



FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Jonathan Jenkins)	MUR 7413
Jonathan Jenkins for Senate)	
and Chris Ehlinger in his official)	
capacity as treasurer)	
Indie Party, Co.)	
)	

**STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. “TREY” TRAINOR III**

In this Matter, the question before the Commission was whether Indie Party, Co. (“IPC”), a for-profit corporation, qualified as a political committee and subsequently failed to register with and report to the Commission, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).

Our Office of General Counsel (“OGC”) recommended that we find reason to believe that IPC violated 52 U.S.C. §§ 30102, 30103, and 30104. We declined to do so because the evidence before us did not support a reason-to-believe finding that IPC accepted contributions or made expenditures exceeding \$1,000, a precondition to becoming a political committee. We also note that, given the lack of available evidence that IPC made contributions or received expenditures exceeding \$1,000, the question of whether the entity was controlled by a Federal candidate or had the “major purpose” of influencing Federal elections is immaterial. Instead, the evidence best supports the view that IPC was a business that properly received payment for the services it rendered to a candidate’s authorized committee (which, in turn, reported disbursing funds for those services), while seeking to market itself to investors and potential clients as a tech-savvy “disruptor” within the market for political campaign services.

I. PROCEDURAL BACKGROUND

The Complaint in this matter was filed on June 11, 2018, and asserts that Jonathan Jenkins, a 2018 senatorial candidate from Texas (“Jenkins”), his authorized committee, Jonathan Jenkins for Senate (the “Jenkins Committee”), and IPC variously violated the Act by making and receiving illegal corporate in-kind contributions, violating the Act’s soft money provisions, failing to register IPC as a political committee, and illegally utilizing a cryptocurrency ostensibly issued by IPC.¹

¹ Compl. at 1–6, MUR 7413 (Jonathan Jenkins for Senate, *et al.*).

OGC recommended that the Commission take no action at this time with respect to all but one of these allegations: that IPC failed to register and report as a political committee in violation of 52 U.S.C. §§ 30102, 30103, and 30104.² On June 10, 2021, the Commission declined by a vote of 3-3 to approve this recommendation, and unanimously voted to close the file.³

II. FACTUAL BACKGROUND

IPC was organized on January 16, 2018 as a for-profit corporation in the state of Texas, and its formation documents list Jenkins as its sole director.⁴ Two days later, IPC also appears to have incorporated in Delaware.⁵ In March or early April of 2018, IPC issued a press release announcing its launch at Austin’s SXSW festival⁶ and its intention to, among other things, “redefin[e] political capital through the creation of a political marketplace powered by the Indie Token, a virtual political currency created by Indie Party Co. that harnesses blockchain technology to make the campaign finance system more transparent and engaging to the American voter.” IPC intended to offer “related technologies and tools that will power the campaigns of candidates who want to run outside of the two-party system,” and “develop[] a digital platform for campaigning and governing designed to engage voters by opening a direct line of communication to Indie candidates on the issues that matter most to them.”⁷

On April 9, 2018, IPC notified the Securities and Exchange Commission (“SEC”) that it intended to raise capital in a Rule 506(c) offering.⁸ In general, Rule 506(c) provides for a regulatory safe harbor to the Securities Act of 1933 that allows issuers to privately sell securities without registering the offering with the SEC, provided that the issuer takes reasonable steps to ensure that each purchaser is an “accredited investor.”⁹

On May 2, 2018, Jenkins filed a Statement of Candidacy,¹⁰ and the Jenkins Committee filed a Statement of Organization.¹¹ On May 3, 2018, Jenkins issued a press release formally announcing his candidacy for U.S. Senate in Texas as an independent.¹² The

² First Gen. Counsel’s Report at 10, MUR 7413 (Jonathan Jenkins for Senate, *et al.*).

³ Certification (June 10, 2021), MUR 7413 (Jonathan Jenkins for Senate, *et al.*).

