hagelin's effort to devalue the deferential nature of the "arbitrary and capricious" standard of review in connection with review of FEC decisions to dismiss administrative complaints at the "reason to believe" stage must fail.

II. THE COMMISSION DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED HAGELIN'S ADMINISTRATIVE COMPLAINT

Hagelin does not dispute that the relevant question here is whether the Commission abused its discretion when it concluded that there was insufficient evidence to find "reason to believe" that CPD acted out of partisanship and thereby failed to comply with the debate regulation. Specifically, Hagelin does not dispute our explanation (FEC Br. at 15-16) of what this case is not about: Hagelin does not challenge the Commission's debate regulation or the criteria CPD used to invite presidential candidates to debate in the 2000 election cycle. Hagelin does not argue that the Commission's regulation even addresses who may sit in the audience of a candidate debate. Hagelin does not deny that the applicable test in the regulation is whether an organization "endorse[s], support[s] or oppose[s] political candidates or political parties," 11 C.F.R. 110.13(a)(1). Nor does Hagelin

claim in this case that any of the appellees were unlawfully excluded from participating in the debates themselves.

Instead, Hagelin's entire case rests upon the assertion that CPD's exclusion from the debate audience of the same group of candidates it had lawfully excluded from the debates themselves constitutes support or opposition of candidates or parties that disqualifies CPD as a debate sponsor under 11 C.F.R. 110.13. Hagelin must demonstrate that the Commission abused its discretion when it evaluated the evidence before it and concluded that there was an insufficient basis for finding "reason to believe" that CPD had violated the Act when it made a generic decision to exclude these non-debating candidates from the audience. Hagelin cannot meet this burden. Indeed, Hagelin offers neither evidence nor even a theory demonstrating why exclusion from the audience of a debate necessarily constitutes opposition to a candidate's election even though exclusion of the same candidate from the debate itself does not. Nor does he offer any notion of how those participating in the debate would be "endorsed" or "supported" based on who is sitting in the audience listening.

A. THIS CASE IS ABOUT THE COMMISSION'S INTERPRETATION OF FACTS AND APPLICATION OF ITS REGULATION, NOT ABOUT THE COMMISSION'S FAILURE TO EXAMINE THE EVIDENCE BEFORE IT

Contrary to Hagelin's contention (Br. at 9), the heart of this case is a dispute over how to interpret the facts that were before the FEC when it decided to dismiss

Hagelin's administrative complaint. Both Hagelin and the district court have erred by approaching this case as if it were the court's role as fact finder to decide the best inference about CPD's motivation to draw from the evidence about CPD's decisionmaking. The actual legal question before the Court is, instead, whether there was sufficient evidence in the administrative record to support the FEC's conclusion that CPD's actions did not violate the law. The district court was mistaken when it supplanted the Commission's view of the evidence with its own and found on this basis that the Commission's application of its regulation was contrary to law.

In dismissing Hagelin's administrative complaint the Commission did not express approval of CPD's exclusion decision; the dismissal expresses no view about whether CPD overreacted, behaved foolishly, or did the right thing. Rather, the Commission concluded only that the evidence presented was insufficient to find reason to believe that CPD was "animated by partisanship" in making its decision. JA 248-249.

The administrative record contains many facts that support the FEC's determination, and thus Hagelin's insistence (Br. at 10) that "the facts in the Record, which were attested to by the CPD itself, contradict and unquestionably negate the FEC's findings," is overbroad and untrue. What Hagelin appears to argue is that if there are any facts in the administrative record that could have

supported a finding by the FEC that there was "reason to believe," then it was arbitrary and capricious for the Commission not to make such a finding. But such a standard would entirely reverse the meaning of the arbitrary and capricious test. It is not enough to assert, as Hagelin does, that another result could have been reached based on evidence in the record, because "[a]n agency's conclusion 'may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.'" Sec'y of Labor, Mine Safety and Health Admin. v. Federal Mine Safety and Health Review Comm'n, 111 F.3d 913, 918 (D.C. Cir. 1997) (quoting Western Air Lines, Inc. v. CAB, 495 F.2d 145, 152 (D.C. Cir. 1974)). Thus, once a reviewing court has found that an agency's decision is supported by substantial evidence, that is the end of the inquiry; "[t]his sensibly deferential standard of review does not allow us to reverse reasonable findings and conclusions, even if we would have weighed the evidence differently." Sec'y of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096, 1104 (D.C. Cir. 1998). See also Chrysler Corp. v. U.S. EPA, 631 F.2d 865, 890 (D.C. Cir.) ("This court may not displace the Administrator's 'choice between two fairly conflicting views,' even if we 'would justifiably have made a different choice had the matter been before (us) de novo.'") (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)), cert. denied, 449 U.S. 1021 (1980); FEC Br. at 24-25.

