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No Child Left (Behind) Unrecruited[1]

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I. INTRODUCTION

On January 8, 2001, only three days after taking office, President George W. Bush announced the controversial educational federal grant program entitled the No Child Left Behind Act of 2001 (NCLB).[2] The NCLB reauthorized for six years the Elementary and Secondary Education Act (ESEA).[3] The NCLB is based on four main principles designed to improve the academic achievement of the disadvantaged: implementation of state accountability systems for all schools; increase of choices available to parents and students attending Title I schools that do not meet state standards; flexibility for states, districts and schools in the use of federal education funds; and use of methods demonstrated to be effective through scientific research.[4]

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[1] This title was inspired by David Goodman, *No Child Unrecruited*, MOTHER JONES, Nov.-Dec. 2002, *available at* http://www.motherjones.com/news/outfront/2002/11/ma_153_01.html (last visited Feb. 27, 2006).

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[2] U.S. Department of Education, NCLB Executive Summary, http://www.ed.gov/nclb/overview/intro/execsumm.html (last visited Nov. 26, 2005) [hereinafter NCLB Executive Summary]. NCLB was passed into law Jan. 8, 2002. Pub. L. No. 107-110 codified as amended at 20 U.S.C. §§ 6301–7941 (2005) ("The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."). The U.S. Department of Education promulgated regulations to implement the NCLB. *See* 34 C.F.R. §§ 200-299 (2005).

[3] Pub. L. No.89-10, 79 Stat. 27 (1965); Pub. L. No. 107-110, 115 Stat. 1426 § 3 (2002).

[4] *See* To Close the Achievement Gap with Accountability, Flexibility, and Choice, So That No Child is Left Behind, H.R. 1, 107th Cong. (2001); H.R. REP. NO. 107-334 (2001) (Conf. Rep.); *see also* NCLB Executive Summary, *supra* note 2.

Although the NCLB seemed to have commendable goals at the time of its enactment, it subsequently imposed an unprecedented financial burden on states, prompting strong reaction from states legislatures. After the NCLB passed, almost every state enacted laws limiting the federal intrusion into the states' domain of education.[5] In April 2005, Utah legislators rejected federal control of education by enacting legislation that prohibits the use of state and local funds for the NCLB.[6]

Additionally, inadequate federal funding of the NCLB has already been challenged in courts. On August 22, 2005, Connecticut became the first state to sue the federal government, arguing that the NCLB is an unfunded mandate that illegally requires states and local districts to spend their own money in order to comply with federal mandates of the NCLB and that the federal government cannot withhold federal funds because states fail to comply with the NCLB due to inadequate funding.[7] The National Education Association's (NEA) lawsuit against the U.S. Department of Education, filed on behalf of nine school districts from Michigan, Texas, and Vermont to prevent the denial of funds to districts for refusing to spend their own money on the NCLB, was dismissed on November 23, 2005 by a Michigan district court.[8]

Insufficient funding is not the only issue whose validity is being questioned. Legal scholarship has addressed problems such as the constitutionality of Congress's power to regulate education under the U.S. Constitution Spending Clause[9] where such regulation affects schools that are not federally funded.[10] The NCLB's hostility towards bilingual

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[5] *See* George F. Will, *In Utah, No Right Left Behind*, WASH. POST, Nov.11, 2005, at A25, LEXIS, News Library, WPOST File ("Only three states have not challenged in some way NCLB's extension of federal supervision over K-through-12 education, but no state has done so with as much brio as Utah, which is insurrectionary even though last year 87 percent of its schools fulfilled NCLB's requirement of demonstrating 'adequate yearly progress.'").

[6] Sam Dillon, *Utah Vote Rejects Part of Education Law*, N.Y. TIMES, Apr. 20, 2005, at A14, LEXIS, News Library, NYT File.

[7] Press Release, Connecticut Attorney General Richard Blumenthal, State of Connecticut, State Sues Federal Government Over Illegal Unfunded Mandates Under No Child Left Behind Act (Aug. 22, 2005) *available at* http://www.state.ct.us/sde/nclb/important-press/State_Sues.pdf.

[8] Press Release, National Education Association, Plaintiffs in 'No Child Left Behind' Act Lawsuit Will Appeal Decision (Nov. 23, 2005), http://www.nea.org/newsreleases/2005/nr051123.html. The National Education Association challenged the imposition of unfunded mandates in *Sch. Dist. of Pontiac v. Spellings*, No. 05-CV-71535, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. Nov. 23, 2005), under 20 U.S.C. § 9527(a), which states:

> Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

[9] U.S. CONST. art. I, § 8, cl. 1.

[10] *See* Ronald D. Wenkart, *The No Child Left Behind Act and Congress' Power To Regulate Under the Spending Clause*, 174 EDUC. L. REP. 589 (2003).

education has been seen as a tool to effectively eliminate bilingual instruction as a method of teaching Limited English Proficiency students, and a proposition "that English is the de facto national language of success."[11] The implications of the race-conscious character of the NCLB education reform have been envisioned as resulting in a new line of litigation seeking race-conscious remedies.[12]

However, a provision of the NCLB that allows military recruiters access to student information received little attention until recently.[13] In order to receive federal funding this provision requires secondary schools to provide military recruiters with students' personal information: names, addresses, and telephone numbers.[14] A parent or student may opt out of this requirement by submitting to a school written parental consent that the information not be released.[15] Schools have an affirmative obligation to timely notify parents about the option not to disclose the student's information to the military.[16] However, as there is no mechanism to ensure compliance with the notification requirement, many parents are unaware of this mandatory disclosure.[17] Various constitutional rights are implicated by this provision: free speech and right of association under the First Amendment, procedural due process rights, privacy rights and schools' right to receive federal funding without imposition of unconstitutional conditions. This article focuses on the military recruiting provision within the scope of the First Amendment and the unconstitutional condition doctrine.

Part II of this article provides an introduction to the legislative history of the NCLB military recruitment provision, section 9528. Part III presents the opt-out campaign initiated by parents and other activists engaged in protecting children from aggressive military recruiting campaign undertaken by the George W. Bush administration. Part IV discusses the government's coercion of schools to disclose student directory information. Part V addresses the creation of Pentagon's national

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[11] *See* Barbara J. Brunner, *Bilingual Education Under the No Child Left Behind Act of 2001:¿se quedará atrás?*, 169 EDUC. L. REP. 505, 512 (2002).

