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March 30, 2000

Sabrina McLaughlin  
Office of General Counsel  
Department of Commerce  
Room 5876  
14<sup>th</sup> & Constitution Avenues, N.W.  
Washington, DC 20230

Re: Public Comments: Anticybersquatting Consumer Protection Act

Dear Ms. McLaughlin:

The Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), and National Republican Congressional Committee ("NRCC") respectfully submit comments in response to the Notice and request for public comments published in the Federal Register on February 29, 2000.<sup>1</sup>

The RNC is a political committee organized under Section 527 of the Internal Revenue Code that promotes the agenda and the interests of the Republican Party. In particular, the RNC works towards electing Republican candidates at the federal, state, and local levels. The organization's activities include: financial and other support for Republican candidates; grassroots organization; inclusive recruiting; community outreach; fundraising; and close cooperation with elected Republican leadership. The chairman of the RNC is Jim Nicholson.

The NRSC is also a political committee organized under Section 527 of the Internal Revenue Code. Its primary concern is to develop and support the campaigns of Republican Senate candidates. The NRSC advances its main objective through candidate recruitment, fundraising, issue speech, voter education and turnout programs, and Party-

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<sup>1</sup> 65 Fed. Reg. 10,763 (2000).

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building activities at the state and local levels. The chairman of the NRSC is Senator Mitch McConnell of Kentucky.

The NRCC—also a political committee organized under Section 527 of the Internal Revenue Code—supports the election of Republicans to the United States House of Representatives by providing direct financial contributions and technical and research assistance to Republican candidates and Republican Party organizations. In addition, the NRCC promotes voter registration, education and turnout programs, and other Party-building activities. The chairman of the NRCC is Representative Tom Davis of Virginia.

## I. Introduction

The Internet holds the promise of re-engaging an increasingly disassociated public in the democratic decisionmaking process. Through this electronic medium, citizens can register their opinions on political matters and also obtain vast amounts of information regarding important public issues, including information provided directly by candidates for political office. In addition, the Internet provides candidates with an ideal tool for communicating with core constituents, attracting new supporters, and fundraising. However, in order for the Internet to realize its potential as a vehicle for increasing democratic participation, steps must be taken to ensure that citizens are able to gain access to accurate information on the Internet in a reasonably simple manner.

One significant obstacle standing in the way of citizens who are seeking sound online information regarding federal candidates is the practice known as “cybersquatting”—the registering of Internet domain names containing trademarks or personal names. A domain name, such as “yahoo.com” or “ebay.com,” is the address that identifies a particular web site.<sup>2</sup> Domain names are issued on a “first come, first served” basis, and name registration requires only a modest investment of less than \$100.<sup>3</sup> In many instances, if one knows the name of a company, he or she need only add “.com” to

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<sup>2</sup> Richard Lehv, Cybersquatting in Focus: Are New Rules Needed or Will Existing Laws Suffice?, N.Y.L.J., Jan. 18, 2000, at S4.

<sup>3</sup> Richard J. Grabowski, Strategies for Securing and Protecting Your Firm's Domain Name, Legal Tech Newsl., Feb. 2000, at 7.

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the end of that name to access the company's web site.<sup>4</sup> As Judge T.S. Ellis recently noted in Washington Speakers Bureau v. Leading Authorities, Inc.,

[s]earches may yield hundreds or even thousands of Web sites, if the user's keywords commonly appear in Web sites. Thus a search engine can be an unwieldy and cumbersome tool. To facilitate access to their Web sites, individuals and companies typically prefer to have a domain name that is memorable and that may even be surmised by users who do not know their exact Web site address.<sup>5</sup>

Realizing that desirable domain names are scarce, cybersquatters have hastened to acquire as many names as they can, including the names of political candidates.<sup>6</sup> Cybersquatters are motivated by a variety of different considerations. Some register a politician's name (or some variation thereof) hoping that it will increase the number of hits on their web sites, many of which are parodies of the web sites of actual candidates.<sup>7</sup> Others, however, do so intending to hold the domain name hostage until the candidate agrees to pay a ransom in exchange for the name.<sup>8</sup> In their efforts to extract payments, cybersquatters will occasionally attempt to sully a candidate by placing pornographic material on sites bearing the candidate's name.<sup>9</sup> Regardless of their motives, cybersquatters create a great deal of confusion amongst those who want to learn more about the candidates and their positions on the issues.

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<sup>4</sup> Lehv, *supra* note 2, at S4.

<sup>5</sup> 33 F. Supp. 2d 488, 499 (E.D.V.A. 1999).

<sup>6</sup> Grabowski, *supra* note 3, at 7.