B. THE PARTIES AND THE DISTRICT COURT AGREE THAT CPD MADE A GENERAL DECISION TO EXCLUDE ALL THIRD-PARTY CANDIDATES FROM THE DEBATE AUDIENCE, BUT DRAW DIFFERENT INFERENCES ABOUT WHY CPD ACTED AS IT DID

Both Hagelin and the Commission, as well as the district court, have premised their differing conclusions about this case on the same central, undisputed facts. All agree that in October 2000, CPD became aware of public statements by candidates Ralph Nader and Patrick Buchanan that led it to fear potential disruption of the presidential debates on live television, and that CPD then made a decision that generally applied to all the non-debating candidates to exclude them from the debate audience. FEC Br. at 22-24; Hagelin Br. at 12-13 & n.6; JA 314-316 (district court opinion).

The Commission interpreted CPD's action as a general response to the perceived threat of disruption, even if the action itself was broad in proportion to the available information: CPD had information regarding Nader and Buchanan, and decided to exclude all of the non-debating candidates who might have been similarly offended by CPD's decision to exclude them from the debates. Hagelin and the district court, on the other hand, interpreted precisely the same facts as evidence of partisan bias on CPD's part. This is a clear and classic example of a dispute over the interpretation of evidence. In such circumstances, deference to the agency's interpretation is appropriate, while substitution of the reviewing court's alternative view is not. See supra pp. 11-12; FEC Br. at 24-25.

Hagelin argues (Br. at 12-16) that the district court correctly found that the FEC ignored evidence in the record that contradicted the conclusion that CPD's actions were not motivated by partisanship. But the Commission did not ignore evidence; it simply drew a different inference than the district court about CPD's motivation, from the same evidence in the administrative record. Indeed, the General Counsel's Report contains discussions of, citations to, and quotations from the same deposition transcripts upon which the district relied in its own assessment of what or whom the CPD feared. Compare JA 246 & n.5, 248 with JA 314 n.9, JA 315 nn.12, 14, and JA 316 nn.16-17.

Specifically, the excerpts from Lewis Loss's deposition clearly indicate that CPD's fear of disruption by a non-debating candidate became a generalized fear about excluded candidates, even though it was prompted by the specific threats or complaints of only two of the disappointed candidates. See JA 37 at 47:21-48:5, 50:9-51:3; JA 39 at 100:14-101:8. The General Counsel's Report expressly recited the administrative complaint's allegation that CPD decided generally to exclude third-party candidates from the debate audience (JA 246). Although the Report did not quote the phrase "general application" that CPD's counsel had used to describe the organization's decision (JA 37 at 50:16-18), such an interpretation of CPD's decision is inherent in the Report's reasoning and conclusion that CPD's action was not "animated by partisanship" (JA 248). See EchoStar Communications

Corp. v. FCC, 292 F.3d 749, 755 (D.C. Cir. 2002) ("Both the Commission's reasoning and its actual holding 'may reasonably be discerned[]' … Making the obvious express would have done no harm, but neither did leaving it implicit") (citation omitted). Moreover, the General Counsel's Report expressly cites Mr. Loss's deposition regarding his "serious reservations about a scenario of admitting such a [third-party] candidate and trying to control the disruption," notes that additional testimony from Mr. Loss and Mr. Fahrenkopf supported CPD's explanation, and concludes that "CPD … has presented substantial information indicating that its [exclusion] decision was based on concerns of potential disruption during live television broadcasts, not partisanship." JA 248 (emphasis added). [4]

[4] Hagelin erroneously accuses (Br. at 9, 16-19) the Commission of presenting post hoc arguments in its opening brief. Much of what Hagelin cites are merely responses to the errors made by the district court. With respect to the rest, while the Commission's brief sometimes used different words than the General Counsel's Report to the Commission, a more detailed explanation in a brief of the reasoning and evidence underpinning the agency's decision is not impermissible post hoc rationalization. See Lucile Salter Packard Children's Hosp. at Stanford v. NLRB, 97 F.3d 583, 592 n. 12 (D.C. Cir. 1996) ("Although it is true that some of the explanations offered by the [agency] in its brief go into somewhat more detail than in its actual ruling, their essence can clearly be found in the [agency's] rationale"); cf. GSA v. FLRA, 86 F.3d 1185, 1188 (D.C. Cir. 1996) ("We have even deferred to 'agency counsel's litigative positions' where we were certain that they did not differ from the agency's") (citations omitted). Because the Commission's briefing does not present an "agency litigating position[] that [is] wholly unsupported by" the reasoning explained in the General Counsel's Report, Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212 (1988), it is not post hoc argumentation.