[12] *See* C. Joy Farmer, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443, 443 (2005).

[13] 20 U.S.C. § 7908 (2005).

[14] *Id*. § 7908(a)(1).

[15] *Id*. § 7908(a)(2).

[16] *Id*.

[17] One author bases his argument that mandatory disclosure does not affect students' privacy rights on a major assumption that parents are notified about the military recruiting provision: "No doubt, assuming most parents [or students] are aware of this option, the intrusion into a student's privacy is minimal. . . . Further, nothing in the recruitment process requires one to actually join the military. It only provides the military an opportunity to spark such an interest. For those opposed to even that, the opting-out provision provides ultimate protection." Alfred J. Sciarrino, *From High School to Combat? No Child Left Behind!*, 36 UWLA L. REV. 94, 105–08 (2005).

database. Part VI argues that the opt-out provision represents a classic example of a First Amendment violation as it is an impermissible government-compelled speech. Part VII examines section 9528 and the right to anonymity. Part VIII addresses the constitutionality of the military recruiting condition imposed on federal funds recipients. Finally, Part IX suggests the opt-in provision as one solution to making the NCLB consistent with the First Amendment.

II. SECTION 9528'S LEGISLATIVE HISTORY

In order to receive federal funds under the NCLB, each secondary school must, upon request, submit to the military a list of its students' names, addresses, and telephone numbers.[18] Failure to do so will result in loss of federal funding.[19] Known as section 9528,[20] the provision is entitled "Armed Forces Recruiter Access to Students and Student Information" and states the following:

> (1) Access to student recruiting information. Notwithstanding . . . [20 U.S.C. § 1232g(a)(5)(B)[21]] and except as provided in paragraph (2) [providing that a secondary school student's name, address, and telephone number can be withheld upon the parent's request], each local educational agency receiving assistance under this Act shall provide, on a request made by military recruiters or an institution of higher education, access to secondary school students names, addresses, and telephone listings.[22]

A. Vitter-Sessions Amendment

The military recruiter access to secondary school students provision was added to the NCLB as a result of the Vitter-Sessions amendment introduced by its sponsors, then Republican Representative and now Senator David Vitter from Louisiana and Republican Congressman Pete

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[18] 20 U.S.C. § 7908(a)(1).

[19] "No recruiters; no money." 147 CONG. REC. H2535 (daily ed. May 22, 2001) (statement of Rep. Shimkus).

[20] H.R. REP. NO. 107-334, at 559 (2001) (Conf. Rep.).

[21] 20 U.S.C. § 1232g (2005) is entitled "Family Education and Privacy Rights," and section (a)(5)(B) of that statute states:

> Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

[22] 20 U.S.C. § 7908(a)(1) (2005).

Sessions from Texas.[23] The Vitter-Sessions amendment proposed the following language: "Any secondary school that receives Federal funds under this Act shall permit regular United States Armed Services recruitment activities on school grounds, in a manner reasonably accessible to all students of such school."[24] Senator Vitter stated that the purpose of the amendment was to "prevent discrimination against armed services recruiters and will simply offer them fair access to secondary schools that accept federal funding."[25] Without producing any particular evidence, Senator Vitter suggested that military recruiters "face daunting challenges in beefing up our military with good, new, young recruits."[26] In support of this proposition, he offered an estimate by the Pentagon that around two thousand secondary schools nationwide "actually have policies banning recruiters from their campuses."[27] A statement by the amendment's co-sponsor, Representative Sessions, best reflects the main idea behind this provision that it is the Armed Forces and not the Department of Education that will leave no child behind:

> [M]any times there are people who have no other opportunities, whether it be college or other directions, and the military stands as a fabulous, not only career, but an opportunity for public service that [sic] young men and young women all across our country, and they might not have that opportunity simply because a school board or a school superintendent or a principal might have a bias against the military.[28]

The Vitter-Sessions amendment passed in the U.S. House on May 22, 2001 by a vote of 366-57,[29] without any challenges, debate, objections or comments.

B. Hutchinson Amendment

A similar version of the amendment imposing military recruiters' access as a condition to receiving federal funding was introduced in the

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[23] 147 CONG. REC. H2535 (daily ed. May 22, 2001).

[24] H.R. REP. NO. 107-69, at 12 (2001).

[25] 147 CONG. REC. H2535 (daily ed. May 22, 2001) (statement of Rep. Vitter).

[26] *Id.*

[27] *Id*.

[28] *Id*. (statement of Rep. Sessions).

[29] 147 CONG. REC. H2542 (daily ed. May 22, 2001) (Final Vote Roll Call No. 133) (two Republicans, fifty-four Democrats, and one Independent voting against the Amendment). The only Congressman who opposed the Vitter amendment on the House floor was a Democrat from Oregon, Peter DeFazio. Although he agreed that military recruiters should have access to schools, he "strongly support[ed] the ability of local communities to determine what is best for their schools and their children." 147 CONG. REC. H2536 (daily ed. May 22, 2001) (statement of Rep. DeFazio).

Senate by Arkansas Republican Tim Hutchinson.[30] Senator Hutchison's amendment included these findings by the Senate: military service is voluntary, recruiting is vital to national defense, recruiting is challenging, recruiters face strong competition, recruiting goals are increasingly difficult to meet, a number of high schools deny access to directory information, directory information is the basic recruiting tool, denying recruiters access hurts the youth, denying recruiters' access undermines national defense, and 10 U.S.C. § 503 requires schools to provide the same access to the military as to other employers.[31] The only finding that included specific evidence was based on a single year's statistics: "In 1999, the Army was denied access on 4,515 occasions, the Navy was denied access on 4,364 occasions, the Marine Corps was denied access on 4,884 occasions, and the Air Force was denied access on 5,465 occasions."[32] Senator Hutchinson also suggested that at the beginning of 2000, twenty-five percent of high schools refused to release student directory information to military recruiters,[33] but provided no documentation to support this claim.[34] The language of the Hutchinson amendment proposed the following:

> Denial of Funds
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> Prohibition. – No funds available to the Department of Defense may be provided by grant or contract to any institution of higher education (including any school of law whether or not accredited by the American Bar Association) that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes—
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> entry to campuses or access to students on campuses; or
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> access to directory information pertaining to students.[35]

While Senator Hutchinson in his closing statements clearly talked about high schools and even finished by concluding that the education campaign about the Armed Forces access is a "good vehicle in this

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[30] 147 CONG. REC. S6181 (daily ed. June 13, 2001).