<sup>7</sup> Robert D. Gilbert, Squatters Beware: There are Two New Ways to Get You, N.Y.L.J., Jan. 24, 2000, at T5; see Phyllis Plitch, Bounty Hunter, New Law Put Squeeze on Net Domain-Name Cybersquatters, WALL. ST. J., Dec. 20, 1999, available in 1999 WL-WSJ 24926545.

<sup>8</sup> *Id.*

<sup>9</sup> H.R. REP. NO. 106-412, at 5 (1999).

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To further illuminate the cybersquatting problem, one need only look at two web sites that typify the "mass collection of domain names in exchange for money" scenario. They are "GreatDomains.com" and "TrademarkDomains.com." Although these sites do not primarily focus on the registration of individual candidate names, the issues presented are parallel. Despite the potential for a \$100,000 civil penalty under the Anticybersquatting Consumer Protection Act, along with associated legal fees and costs,<sup>10</sup> cybersquatters are not likely to be deterred from engaging in such behavior. The reason is quite simple—as of March 29, 2000, the web site "GreatDomains.com" had over 515,000 (515,996 to be exact) domain names listed for sale, with an estimated market value of \$7,481,942,000. One particular domain name had a selling price of \$30 million dollars and another was listed at \$48 million dollars. The potential financial returns are mind boggling considering it costs merely \$35 per year to register a domain name.<sup>11</sup>

As organizations whose chief purpose is to promote Republican candidates and to advance their agendas, the RNC, the NRSC, and the NRCC are deeply concerned about problems created by cybersquatting. The following comments examine more closely the cybersquatting problem and then suggest some potential solutions to those problems. Part II discusses the characteristics that make the Internet a unique resource in political campaigns. Part III looks at the cybersquatting problem as it applies to the names of candidates. Part IV explores the First Amendment issues that would be implicated if the practice of registering candidates' names as domain names were regulated. Finally, Part V sets forth some potential solutions to the cybersquatting problem.

## II. The Unique Characteristics of the Internet

In the case McIntyre v. Ohio Elections Comm'n, the Supreme Court declared, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."<sup>12</sup> Due to its unique characteristics, the Internet is an especially valuable resource for educating the public regarding candidates and important issues.

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<sup>10</sup> Pub. L. No. 106-113, 113 Stat. 1501, 1501A—545-52.

<sup>11</sup> See Grabowski, *supra* note 3.

<sup>12</sup> 115 S. Ct. 1511, 1519 (1995).

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First of all, the Internet "provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions."<sup>13</sup> Reaching an audience by means of broadcast media or direct mail entails substantial costs, which thus limits the quality and distribution of such communications. Internet communication, on the other hand, is a relatively inexpensive way for a candidate to disseminate and for a citizen to receive information relating to the candidate's positions on relevant political issues. Furthermore, unlike both broadcast and print media, the Internet allows for interaction between candidates and voters by means of e-mail, chat rooms, and message boards. In short, the Internet enables candidates to efficiently and effectively promote themselves and their ideas, while at the same time enabling citizens to gather desired information and to express themselves.

As a marketplace for political ideas, the Internet is not without its problems, however. First of all, because of the enormous amount of information that is available online, one can quickly become frustrated and intimidated while navigating through a seemingly endless maze of web pages, message boards, and chat rooms in an effort to find a particular site. This is especially true for those who are newcomers to the web. Moreover, a net-savvy individual can, at a relatively low cost, construct a hoax web site that looks nearly identical to a candidate's authorized site. What confuses matters even further is that many of these counterfeit sites have domain names that would be logical choices for a candidate's own web site.

### **III. Candidates' Names and the Cybersquatting Problem**

Imagine a voter is interested in learning more about a particular presidential candidate but is not sure where to find his authorized web site. The voter might start with "candidate4pres.com." However, the only thing that comes up is a blank screen. So the voter then tries "candidate2000.com," but the response is a screen indicating that the name doesn't correspond to a web site. Next, the voter simply types in "candidate.com." Finally, she finds a web site that has "Candidate for President" at the top of the screen. It has the trappings of an authorized site: the official campaign logo, high-quality graphics,

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<sup>13</sup> ACLU v. Reno, 929 F. Supp. 824, 843 (E.D. Pa. 1996), aff'd 117 S. Ct. 2329 (1997).

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and patriotic symbols. However, as the voter begins reading the page's contents, it becomes clear that she has accessed a parody site.