Thus, Hagelin's arguments that the Commission ignored dispositive evidence are little more than ipse dixit. For example, after listing several facts about CPD's actions, Hagelin concludes (Br. at 13-14, quoting district court opinion) that the "totality of this evidence, as the district court recognized, demonstrates that 'CPD's policy was not motivated by fear of disruption by other third party candidates,' given that CPD's own officials candidly admitted that they took no 'measures to exclude non-candidates from disrupting the debates[.']" But the Commission reached a different conclusion after reviewing this same evidence, and it is the agency's interpretation, not the district court's, that is entitled to deference.

Taking this ipse dixit one step further, Hagelin cites (Br. at 16) the district court's conclusion that the FEC ignored the fact that there was an absence of evidence that third-party candidates other than Nader or Buchanan gave CPD a subjective fear that they might disrupt the live debates if seated in the audience. See also JA 317 & n.19 (district court opinion). But we have already shown above that the General Counsel recognized that CPD's general decision to exclude the non-debating candidates stemmed from explicit statements by one or two of them, which is an implicit acknowledgment that the other excluded candidates had not made any such threats. As the Commission explained in its opening brief (at 25-26), an agency is not required to exhaustively list each and every piece of

evidence it has examined, and explain its assessment of each and every fact, in writing its explanation for a decision. See also SBC Communications Inc. v. FCC, 56 F.3d 1484, 1492 (D.C. Cir. 1995) ("The Commission stated that it reviewed the documents…. The agency is not obliged to summarize in its decision the contents of all of the documents in the record before it.").

In addition, the record's silence about the extent to which third-party candidates other than Nader and Buchanan may have presented a risk of disruption does not, as Hagelin asserts (Br. at 16), prove that partisanship was the motive behind CPD's exclusionary decision. See also JA 315-317 (district court opinion). While CPD officials stated that they did not have the same type of information about other non-debating candidates that they had about the "concrete threat" they perceived from Nader (see JA 315-316 & n.14), they did not disclaim subjective fears regarding other non-debating candidates who were in the same position as Nader. Indeed, Loss's testimony about making a decision of "general application" does not, by itself, indicate why the generalized decision was made. Although both Hagelin and the district court jumped to the conclusion that only partisanship could explain CPD's generalized decision (Hagelin Br. at 16), the FEC reasonably viewed the same evidence differently. The Commission accepted (JA 248) CPD's explanation that "its decision was based on concerns of potential disruption during live television broadcasts, not partisanship." Because the evidence is thus subject

to different interpretations, the district court erred when it found that the Commission's view of the evidence was impermissible.[5]

Both Hagelin and the district court also contend that CPD's policy regarding third-party candidates, without similarly excluding supporters of third-party candidates, further demonstrates that CPD's actions had to be "partisan." (Br. at 18-19; JA 316). Hagelin does not explain why excluding everyone who might support a third-party candidate should be viewed as a less "partisan" action than excluding only candidates who were denied invitations to debate. Common sense indicates that CPD's decision to exclude only the non-debating candidates, who were similarly situated to Nader, was a more direct and measured response to the threat it perceived than expanding its decision to a quixotic attempt to identify all potentially disorderly supporters of the third-party candidates. (Hagelin's suggestion, Br. at 18, that CPD should have identified and excluded third-party supporters based upon their lapel pins, is absurd.) Moreover, Hagelin does not

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[5] The logic of Hagelin's argument is also flawed because it knows no bounds. Hagelin insists (Br. at 15-16), in line with the district court's decision, that without affirmative evidence that CPD feared potential disruption from each candidate it excluded from the 2000 debates, CPD's decision was necessarily "partisan" and therefore the FEC's dismissal of his complaint was contrary to law. According to this argument, even if CPD had subjectively feared disruption from most of the third-party candidates, it still would have been guilty of partisanship if it excluded any candidate about whom it lacked a concrete, personalized concern of disruption. In other words, according to Hagelin, any generalized decision by CPD in such circumstances would necessarily indicate undue partisanship. Hagelin offers nothing, however, to support such reasoning.

respond to our argument (Br. at 23) that the district court erroneously criticized CPD's decision as both too broad and too narrow. In essence, Hagelin (Br. at 18-19) and the district court infer partisanship whenever CPD could have excluded fewer people to more narrowly target those most likely to disrupt the debates, as well as whenever CPD could have excluded more people to better demonstrate how serious it really was about preventing disruption. It was not arbitrary for the Commission to eschew this kind of darned-if-you-do-darned-if-you-don't reasoning.[6]