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *See* Rick Jahnkow, *Military Escalates Assault on Civilian Schools*, DRAFT NOTICES, May-July 2001, http://www.comdsd.org/article_archive/meacs_article.htm ("It has also been claimed that 25% of all high schools refuse to provide student directory information to recruiters, yet when the military was trying to regain access to student lists a few years ago in San Diego, recruiters claimed that only two school districts west of the Mississippi wouldn't release the lists.").

[35] 147 CONG. REC. S6181 (daily ed. June 13, 2001).

provision in the Elementary and Secondary Education Act,"[36] he was followed by the Republican Senator from Alabama, Jeff Sessions, who exclusively talked about military recruiters' access to law schools,[37] and Republican Senator from New Hampshire, Judd Gregg, who talked only about access to colleges.[38] The similarity of the secondary school military recruiters' access in the Hutchinson amendment to the Solomon amendment is striking,[39] but the comments of Senators Sessions and Gregg did not belong in the discussion of an amendment to the law governing secondary education. The extent of certain senators' aggressive campaign to attach military recruiters' access as Congress's condition imposed on the recipients of federal funds is apparent from Senator Sessions' statements related to the Judge Advocate General's (JAG) Corps access to law schools.[40] These statements suggest that the Hutchinson amendment was part of a larger campaign aimed at increasing military recruitment by all means possible and without much regard to students' or parents' constitutional rights.

The very short legislative history of section 9528 is devoid of any discussion about student or parental consent. There is no mention of notice to students or parents about the option not to disclose. Slightly changed, the Vitter-Sessions amendment was incorporated in the NCLB as modified by additional sections providing for student or parental consent, same access to students as provided to secondary educational institutions or employers, and the exception for institutions maintaining religious objection to service in the Armed Forces.[41]

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[36] *Id*. at S6182 (statement of Sen. Hutchison).

[37] *Id*. (statement of Sen. Sessions).

[38] *Id.* at S6182-83 (statement of Sen. Gregg).

[39] 10 U.S.C. § 983 (2005). The United States Supreme Court upheld the Solomon Amendment, 8-0. Rumsfeld v. Forum for Academic & Inst. Rights, 126 S. Ct. 1297 (Mar. 6, 2006).

[40] Although the Hutchinson amendment primarily intended to provide military recruiters' access to high schools, as is obvious from its legislative findings, the language used in the amendment covered institutions of "higher education." The inclusion of law schools in the amendment's language prompted the following statement:

> I think this legislation will be a healthy signal that the Senate says, as I told this law school dean: You have freedom. We have a rule of law in America today because men and women in uniform have defended against the communist totalitarians, the Nazi oppressors, and defeated them and preserved liberty. The very concept, the very idea that the legal arm of the Defense Department, the JAG officers, are not respected and cannot recruit on the campus of the best law schools is unacceptable. I appreciate the opportunity that Senator Hutchinson has provided to allow this amendment be included as a part of his legislation.

147 CONG. REC. S6182 (daily ed. June 13, 2001) (statement of Sen. Sessions).

[41] 20 U.S.C. § 7908 (2005).

III. OPT-OUT CAMPAIGN

The NCLB, as amended, passed in the Senate on June 14, 2001 by a 98-1 vote.[42]

The "consent" or so called "opt-out" provision of section 9528 allowing students and parents to request that students' names, addresses, and telephone numbers not be released to military recruiters without prior written consent was hidden deep in the Act:

> (2) Consent
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> A secondary school student or the parent of the student may request that the student's name, address, and telephone listing described in paragraph (1) not be released without prior written parental consent, and the local educational agency or private school shall notify parents of the option to make a request and shall comply with any request.[43]

The first time any major newspaper mentioned this provision was in December 2001, by the *San Francisco Chronicle*, and then still only in passing.[44] Almost a year went by before *The Washington Post*[45] and *The Boston Globe*[46] reported on the opt-out provision in November 2002, followed by *The New York Times* addressing the issue for the first time in January 2003,[47] and *The Los Angeles Times* in February 2003.[48] This newspaper survey is telling. It was only after students had been aggressively recruited at home by the military that they and their parents learned about the opt-out provision and that anecdotal stories started reaching the news.[49] The Armed Forces' desperate attempts to increase

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[42] 147 CONG. REC. 56,239, 6305 K (daily ed. June 14, 2001) (Roll Call Vote No. 192), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_107_1.htm. The following Senators voted against the NCLB: Bennett (R-UT), Feingold (D-WI), Helms (R-NC), Hollings (D-SC), Inhofe (R-OK), Kyle (R-AZ), Nickles (R-OK), Voinovich (R-OH). Senator Inouye (D-HI) did not vote.

[43] 20 U.S.C. § 7908 (a)(2) (2005).

[44] Meredith May, *Conservative Caveats Threaten Schools: They Lose Millions If Scouts Are Banned from Using Space*, S.F. CHRONICLE, Dec. 23, 2001, at A3.

[45] Elaine Rivera, *Recruiting Law Breeds Worries: Military Given Access to Student Data*, WASH. POST, Nov. 24, 2002, at C9. Interestingly, the first three major newspapers' reports bringing public attention to this issue were written by women.

[46] Susan Milligan, *Military Recruiters Getting a Foot in Door: Federal Education Bill Requires High Schools To Share Student Data*, BOSTON GLOBE, Nov. 21, 2002, at A3.

[47] Tamar Lewin, *Uncle Sam Wants Student Lists, and Schools Fret*, N.Y. TIMES, Jan. 29, 2003, at B10, 2003 WLNR 5176839.

[48] Erika Hayasaki, *California: Districts Taking on Recruiters*, L.A. TIMES, Feb. 13, 2003, § 2, at 1, LEXIS, News Library, LAT file.