⁴ Tex. Comptroller of Pub. Accounts, File No. 0802907658 (Effective Date Jan 16, 2018).

⁵ Del. Dep’t of State, Div. of Corps., File No. 6715737 (Effective Date Jan 18, 2018).

⁶ SXSW (also known as “South by Southwest”) is an annual festival and conference showcasing film, music, interactive media, and technology that typically takes place each year in mid-March in Austin, Texas.

⁷ *Indie Party Press Release*, available at <https://businessviewmagazine.com/new-political-movement-launches-offer-alternative-solution-american-voters> (cited in Complaint n.19).

⁸ See Compl. at Ex. D, MUR 7413.

⁹ 17 C.F.R. § 230.506(c). An individual investor is “accredited” if he or she has a net worth exceeding \$1,000,000, excluding any positive equity or indebtedness they may have with respect to their primary residence. 17 C.F.R. § 230.501(a)(5)(i).

¹⁰ Statement of Candidacy, Jonathan Jenkins, available at <https://docquery.fec.gov/pdf/328/201805020200363328/201805020200363328.pdf>.

¹¹ Statement of Organization, Jonathan Jenkins for Senate Committee, available at <http://docquery.fec.gov/pdf/320/201805020200363320/201805020200363320.pdf>.

¹² *Jenkins Press Release*, available at <https://www.prweb.com/releases/2018/05/prweb15460016.htm>.

Jenkins Committee’s 2018 July Quarterly Report lists expenditures related to obtaining ballot access in Texas, but Jenkins ultimately failed to qualify for the ballot by the June 18, 2018 deadline, and the Committee ceased making expenditures and accepting contributions after that date.¹³

III. APPLICABLE LAW

Under the Act and Commission regulations, a “political committee” is “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 or which makes expenditures aggregating in excess of \$1,000 during a calendar year.”¹⁴ A “contribution” is a “gift, subscription, loan, ... advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office,”¹⁵ and an “expenditure” is a “purchase, payment, distribution, loan, ... advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”¹⁶ Political committees established, financed, maintained, or controlled by the same candidate for the same election to Federal office are considered affiliated under the Act, and share one overall contribution limit, per candidate, per election.¹⁷

When the Act was initially passed, Congress elected not to regulate many “liberal, labor, environmental, *business* and conservative organizations”¹⁸ (emphasis added) as political committees, including those that “frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office.”¹⁹ Rather, Congress provided that those organizations should be subject to separate disclosure requirements under an independent provision of the Act.²⁰ The D.C. Circuit, however, declared that provision unconstitutional in *Buckley v. Valeo*, and its ruling, rather than being appealed to the Supreme Court, was “apparently accept[ed]” by lawmakers.²¹

At the same time, various courts considered vagueness and overbreadth challenges to the definition of “political committee,” and from the beginning, the judiciary warned that, absent a limiting construction, “[t]he dampening effect on first amendment rights ... would

¹³ Jonathan Jenkins for Senate Committee, July 2018 Quarterly Report, *available at* <http://docquery.fec.gov/pdf/102/201807190200622102/201807190200622102.pdf>; *see* Patrick Svitek, *Independent U.S. Senate candidate with unconventional campaign misses filing deadline*, TEX. TRIBUNE, *available at* <https://www.texastribune.org/2018/06/21/independent-us-senate-candidate-unconventional-campaign-misses-filing-/>.

¹⁴ 52 U.S.C. § 30101(4)(a); 11 C.F.R. § 100.5(a).

¹⁵ 52 U.S.C. § 30101(8)(a); 11 C.F.R. § 100.52(a).

¹⁶ 52 U.S.C. § 30101(9)(a); 11 C.F.R. § 100.111(a).

¹⁷ 11 C.F.R. §§ 100.5(g)(1)–(2); 110.3(a)

¹⁸ 120 CONG. REC. H10333 (daily ed., Oct. 10, 1974).