The voter may decide to try one more time and enters the following web address: "candidate-president.com." A web page appears that displays prominently a picture of the candidate, underneath which are the words "Candidate for President." But soon the voter realizes that this is a hoax site as well. At this point, after having reached so many dead-ends, a voter may decide to abandon the search because it is taking too much time. Thus, the voter may never make it to the candidate's authorized campaign web site.

Not only does this type of situation fluster voters seeking comprehensive and accurate information about political candidates, it can also present adverse moral ramifications for parents and their children. This point can be brought into sharp focus simply by looking at the example of the web site "Whitehouse.com." Many parents and children seeking information about the Executive Branch of the U.S. Government have been shocked to find themselves staring at a computer screen filled with pornographic pictures. The reason this happened is because the official White House web site is "Whitehouse.gov," not "Whitehouse.com." Similarly, individuals who own a domain name similar or identical to that of a candidate for public office are able to easily post objectionable material, thereby exposing unwitting civic-minded people to offensive images. The health and vitality of American democracy depends upon an informed citizenry. Towards this end, the Internet could potentially provide a superior method for viewers or individuals to gather accurate information on candidates and issues. However, this potential is impaired when citizens either cannot find or cannot trust the information that is available online.

By registering domain names that include the names of candidates, cybersquatters increase the "search costs"—i.e., the time and effort—that net users must expend to learn more about a candidate. As search costs rise, so does the likelihood that online citizens will quit their searches before reaching reliable information provided by a particular candidate. Furthermore, a cybersquatter's control over a domain name that is similar to a candidate's will diminish the candidate's ability to distribute his message because the cybersquatter's site will draw away Internet traffic that was intended for the candidate's authorized site. Also, the potential for abuse is significant. For example, on at least one occasion, an imposter web site designed to look like that of a particular presidential

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candidate has fraudulently taken campaign contributions intended for that candidate.<sup>14</sup> Accordingly, "electronic democracy" will not serve as a truly transformative force in our political culture until the problems associated with cybersquatting are adequately resolved.

During the debates surrounding the passage of the Anticybersquatting Consumer Protection Act,<sup>15</sup> Congress recognized the difficulties brought on by cybersquatters who misappropriate the names of candidates. Several representatives related instances where they had been the victims of cyberpirates who had registered the representatives' names and then attached them to highly objectionable web sites. At least one representative mentioned how he had had to register multiple permutations of his name "to preempt the unauthorized use of his name in websites."<sup>16</sup> However, even using such a forward-looking approach can prove futile for some candidates. In 1999, a presidential campaign attempted to curb this potential hazard by registering more than 160 derivations of their candidate's name. The campaign even registered several offensive and possibly vulgar derivative domain names in an effort to prevent third parties from registering such names.<sup>17</sup> As discussed earlier, even such intuitive thinking can prove fallible due to the fact that it is improbable, if not nearly impossible, to conceive of every possible permutation and combination to preempt such cybersquatting activity.

In an earlier version of the cybersquatting bill, a section was added directing the Commerce Department to establish a top-level domain for registration of the names of "the President, Members of Congress, United States Senators, and other current holders of, and official candidates and potential candidates for, Federal, State, or local political office in the United States."<sup>18</sup> Though this section was later omitted, Congress expressed

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<sup>14</sup> Brian Blomquist & Daniel Jeffreys, FBI Crashes Campaign Web-Scam Site, N.Y. POST, February 20, 2000, at 26.

<sup>15</sup> Pub. L. No. 106-113, 113 Stat. 1501, 1501A—545-52.

<sup>16</sup> House Panels Take Quick Action On Measure to Combat "Cyberpiracy," Reg., L. & Econ. (BNA) No. 198, at A-4, A-5 (Oct. 14, 1999).

<sup>17</sup> Bush consultant ties up strategic Bush domain names, A.P. WIRE, April 28, 1999, available in WESTLAW, Westnews database.

<sup>18</sup> House-Passed Cyberpiracy Bill Protects Famous Names, Names of Public  
(Continued...)

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its concern over the effects of cybersquatting on the names of candidates by including a provision in the final version of the bill that requires the Department of Commerce "to conduct a study and report to Congress with recommendations and guidelines . . . for protecting the public from registration of domain names that include the personal names of government officials, official candidates, and potential official candidates for Federal, State, or local political office in the United States, and the use of such domain names in a manner that disrupts the electoral process or the public's ability to access accurate and reliable information regarding such individuals."<sup>19</sup>

#### IV. First Amendment Issues

Any proposed regulation of the appropriation of candidates' names by cybersquatters must take into account legitimate First Amendment concerns. The Supreme Court has declared that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."<sup>20</sup> Therefore, according to the Court, "[t]he First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>21</sup>

We oppose any regulation that would restrict anyone's First Amendment rights under the Constitution and would adamantly reject any proposal to quell such rights. The speech primarily at issue here is political parody and we support such expression as protected by the First Amendment. Courts have, however, determined that such protection is not absolute, and under certain circumstances, courts have been willing to restrict such rights. It is not our position to attempt to alter any of the First Amendment protections afforded by the courts with regard to these matters. The solutions offered herein regarding parody sites accomplish the dual goal of affording the constitutional

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(...Continued)

Officials, Reg., L. & Econ. (BNA) No. 208, at A-18 (Oct. 28, 1999).