[49] *See* Tommy Nguyen, *School Recruiters Meet Resistance*, CHRISTIAN SCI. MONITOR, Dec. 19, 2003, at 13, LEXIS, News Library, CSM file ("Last summer Mark Spencer's 17-year-old son received a phone call from a military recruiter. Mr. Spencer told the recruiter not to call his son again. An hour later, the recruiter called their Mesquite, Texas residence a second time. The next week he left phone

recruitment are best reflected in the letter sent by Rod Paige, Secretary of Education and Donald Rumsfeld, Secretary of Defense, to schools across the country in which they emphasized that the educational institutions' support of recruitment efforts was "critical to the success of the All-Volunteer Force."[50]

Although section 9528 requires the Secretary to notify "principals, school administrators, and other educators" about the opt-out provision and mandatory notification of parents, there is no uniformed mechanism to do so and no monitoring system to assure compliance. The Pentagon statement that all 22,600 high schools complied with the military provision of the NCLB is misleading.[51] While it may be true that all schools complied as to mandatory disclosure of student information and none lost

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messages. 'It's a predatory practice,' says Spencer, 'to keep calling students even if their parents object.'"); Erika Hayasaki, *Los Angeles: Campus Military Recruitment Roils Students*, L.A. TIMES, Feb. 8, 2004 at B3, LEXIS, News Library, LAT file (detailing military recruiting phone calls to Victor Banuelos, a Los Angeles High School senior with college ambitions, telling him that "if we're failing classes, we're not going to make it to college," and that "with our help is the only way to get out of the ghetto," and to 16-year-old Frances Martin, a Crenshaw High School student who received at least two telephone calls from recruiters, which she hung up on. Martin repsonds, "it is unfair to target students in low-performing schools for military recruitment, when they are receiving a poor education because of overcrowded classrooms and a lack of books or qualified teachers. There are more adults pushing her and other students to enlist in the military than to apply to college." Another student, Marcella Sadler, 17, has become "horrified and saddened" by "one of her former high school friends [who] became a soldier and killed five Iraqis."); Emily Shartin, *Fliers Advise Teen on Rights They Can Stop Data to Military Recruiters*, BOSTON GLOBE, Aug. 14, 2004, at B1, LEXIS, News Library, BGLOBE file ("Soffiyah Elijah, a Dorchester parent, helped spread awareness of the No Child Left Behind provision at Boston Arts Academy. She said her older son, who is about to begin college, was approached at a bus stop by military recruiters who followed him to a recording studio and then home, where she threatened to take them to court."); Bergen Action Network, *Schools Point Out Teens to Recruiters*, Mar. 4, 2003, reprinted from THE STAR-LEDGER, (An army recruiter told 17-year-old Ted Giannopoulos he'd like to take Giannopoulos to lunch and then to the East Orange recruitment station, where he would show Giannopoulos a video. 'I said I wasn't interested,' the Livingston High School senior said. He added: 'We were on the phone for like half an hour. I just tried to get him off the phone. I told him I'd call him back.'"); Maryclaire Dale, *Activists Tell Parents to Have Schools Deny Kids' Data to Military*, CHI. TRIBUNE, June 22, 2005, at C22, LEXIS, News Library, CHTRIB file ("Nancy Carroll didn't know schools were giving military recruiters her family's contact information until a recruiter called her 17-year-old granddaughter. That didn't sit well with Carroll, who believes recruiters target minority students."); Jim Spencer, *It's Not Easy To Block Calls by Uncle Sam*, DENVER POST, Sept. 23, 2005, at B1, LEXIS, News Library, DPOST file ("Twice last year, Irene Berry got phone calls at work for her son, Will. 'They sounded like friends,' Berry said. 'Only I couldn't figure out why they were calling my office.' The Jefferson County mom soon got an answer. One caller was from the Navy, the other from the Marine Corps. Each hoped to recruit her son, using contact information provided by his high school. 'I didn't realize the school had to give that information,' Berry said. 'It's certainly usurping parental rights.'").

[50] Press Release, U.S. Dept. of Educ., Dear Colleague Letter on Military Recruitment (Oct. 9, 2002) http://www.ed.gov/news/pressreleases/2002/10/recruitingletter.html (last modified Aug. 29, 2003).

[51] Mary Clare Dale, *Parents Uniting to Keep Military Recruiters from High Schoolers*, AP, June 17, 2005, WESTLAW, 6/17/05 APLERTNM 17:34:02 (compliance information provided to the Associated Press by Air Force Lt. Col. Krenke, a Pentagon spokeswoman).

funding,[52] neither the military nor the Department of Education express any genuine concern with whether schools complied with mandatory parental notification before releasing the student information.[53] A clear allegation of non-compliance is a recent lawsuit filed by the American Civil Liberties Union (ACLU) of New Mexico against the Albuquerque public schools.[54] On behalf of students and parents, ACLU is suing Albuquerque public schools because they failed to implement policies and procedures regarding disclosure of student information and because they disclosed student directory information to the military recruiters before giving notice to parents and students about their rights to refuse disclosure.[55] The New Mexico case is illustrative of the importance of notifying students and parents about their rights and the consequences of a school's failure to notify. However, some schools, even when they satisfy parental notification, require the opt-out letter to be sent to a School District Superintendent in order for it to be effective, adding a time factor as another obstacle for students and parents in the exercise of their rights.[56] The issue of timing is especially critical "since in most school districts, students and parents are only able to 'opt-out' during the first months of the school year."[57]

As the government remained mostly aloof to schools' failures to properly and timely notify parents and students about their option to prohibit public schools from disclosing their children's personal information to the military, parents and students engaged in a battle to fight unlawful practices and to widely publicize the opt-out provision in order to increase awareness of the public on this issue.[58] Moved by unchecked

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[52] *Id*.

[53] "According to statistics from the U.S. Department of Education, out of the 22,629 public schools affected by the legislation, only 271 are being monitored for compliance issues. The department does not yet track the number of students whose parents opt not to release the information, said Jim Bradshaw, a spokesman." Kasi Addison, *Montclair Parents Say No to Military*, STAR LEDGER, Jan. 19, 2005, *available at* http://www.refusingtokill.net/USGulfWar2/MontclairParentsSayNo.htm.

[54] Notice of Filing State Court Record, ACLU v. Albuquerque Pub. Schools, No. CIV 05-541 RB/WPL (D.N.M. May 5, 2005).

[55] Complaint for Declaratory and Injunctive Relief at 10-14, ACLU v. Albuquerque Pub. Schools, No. CIV 05-541 RB/WPL (D.N.M. May 5, 2005).

[56] National Parent Teacher Association (PTA), *Military Recruitment in Schools and DOD Database Information*, Aug. 2, 2005, http://www.pta.org/documents/military.pdf.

[57] *Id*.