¹⁹ *Buckley v. Valeo*, 519 F.2d 821, 871 (D.C. Cir. 1975) (per curiam), *aff’d in part*, 424 U.S. 1 (1976), and cited by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 79 n.106 (1976).

²⁰ 2 U.S.C. § 437a (1974).

²¹ *See Buckley*, 519 F.2d at 863 n.112 (observing that, while making other changes to the political committee definition, Congress did not materially alter the provision in response to the narrowing constructions imposed by Jennings and National Committee for Impeachment).

be intolerable.”²² Consequently, the Supreme Court further limited the definition of “political committee” to entities whose “major purpose” is the election or defeat of candidates for Federal office.²³ However, the question of whether an entity has the “major purpose” of electing or defeating candidates for Federal office is not germane if that entity does not clear the initial bar for political committee status by receiving or making in excess of \$1,000 in contributions or expenditures.

IV. LEGAL ANALYSIS

The Complainant and OGC assume, based on IPC’s promotional statements and press releases, that IPC was—rather than a for-profit business—a “group of individuals that ... raised more than \$1,000 in contributions and made more than \$1,000 in expenditures” with “the major purpose [of] the election of federal candidates”—namely, candidate Jenkins—and therefore that IPC should have registered with and reported to the Commission as a political committee.²⁴ We disagree. In fact, the Complaint’s own exhibits indicate that the funds received by IPC were proceeds resulting from IPC’s sale of equity securities to accredited investors in a non-public offering, rather than contributions solicited from donors for the purpose of influencing federal elections, and the Jenkins Committee’s filings with the Commission indicate that IPC was paid for its services as a ballot access vendor.²⁵

On the contributions front, the Complaint does not provide evidence that IPC raised funds from sources other than the accredited investors it ostensibly solicited in or around April 2018 under its Rule 506(c) offering. And based on IPC’s public filings with the SEC, IPC was not soliciting or accepting contributions for the purpose of influencing elections. Rather, it was soliciting capital from investors in exchange for providing them with an equity stake in IPC. The Commission is not aware of any complaints by those investors that they were somehow deceived about IPC’s mission or purpose, or that IPC led them to believe that it intended to operate as a nonprofit political committee rather than a profit-generating company that would, hopefully, provide them with a return on their investment. Moreover, whether or not an investment in a for-profit entity is worthwhile, profitable, or appropriately priced²⁶ is outside this agency’s area of expertise. In short, the evidence is insufficient to establish reason to believe that IPC received in excess of \$1,000 in “contributions” within the meaning of the Act.

IPC could still be a political committee if it exceeded \$1,000 in expenditures, but there is no evidence it did so. The Complaint alleges (based on tweets and political canvasser job advertisements posted by IPC) that IPC paid for a “significant portion of the signature

²² *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972). This opinion was adopted by the D.C. Circuit in *Buckley v. Valeo*, 519 F.2d 821, 863 n.112 (D.C. Cir. 1975) (per curiam), *aff’d in part*, 424 U.S. 1 (1976), and cited by the Supreme Court in its opinion in *Buckley v. Valeo*, 424 U.S. 1, 79 n.106 (1976).

²³ *Buckley*, 424 U.S. at 79.

²⁴ Compl. at 5, MUR 7413; *see also* First Gen. Counsel’s Report at 5, MUR 7413.

²⁵ Jonathan Jenkins for Senate Committee, July 2018 Quarterly Report, *available at* <http://docquery.fec.gov/pdf/102/201807190200622102/201807190200622102.pdf>.

²⁶ Courts generally recognize the proposition that—absent fraud on the market—the “just” price of a security is whatever that market will bear based upon the competing judgments of buyers and sellers. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 245–46 (1988).

collection efforts” in support of the Jenkins Committee.²⁷ This allegation is refuted by the Jenkins Committee’s own filings with the Commission, which include \$100,000 in disbursements made to IPC for “Signiture [*sic*] Gathering” on the 2018 July Quarterly Report.²⁸ In the absence of any evidence indicating that IPC provided these services or other services to the Jenkins Committee gratuitously, or for less than fair market value, we decline to characterize them as either “expenditures” or “in-kind contributions” under the Act.