<sup>19</sup> Pub. L. No. 106-113, 113 Stat. 1501, 1501A—550-51.

<sup>20</sup> Buckley v. Valeo, 424 U.S. 1, 14 (1976).

<sup>21</sup> Id. (citation and internal quotations omitted).

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protection of free and unfiltered speech to parodists while still allowing candidates to protect their individual names as well as their candidate committee names, thereby facilitating the transference of accurate political information via a candidate's authorized web site.

## V. Potential Solutions

### 1. *Registry of Campaign Sites*

There are a number of different approaches that have been suggested in attempting to meliorate the cybersquatting problem as it applies to the names of candidates. One solution would be to allow the Federal Election Commission ("FEC" or "Commission") to develop a web site that includes a registry of hypertext links to each federal candidate's authorized web page. For purposes of these comments, we will call it the Registry of Campaign Sites ("ROCS"). In addition, the FEC could coordinate with state and local campaign finance agencies in collecting the web addresses of non-federal candidates as well. ROCS would thus function as a dependable, centrally located access center where interested citizens could link to the web sites of federal, state, and local candidates. From this secure site, citizens would be able to obtain reliable information on candidates and issues, and volunteer or make online contributions to the desired candidate, without the fear and confusion caused by cybersquatters and parodists.

This solution would not restrict parodists' free speech rights because they would still be able to register and create web sites as they now do. The only difference is that, with ROCS, citizens could go to a secure government site in order to find the candidate's authorized site. Moreover, creating this site may be achieved relatively quickly—particularly on the federal level—by taking the following steps. First, the FEC could amend its Form 2—the designation form for a candidate—to include a section where registrants could fill in the address to their authorized web sites. Under current law, a declared candidate must designate a principal campaign committee by submitting to the FEC his or her name and party affiliation and the office being sought.<sup>22</sup> By adding a section for a candidate to voluntarily provide a web address, a modified FEC Form 2

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<sup>22</sup> 11 C.F.R. § 101.1. The name of a candidate committee must include the name of the candidate who authorized the committee: "no unauthorized committee shall include the name of any candidate in its name." *Id.* § 102.14(a).

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would provide an effective means for the Commission to compile accurate, verifiable information about candidates' authorized web pages. Second, the FEC could coordinate with its state and local counterparts to create similar registration and posting systems.

## 2. *FEC-Hosted Web Site*

A second, but similar approach to the cybersquatting problem would be for the FEC to establish a site that would serve as a common host for the authorized web sites of all federal candidates. Under this approach, the FEC would give the host site a domain name like "www.candidate.gov" and then provide space on its web server for candidates to fashion their own authorized web pages. So for example, the authorized site for George W. Bush would be found at "www.candidate.gov/bush," and Al Gore's at "www.candidate.gov/gore," and so on. Such a site would thus be a safe haven where voters could go to find accurate and reliable information provided by the candidates themselves.

Because this second proposal does have some drawbacks, we do not support this approach. First of all, privacy and other technological concerns might arise if candidate web sites were located on a government web server. In addition, providing web space to every federal, state, or local candidate might place too great a burden on government resources.

Under either option, however, the secure site would need to be adequately publicized so that the populace would be aware that a site existed where they could easily access trustworthy information on the candidates. Thus, in order to attract attention to the host site, it would likely need to be advertised on popular search engines such as "yahoo.com," and on well-known news sources such as "cnn.com" or "foxnews.com," and on FEC informational material.

## 3. *Federal Right of Publicity*

Next, political candidates could be afforded the same legal protections that are afforded to trademark owners. Under such an approach, a candidate would be able to sue any person who, with a bad faith intent to profit, registers the candidate's name as a domain name. In effect, this law would create a federal right of publicity on behalf of candidates for public office.