[58] *See* National Parent Teacher Association (PTA) Position on Privacy of Student Records, ("[D]istricts must provide notice to parents of the type of student information it releases, explain that parents have the right to request that the information not be disclosed, include information on how to "opt-out" of the release of such information, and any applicable deadlines. . . . National PTA seeks to increase awareness and community sensitivity about the collection and dissemination of information regarding students and believes that such records should respect the right to privacy and be relevant to a child's education."), http://www.pta.org/ia_pta_positions_1124827720656.html (last visited Feb. 25,

violations of privacy rights, Working Assets, Mainstream Moms and Association of Community Organizations for Reform Now (ACORN) partnered to launch Leave My Child Alone! (LMCA), a Family Privacy Project with the goals of educating parents about military recruitment provision, are helping parents in requiring that schools adopt adequate measures for students protection, supporting the Student Privacy Protection Act of 2005,[59] and encouraging the local organization of parents.[60] On its web site, the LMCA provides opt-out forms in English and Spanish and organizes opt-out parties across the country in order to educate parents and students about section 9528.

IV. COERCING SCHOOLS TO DISCLOSE STUDENT DIRECTORY INFORMATION

The LMCA was not alone in its efforts to prevent disclosure of students' personal information to the military recruiters without appropriate safeguards. In 2003, a peace and social justice organization based in Santa Cruz, California, the Resource Center for Nonviolence, launched an opt-out and opt-in campaign lead by, among others, counter recruitment organizer Josh Sonnenfeld.[61] This campaign was initiated after Santa Cruz High School implemented an opt-in policy in March 2003,[62] following examples of Fairport Central School District in New York[63] and Columbia High School in the Maplewood-South Orange District in New Jersey.[64] Shortly afterwards, in July 2003, the Department of Education and Department of Defense sent a letter to all State Superintendents informing them that the opt-in policy is "contrary to the law" and giving states' local educational agencies (LEA) three weeks to fully comply with

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2006); Los Angeles Independent Media Center, *National "Opt-Out" Day Focuses Attention on-No Child Left Behind Act*, Sept. 16, 2003 (reporting on a coalition opposing the military recruitment provision of NCLB), http://la.indymedia.org/news/2003/09/85462.php; *see also* notes 56 & 57 and the accompanying text.

[59] 151 CONG. REC. H347, 350 (Feb. 2, 2005).

[60] Leave My Child Alone! A Family Privacy Project to Protect Students from Unwanted Military Recruiting, http://www.leavemychildalone.org/index.cfm?event=showContent&contentid=15 (last visited Nov. 25, 2005).

[61] Josh Sonmenfeld, *Truth & Privacy Opt-In & Opt-Out Campaigns: A Detailed Narration by the Organizer,* Resource Center for Nonviolence, http://www.rcnv.org/counterrecruit/optoutcampaign/ (last visited Nov.25, 2005).

[62] Santa Cruz City Schools, Resolution # 33-02-03, Release of Directory Information to Military Recruiters (March 26, 2003), http://www.rcnv.org/counterrecruit/graphic_link/Santa%20Cruz%20Opt-In%20Resolution.doc.

[63] Lewin, *supra* note 47.

[64] Bergen Action Network, *supra* note 49.

the opt-out provision.[65] Subsequently, Santa Cruz and other districts complied with the opt-out provision[66] accompanied by an aggressive opt-out campaign to inform parents of their rights.[67]

Amongst the last to comply was the Fairport Central School District in New York. The Superintendent of this affluent Rochester suburban district, Dr. William C. Cala, resisted the opt-out provision imposed by section 9528, instituting instead an opt-in version that was sent out to parents on October 8, 2002:

> Dear Parent/Guardian:
>
> Recently Congress passed the No Child Left Behind Act. Included in this law is a provision which makes available student directory information to all branches of the military. Directory information consists of the student's name, address, and phone number. It can only be released with your approval. Please complete the form below. If signed permission is not returned, we will not release directory information.
>
> Please check one:
>
> __I grant permission to the Fairport Schools to release directory information.
>
> __I do not grant permission to the Fairport Schools to release directory information.[68]

The opt-in policy of the Fairport District has proved to be successful because only "80 out of 1,580 Fairport families (5%) requested that the school release student information to the military."[69] However, as Santa Cruz, the Fairport District was also forced to comply with the opt-out

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[65] Letter from William D. Hansen, Deputy Secretary of Education and David S.C. Chu, Under Secretary of Defense, to Chief State School Officers, (July 2, 2003), http://www.rcnv.org/counterrecruit/graphic_link/Depts.%20of%20Defense%20and%20Education%20Fight%20Opt-In.pdf.

[66] Thank You Letter from U.S. Army Recruiting Battalion Syracuse to Dr. William Cala, Fairport Central School District Superintendent, (Nov. 25, 2002), (thanking for the district's "rapid response in releasing directory information"), http://www.rcnv.org/rcnv/IMAGES/optin_images/Army%20thank%20you%20letter.pdf.

[67] Santa Cruz City Schools, Resolution # 33-02-03 Revision, (Oct. 22, 2003) http://www.rcnv.org/counterrecruit/graphic_link/Santa%20Cruz%20Opt-Out%20Resolution.doc.

[68] Letter from David M. Paddock, Principal Fairport High School to Parent/Guardian, (Oct. 8, 2002), http://www.rcnv.org/rcnv/IMAGES/optin_images/Fairport%20opt-in%20letter.doc; Policy Institute Research for the Region, *School Districts and Pentagon Clash Over Student Information* (Fall 2005) ("In March, the U.S. Army dispatched a uniformed colonel to settle a dispute with Superintendent William Cala."), http://region.princeton.edu/issue_57.html.

[69] Policy Institute Research for the Region, *supra* note 68.

provision that was implemented in the 2005-2006 school year, and now states:

> Dear Parent/Guardian:
>
> On January 2, 2002, the No Child Left Behind Act was signed and became law. Included in this law is a provision which makes available student directory information to all branches of the military. Directory information consists of the student's name, address, and phone number. You are permitted to opt-out of the release of this information. If the form below is not filled out and returned, you have by default chosen not to opt out of this program. In order to confirm that you have been fully advised, I ask that you complete the form below and return it with the emergency information on the reverse side.
>
> Please check one:
>
> __ I grant permission t o Fairport Schools to release directory information to the military.
>
> __ I do not grant permission to Fairport Schools to release directory information to the military.[70]

Coercing schools to disclose student information operates successfully due to, among other things, the lack of parental notification enforcement. The best example of an aggressive campaign publicizing opt-out provision is the Montclair High School in New Jersey, where students in 2003 organized a group called "Oye Oye," (Open Your Eyes, Open Your Eyes) in order to raise awareness about military recruitment in high schools.[71] Before this campaign, only thirty-three percent of students opted-out, compared with ninety-two percent after the launching of the campaign.[72] An illustration of ineffective parental notification is also found in New Jersey, where in one of Paterson's high schools, parents are notified about the opt-out provision through the student handbook and calendar, consequently resulting in only one student opting out in a school of 2000 students.[73] These numbers reflect the disparate impact that coercion has on schools in different districts that vary according to factors such as race and class.[74] Coercing schools to disclose student information to military

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[70] Letter from David M. Paddock, Principal Fairport High School to Parent/Guardian (2005-2006).