Because the available evidence in this Matter does not indicate that IPC accepted contributions or made expenditures in excess of \$1,000, the next stage of the political committee analysis—whether the entity had the “major purpose” of electing or defeating candidates for Federal office—is irrelevant, as is Jenkins’s apparent control of IPC. Even so, in light of the Complaint’s and OGC’s characterization of common sales puffery as statements indicating an entity’s political purpose, we wish to briefly explain why the Commission should avoid weighing in on the public statements of campaign vendors that provide services for fair market value and do not otherwise qualify as political committees.

Vendors that provide paid services to candidates and their campaigns will inevitably seek to market themselves effectively, and in the political sphere, the most effective marketing is the assurance that a vendor is committed to its client’s electoral victory. A vendor also may seek to show off their past wins and establish a positive track record by posting clients’ campaign materials—perhaps even the campaign materials of current candidates—on its public website. And in many instances, campaign vendors effectively pick a partisan side and explicitly market themselves as capable of helping candidates from one party win their elections. Individual vendors’ motivations and ideologies aside, this type of marketing is aimed at fostering trust and generating business in a crowded and growing field.

The Commission has concluded on multiple occasions that a commercial vendor providing services to political committees under 11 C.F.R. § 114.2(f)(1) need not make its services available to committees representing all political ideologies, and may establish objective business criteria to protect the commercial viability of its business without making contributions to the committees that meet those criteria.²⁹ It is no coincidence that IPC released a press statement marketing itself as a company aimed at “power[ing] the campaigns of candidates who want to run outside of the two-party system” and “build[ing] a movement that can elect candidates who will create a powerful minority between the two major political parties” mere days before soliciting investors in a non-public securities offering. Announcing the formation of a company that would effectively “disrupt” the two-party system and politics at large by providing services to certain types of candidates is not advocacy for advocacy’s sake. In IPC’s case, it appears to have been a marketing technique

²⁷ Compl. at 3, MUR 7413.

²⁸ Ultimately, Jenkins failed to qualify for the ballot, and the Jenkins Committee ceased accepting contributions and making expenditures in June of 2018.

²⁹ See Advisory Opinion 2012-28 (CTIA — The Wireless Association) at 3, 8–9 (no contribution where “wireless service providers may decide, due to commercial considerations, to accept proposals from some political committees and not others”); Advisory Opinion 2012-26 (Cooper for Congress *et al.*) at 10 (no contribution where its participation was subject to “objective and commercially reasonable” criteria); Advisory Opinion 2006-34 (Working Assets) at 2–3 (describing requestor’s proposed use of “common commercial principles” to determine partner entities’ commercial viability).

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geared at raising capital for a fledgling business, rather than an effort to solicit contributions under the Act.

Under the rationale provided by the Complainant and OGC, statements and materials indicating that a vendor's activities focus exclusively on nominating or electing candidates for office could expose a wide range of political campaign-oriented businesses to potential complaints and enforcement under the Act. Based on the Act, its legislative history, and Commission precedent, this cannot be correct.³⁰ Absent evidence that a political campaign vendor is charging a candidate or their committee less than fair market value for services rendered, that vendor's public statements aimed at generating engagement with or business from candidates, their campaigns, voters, and volunteers are not within the purview of the Act or the Commission's jurisdiction.

Accordingly, for the foregoing reasons, we voted against OGC's recommendation that we find reason to believe that IPC violated 52 U.S.C. §§ 30102, 30103, and 30104.

July 14, 2021

Date



Allen Dickerson
 Vice Chair

July 14, 2021

Date



Sean J. Cooksey
 Commissioner

July 14, 2021

Date



James E. "Trey" Trainor III
 Commissioner

³⁰ See *supra* n.18–23, n.29, and accompanying text.