A right of publicity would provide to a candidate "the exclusive ability to commercially exploit that identity, which includes their voices, names, signatures, photographs or likenesses."<sup>23</sup> In contrast to a trademark claim, a "right of publicity claim does not require proof of likelihood of confusion, but rather the unauthorized use of a party's name or image."<sup>24</sup> In short, "[t]he unauthorized use of [one's] identity by another in promoting products, or any other commercial endeavor, violates the right of publicity."<sup>25</sup>

If it survives constitutional scrutiny, the creation of a federal right of publicity for candidates would probably not be an effective method for combating cybersquatting. For one thing, the pursuit of legal remedies in court often costs the claimant a great deal of money. More importantly, civil litigation often proceeds at a slow pace, sometimes egregiously so. Most political campaigns take place over a relatively short period of time. Thus, in the time that it would take a candidate to conduct a successful lawsuit against a cybersquatter who has misappropriated the candidate's name, the electoral window may have narrowed considerably, if not shut altogether. This would be true even for presidential campaigns and high-profile congressional campaigns. Injunctive remedies would not afford much protection to candidates either, since such equitable relief would only enjoin cybersquatters from further use of a candidate's name, but would not require the cybersquatters to return use of the site to the candidate.

Additionally, a federal right of publicity for candidates would only resolve a small portion of the overall cybersquatter problem. A candidate could only exercise this right against those who endeavor to gain a financial advantage by registering the candidate's name. Thus, the right of publicity would do nothing to prevent voter confusion created by parody web sites with candidates' names for domain names whose creators have no intention of profiting from the use of the names.

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<sup>23</sup> Lott & Hutton, *supra* note 18, at 529.

<sup>24</sup> *Id.* at 531.

<sup>25</sup> *Id.* at 529-30.

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#### 4. *New Top-Level Domain*

One further approach would be to create a new generic top-level domain ("gTLD") that could be used only by registered candidates. gTLDs are the collection of suffixes—such as ".com," ".net," ".org," ".gov," or ".edu"—that determine one's e-mail or web site address. According to the supporters of this approach, the creation of a new gTLD—like ".pol," for example—to be used exclusively by candidates would solve the voter-confusion problem. During the debate on the Anticybersquatting Consumer Protection Act, Representative Howard Berman stated that a new gTLD designated for use by federal candidates would provide "a specific domain under the control of the U.S. Government where [candidates could] post their official web site. This [would] give voters the assurance that when they go to a site in this domain, they [would] be getting the official web site of the candidate, and not a site authored by an opponent, critic, or even faithful supporter. This [would be] a major step towards enhancing the value of the Internet to our democracy."<sup>26</sup>

The creation of a new gTLD would have short-term practical difficulties, however. Though "there seems to be no significant disagreement with the proposition that there could be an unlimited number of gTLDs,"<sup>27</sup> the creation of a new gTLD may have to be made through international agreements amongst global Internet organizations—a situation that could give rise to hold-out problems and other negotiations-related difficulties.<sup>28</sup> Furthermore, it is unclear what safeguards would be

<sup>26</sup> 145 CONG. REC. H10827 (daily ed. October 26, 1999) (statement of Rep. Berman).

<sup>27</sup> Milton L. Mueller, "Internet Domain Names: Privatization, Competition, and Freedom of Expression" (visited Mar. 24, 2000) <<http://www.cato.org/pubs/briefs/bp-033es.html>>.

<sup>28</sup> See generally W. Scott Petty, NSI Challenges IAHC for Internet Management, INTELL. PROP. TODAY, Jun. 1997, at 32 (detailing how an ad hoc committee composed of international Internet players was assembled in an as-of-yet unsuccessful attempt to create new gTLDs); Christy Hudgins-Bonafield, Domain Wars, NETWORK COMPUTING, April 15, 1997, available in LEXIS, News, Magazine Stories, Combined (reporting that international telecommunications officials are dissatisfied with the process for creating new gTLDs).

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imposed to prevent cyberpirates from developing parody sites on the new gTLD. Hence, the new-gTLD approach would not be the most efficient short-term solution.

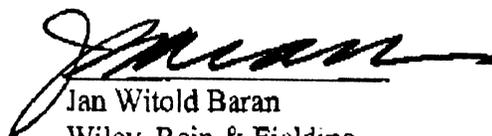
### Conclusion

The Internet holds the possibility of transforming democracy. It is an unparalleled resource for gathering information about both candidates and important issues that touch the lives of everyday citizens. However, the Internet can play a meaningful role in the electoral process only if citizens have both ready to access this online information and some assurance regarding its reliability.

The cybersquatting problem threatens to undermine the Internet's potential as an instrumentality for increasing democratic participation in our country. Citizens need to be able to locate and then have confidence in the candidate information that is available online.

We hope this information will be useful to the Department's deliberations.

Sincerely,



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