[71] Addison, *supra* note 53.

[72] Policy Institute Research for the Region, *supra* note 68.

[73] Addison, *supra* note 53.

[74] Policy Institute Research for the Region, *supra* note 68.

recruiters is plainly wrong, especially because it is uncertain how and by whom students' personal information may be used in the future.

V. PENTAGON DATABASE

Despite the NCLB promise that "[n]othing in this Act . . . shall be construed to authorize the development of a nationwide database of personally identifiable information on individuals involved in studies or other collections of data under this Act,"[75] the Department of Defense announced in June 2005 that it engaged an outside marketing firm to create a national database for recruiting using the personal data of millions of students between ages sixteen and twenty-five.[76] The DOD admitted that it created a student information database containing information on about 30 million students in 2003, but did not report it in Federal Register until May 2005.[77] The announced DOD program, called Joint Advertising Market Research and Studies (JAMRS) is managed by a private company BeNOW, a Mullen Advertising subcontractor, which provides database marketing services including, among others, production of High School Masterfile, Selective Service System, Joint Leads Fulfillment, College Students File, and Permanent Suppression File.[78] The database is designed to collect a variety of personal data including names, date of birth, gender, address, phone numbers, Social Security Number, ethnicity, high school name, graduation date, G.P.A. and much more.[79] The JAMRS also publishes recruiting studies, reports and research on youths through the Defense Market Research Executive Notes (DMREN),[80] but access is password protected, limited only to those registered users who receive DOD approval.

Public outrage[81] followed the DOD announcement on the Pentagon

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[75] 20 U.S.C. § 7911 (2005).

[76] Transcript of Media Roundtable with Deputy Under Secretary of Defense for Personnel and Readiness David Chu, (June 23, 2005), http://www.dod/mil/transcripts/2005/tr20050623-3121.html; Jonathan Krim, *Pentagon Creating Student Database: Recruiting Tool for Military Raises Privacy Concerns*, WASH. POST, June 23, 2005, at A1, LEXIS, News Library, WPOST file; Mark Mazzetti, *Military Enlists Marketer to Get Data on Students for Recruiters*, L.A. TIMES, June 23, 2005, at A1, LEXIS, News Library, LAT file; Damien Cave, *Age 16 to 25? The Pentagon Has Your Number, and More*, N.Y. TIMES, June 24, 2005, § A3, at 18, LEXIS, News Library, NYT file.

[77] 70 Fed. Reg. 29,486-87 (May 23, 2005).

[78] JAMRS, *Affiliations*, http://www.jamrs.org/about/affiliations.php (last visited Nov. 25, 2005).

[79] 70 Fed. Reg. 29,486 (May 23, 2005).

[80] *See* Defense Market Research Executive Notes, http://dmren.org/DMREN/execute/index (last visited Mar. 31, 2006).

[81] *See, e.g.*, Press Release, ACLU, Pentagon Student database Another Example of the Government's Out-of-Control Information Grab, ACLU Says, (June 23, 2005) *available at* http://www.aclu.org/Privacy/Privacy.cfm?ID=18571&c=253. The following is a sampling of web sites of organizations and groups concerned with the JAMRS database: Electronic Privacy Information Center, http://www.epic.org/privacy/student/doddatabase.html; CodePink: Women for Peace,

database prompting strong reaction by legislators. Senator Hillary Clinton, Democrat from New York, spearheaded the protest against DOD actions and sent a letter to Secretary Rumsfeld calling the DOD to immediately cease its efforts to create a national database using private marketing firms:

> [W]e can not condone the hiring of a private company to collect and disseminate the most private information about our youth. We are concerned both with the potential violation of privacy interests and with the potential for identity theft and other misuses of this personal information. We fail to see a legitimate need for the creation of a database containing such personal information and are concerned that it may be an inappropriate effort to profile students based on ethnicity or other personal factors. . . . [W]e ask that you immediately cease the creation of this database and stop this private company from collecting and disseminating students' personal information. We also ask that you immediately post, on the Department of Defense website, a standard "opt-out" letter that students may execute to stop military recruiters from using their personal information to contact them at home.[82]

Various activist groups and organizations immediately initiated actions to inform the public about the possible implications of the creation of a national database.[83] Although the DOD stated that the JAMRS database had no connection to information collected through the NCLB,[84] the Electronic Privacy Information Center (EPIC) noted the uncertainty of the relationship between the NCLB and the JAMRS in a detailed

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http://www.codepink4peace.org/article.php?list=type&type=48; CounterRecruiter.net: News on the Growing Counter Military Recruiting Movement, http://rncwatch.typepad.com/counterrecruiter/; Leave My Child Alone, http://www.leavemychildalone.org/; Military Free Zone, http://www.militaryfreezone.org/; The National Network Opposing Militarization of Youth, http://www.youthandthemilitary.org/; The Project on Youth and Non-Military Opportunities (YANO), http://www.projectyano.org/.

[82] Press Release, Senator Hillary Rodham Clinton, Senator Clinton Calls on Pentagon to Stop Data Collection Efforts that Infringe on High School Students' Privacy, (May 8, 2006), *available at* http://clinton.senate.gov/news/statements/details.cfm?id=239912&&. The letter was signed by Senators Hillary Clinton (D-NY), John Corzine (D-NJ), Frank R. Lautenberg (D-NJ), Daniel K. Akaka (D-HI), Russ Feingold (D-WI), Maria Cantwell (D-WA), and Roy Wyden (D-OR). As of November 2005, the DOD did not provide any information on its web site pertaining to the NCLB opt-out provision. *See also* DOD Database Campaign Coalition Letter, (Oct. 18, 2005) *available at* http://www.libertycoalition.net/dod_database_campaign_coalition_letter.