C. THE BUCHANAN CASE DOES NOT CONTROL THE OUTCOME HERE

Hagelin's brief (at 11-12) assumes that, to the extent his administrative complaint made allegations regarding CPD's origins and management that echoed the evidence before the court in Buchanan v. FEC, 112 F.Supp.2d 58 (D.D.C. 2000), the Commission would be required to begin where the Buchanan case left off and apply a one-way ratchet to any further allegations or evidence. Even while

[6] Although CPD is not a governmental entity subject to the requirements of the First Amendment, Hagelin's argument is reminiscent of the type rejected by the courts regarding an "underinclusive" challenge to a regulation of speech. See, e.g., Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995) ("But a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals."), cert. denied, 517 U.S. 1119 (1996). CPD was not required to exclude as many potentially disruptive people as possible in order to prove that it was not motivated by partisanship.

conceding that the Buchanan decision upheld the FEC's dismissal of a complaint challenging the legality of the same debates at issue here, Hagelin interprets the opinion in that case to mean, colloquially, that one more straw of evidence must break the camel's back. However, even if that district court decision were binding on this Court, it does not say, expressly or implicitly, that one more bit of evidence added to the sum total presented to the Commission in the Buchanan administrative matter would require the FEC to find that CPD violated the debate regulations. Thus, Hagelin's claim (Br. at 12) that he has presented "the requisite contemporary evidence of partisan conduct" by CPD — as if any such information would pass some judicially-drawn line of no return — is simply a non sequitur.

Hagelin's brief (at 11) quotes a portion of the Buchanan opinion in which, according to appellees, the district court judge "took pains to acknowledge the credibility and relevance of the plaintiffs' evidence" in that matter. After that portion of the opinion, however, the court made clear that it is the Commission's evaluation of the evidence that is most important:

> As the D.C. Circuit has noted, "[t]he 'reason to believe' standard ... itself suggests that the FEC is entitled, and indeed required, to make subjective evaluation of claims." Orloski, 795 F.2d at 168. Thus, the FEC is expected to weigh the evidence before it and make credibility determinations in reaching its ultimate decision. See id. As long as the FEC presents a coherent and reasonable explanation of that decision, it must be upheld. See Carter/Mondale [Presidential Comm., Inc. v. FEC], 775 F.2d [1182,] 1185 [(D.C. Cir. 1985)].

> Here, the General Counsel's terse explanation could have been more clear and thorough. However, it is apparent from the report that in the absence of any contemporaneous evidence of influence by the major parties over the 2000 debate criteria, the FEC found evidence of possible past influence simply insufficient to justify disbelieving the CPD's sworn statement, corroborated by the DNC and RNC, that the CPD's 2000 debate criteria were neither influenced by the two major parties nor designed to keep minor parties out of the debates. While reasonable people could certainly disagree about whether the [FEC]'s credibility determination was correct, under the extremely deferential standard of review that I must apply, the FEC is entitled to the benefit of the doubt ….

Buchanan, 112 F.Supp.2d at 72-73 (emphasis added). Moreover, the "contemporaneous evidence" the Buchanan court found absent was regarding who may actually participate in the presidential debates — i.e., "influence by the major parties over the 2000 debate criteria" — not merely evidence about who could sit quietly in the audience. And there is not even an allegation in this case that "the major parties" had any role in CPD's decision about who would be admitted to the audience.

In any event, as in Buchanan, the Commission's determination here is entitled to deference — or, as the court phrased it in Buchanan, "the benefit of the doubt." After reviewing the new evidence submitted by Hagelin, the Commission concluded that it was not evidence of partisanship, and therefore provided no basis for revisiting the Commission's prior determination in the Buchanan MUR that the other information Hagelin cites did not support a finding of "reason to believe" in prior matters concerning CPD. Thus, the FEC did not "misapply" the Buchanan

decision as Hagelin asserts (Br. at 4-5), but fully considered the "contemporaneous evidence" about CPD's actions in 2000, and reasonably concluded that it was not evidence of partisanship that would warrant reopening the Commission's previous conclusion that there was no reason to believe CPD was ineligible to sponsor debates under the Commission's regulation. This was a decision well within the Commission's prosecutorial discretion, and the district court erred in refusing to defer to it.

CONCLUSION

While conclusions different from the one reached by the FEC might be reasonable, so long as the Commission's determination that there was no "reason to believe" CPD violated the Act is supported by evidence in the record, Hagelin's attempt to defend the district court's substitution of its own conclusion cannot be sustained. Thus, even if the district court's view of the evidence is as reasonable as the Commission's, the Court should reverse the district court's decision and find that the Commission did not act contrary to law when it dismissed Hagelin's administrative complaint.

Respectfully submitted,

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March 10, 2005

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