[83] *See, e.g.*, NYCLU, *NYCLU Unveils Campaign to Protect Students' Rights from Abusive Military Recruitment Tactics* (Sept. 22, 2005), http://www.nyclu.org/milrec_pr_092205.html.

[84] Transcript of Media Roundtable, *supra* note 76.

memorandum describing the DOD database and the Privacy Act.[85] As the EPIC pointed out, the NCLB opt-out provision does not operate as a limit on the JAMRS database, and is inconsistent with the DOD's statement of purpose of the JAMRS, which is "to provide a single central facility within the Department of Defense to compile, process and distribute files of individuals who meet age and minimum school requirements for military service."[86] The EPIC has also filed Freedom of Information requests with the DOD in order to find out "how the NCLB data is collected, stored and used," but has not received any information as of November 2005.[87]

Because of legitimate concerns that students' information obtained through the NCLB military recruitment provision has been or will be added to the JAMRS database, various web sites offer Pentagon database opt-out forms as the only currently available tool against this government project. However, some question the purpose of anti-recruitment action by organizations such as New York Civil Liberties Union, which launched a campaign against "intrusive military tactics."[88] Professor Eugene Volokh, on his blog "The Volokh Conspiracy," asked what aspects of civil liberty are affected by the military recruitment methods claimed by NYCLU to be abusive.[89] For example, Volokh wonders how providing the military with student information interferes with civil liberty and why is military recruitment not seen as part of an effective race-based affirmative action plan, supported by the NYCLU.[90] These questions, while legitimate and above all provocative, seem to be based on viewing the NYCLU actions related to the NCLB military recruitment in isolation from many other issues implicated by the military action.[91] One fundamental civil liberty directly violated by the NCLB military recruitment provision is embodied in the constitutional rights guaranteed by the First Amendment.

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[85] Memorandum from the Electronic Privacy Information Center on The Pentagon Recruiting Database and the Privacy Act, (July 15, 2005) at 12-13, *available at* http://www.epic.org/privacy/student/doddatabase.html.

[86] 70 Fed. Reg. 29,486-87 (May 23, 2005).

[87] Electronic Privacy Information Center, *supra* note 85, at 13.

[88] *See* NYCLU, *supra* note 83.

[89] Posting of Eugene Volokh to The Volokh Consipracy Blog, "*New York Civil Liberties Union vs. "Unwanted, Abusive, and Intrusive Military Recruitment Tactics,"* http://volokh.com/archives/ (Sep. 23, 2005 14:32 EST).

[90] *Id.*

[91] Although the government can recruit and even compel military service, once in the military, individuals are subject to a different set of rules and "may not claim many freedoms that we hold inviolable as to those in civilian life." W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 n.19 (1943). Whether an individual will be recruited to the military by unconstitutional means and consequently have their rights diminished due to the military service would seem to be of great concern to civil liberties groups.

VI. COERCING SPEECH THROUGH OPT-OUT: REVOCATION OF PRESUMED CONSENT

Although the consent provision of section 9528 states that a student or parent "may request" that a student's information "not be released without prior written consent,"[92] the military recruiters access provision is mandatory, requiring that schools "shall provide on a request" access to students' names, addresses and telephone numbers.[93] Read in conjunction, these two provisions plainly demonstrate that if a student or parent of the student wishes to prevent mandatory disclosure of the student's personal data, such person is compelled to provide a written letter requesting non-disclosure. In other words, section 9528 is coercive because consent is presumed and must be affirmatively revoked by students or parents who wish to protect students' personal information from disclosure to the military.

Close examination of the meaning of "consent" reveals its purposeful and misleading use in section 9528. *Black's Law Dictionary* defines "consent" as an "[a]greement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person."[94] The element of voluntariness is crucial for an act to satisfy the definition of consent and that aspect is clearly missing in the section 9528 consent provision, which does nothing more than provide an opportunity to demand exception from mandatory disclosure. The true meaning of consent would be satisfied by an opt-in provision by which a student could voluntarily consent to a governmental act of disclosure without being compelled to do so by consequences of some other provision requiring mandatory disclosure. *Webster's Dictionary* definition of consent is instructive for a proper understanding of the meaning of "consent." It is defined as:

> a) compliance or approval, esp. of what is done or proposed by another: acquiescence, permission . . . b) capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action . . . 3) agreement among persons usu. as to a course of action or concerning a particular point of view or opinion.[95]

Objection to mandatory disclosure is not a voluntary agreement to an act or a voluntary acquiescence to or permission for what is being done by

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[92] 20 U.S.C. § 7908(a)(2) (2005).
[93] 20 U.S.C. § 7908(a)(1) (2005).
[94] BLACK'S LAW DICTIONARY 323 (8th ed. 2004).
[95] WEBSTER'S THIRD NEW INT'L DICTIONARY 482 (1976).

the government. One consents to what is done by another; one does not consent to another's not doing an act required by law. Section 9528 includes an exception to mandatory disclosure for "a private secondary school that maintains a religious objection to service in the Armed Forces" provided that the objection can be verified through a school's documentation.[96] There is practically no difference between the "consent" and "exception" clauses of section 9528. Both allow exception to mandatory disclosure through a written document reflecting objection to military recruitment. The exception clause could have easily been labeled "consent," stating that a "private school may request that section 9528 not apply by submitting prior written consent." The "consent" clause could have been called "exception," stating that "the requirements of section 9528 do not apply to secondary school students or parents of students who maintain an objection to service in the Armed Forces or military recruiting, if the objection is verifiable through prior written consent submitted to the school." While the above hypothetical points out a matter of choice of language in drafting the statute, the mere substituting of "exception" with "consent" is a serious flaw. The compulsory nature of the "consent" clause is clear. As Justice Jackson said in *Barnette*, a Bill of Rights "guards the individual's right to speak his own mind,"[97] and protects against coerced speech, which in the case of section 9528 is the only means to avoid mandatory government action with which one disagrees.

Anyone who opposes military recruiters' access to student information is coerced into expressing their opposition to disclosure in writing because there are no other means to obtain exemption from disclosure. Expressing objection to mandatory disclosure by providing a written consent form conveys a message of disagreement with the military recruiting efforts, thus forcing the speaker of the message to express her point of view. While there might be some who would see this type of expression as a platform for voicing their political opinions, there are others who would rather remain silent and not be forced to reveal their belief that mandatory military recruitment access to student information in secondary school is inappropriate. This plainly represents an impermissible governmental coercion of speech and, as such, is unconstitutional under the First Amendment.

It is well established that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[98] The Supreme Court

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[96] 20 U.S.C. § 7908(c) (2005) ("The requirements of this section do not apply to a private secondary school that maintains a religious objection to service in the Armed Forces if the objection is verifiable through the corporate or other organizational documents or materials of that school.").

[97] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1948).

[98] Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citing *Barnette*, 319 U.S. at 633–34).

has sustained challenges to compelled speech in several categories. The foundation of the compelled speech doctrine was laid out in *Barnette*, where the Court held that government authorities' compelling of students to salute the flag while reciting the pledge "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[99] The statute in that case required students to salute the flag, and refusal to salute was considered insubordination resulting in expulsion from school.[100] The Court formulated the issue in the case as "whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan."[101] In the accompanying footnote, the Court explained that "the Board of Education did not adopt the flag salute because it was claimed to have educational value. It seems to have been concerned with promotion of national unity . . . . No information as to its educational aspect is called to our attention . . . ."[102] The *Barnette* Court placed a great emphasis on the freedom of belief and freedom of mind formulating this often quoted statement: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[103] It is important to remember these words because in *Barnette*, the state required the student to communicate "by word and sign his acceptance of the political ideas it thus bespeaks."[104]

In the case of the NCLB consent provision, the student or parent is forced, by submitting consent to nondisclosure, to communicate not the acceptance, but the rejection of government's expressive message embodied in the form of recruiting.[105] More recently, the Supreme Court in *Hurley* reaffirmed the core holding in *Barnette* that "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control."[106] This means that a speaker

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[99] *Barnette*, 319 U.S. at 642.

[100] *Id.* at 626, 629.

[101] *Id.* at 631.

[102] *Id.* at 631 n.12.

[103] *Id.* at 642.

[104] *Id.* at 633.

[105] *See* Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219, 236-37 (3d Cir. 2004) ("The expressive nature of recruiting is evident by oral and written communication that recruiting entails . . . . [r]ecruiting necessarily involves 'communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes'—the hallmarks of First Amendment expression.") (citing Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980)).

[106] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 575 (1995).

should not be forced by the government to express a point of view in respect to military recruitment, whether approving it or disapproving. Unlike in *Barnette* where students were compelled by saluting the flag to involuntarily affirm a particular message of the government with which they disagreed, section 9528 coerces a speaker to defy involuntary affirmation of military recruiting practices, imposed on the speaker by the school's mandated disclosure of the student information in the absence of the speaker's consent. The Court condemned the government's imposition of involuntary affirmation on the speaker, and in comparing it with the government's power to censor and suppress expression of opinion which presents "clear and present danger," concluded that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."[107]

Involuntary affirmation is precisely what section 9528 mandates regardless of whether the student or parent consented to disclosure. Rather, the only way for the speaker to avoid involuntary affirmation of the military recruiting policies by silence is through compelled speech. That the legislature dressed involuntary affirmation of government belief by mandated disclosure in the language of "consent" and "may request" does not make this provision any less coercive than the provision requiring mandatory flag salute. Both mandatory disclosure and mandatory flag salute represent compulsion of students to declare beliefs by involuntarily assenting to the government's message. In the former, students involuntarily assent to political ideas bespoken by the government through military recruitment, and in the latter, students involuntarily assent to accepting "a flag as a symbol of adherence to government as presently organized," accepting that way the political ideas of the government.[108]

The Supreme Court reaffirmed the rule from *Barnette* that the freedom of thought includes right to refrain from speaking in *Wooley*.[109] In that case, the plaintiff challenged the constitutionality of enforced sanctions against individuals who cover the state motto "Live Free or Die" on their vehicle license plates.[110] The Court held that the state may not constitutionally require individuals to participate in the dissemination of the government's ideological message by the mandated display of the state motto on their license plates.[111] The *Wooley* court applied a balancing test

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[107] *Barnette*, 319 U.S. at 633–34.
[108] *Id.* at 633.
[109] Wooley v. Maynard, 430 U.S. 705, 714 (1977).
[110] *Id.* at 706–07.
[111] *Id.* at 713.

it announced earlier in *O'Brien*.[112] The *O'Brien* case involved symbolic speech, an act of burning the Selective Service registration certificate.[113] The Court formulated a rule stating that a government regulation is justified "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[114] In applying the *O'Brien* test, the Court in *Wooley* identified the plaintiff's interest as the right "to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."[115] The Court rejected both interests advanced by the government. The first interest in facilitation of vehicle identification was dismissed by the Court because "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[116] The second interest propounded by the government, promoting "appreciation of history, individualism, and state pride,"[117] was found not to be ideologically neutral by the Court.[118] The Court concluded that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[119]

Although section 9258 involves explicit speech requiring speakers to express in writing their opposition to mandatory disclosure, applying the *O'Brien*'s test results in the same findings as in *Wooley*. There is no doubt that military recruiting furthers an important governmental interest of staffing the Armed Forces to perform national defense. However, this interest is directly related to suppression of freedom of speech which includes freedom from compulsion to speak. In order to assure military recruiters' access to secondary schools, the government made it mandatory. This mandated disclosure can only be avoided by a written consent not to disclose, which represents a direct compulsion of speech for those speakers who are consequently inhibited in exercising their right to not speak. As section 9528 is directly related to the suppression of free expression, its restriction of the First Amendment rights is not incidental.

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[112] *Id.* at 715–16 ("We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.") (citing United States v. O'Brien, 391 U.S. 367, 376–77 (1968)).

[113] United States v. O'Brien, 391 U.S. 367, 369 (1968).

[114] *Id.* at 377.

[115] Wooley v. Maynard, 430 U.S. 705, 715 (1977).

[116] *Id.* at 716.

[117] *Id.*

[118] *Id.* at 717.

[119] *Id.*

Even if it were incidental, the restriction on free speech is greater than is essential to further the government's interest.

Students and parents of students clearly have the right to hold a point of view different from the majority; that is the right to disapprove or oppose the mandatory disclosure of students' information to military recruiters for the purposes of recruiting enlistees for the Armed Forces. This right includes the right not to be compelled to accept "any patriotic creed"[120] or to oppose such creed. No matter how laudable the goal of military recruitment is, the government cannot achieve it with means that broadly infringe upon individual's First Amendment rights.[121] As the Court pointed out in *Wooley*, "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."[122]

Notwithstanding the fact that the military recruitment provision is in no way related to the purpose of enacting the NCLB,[123] in the case of section 9528, it is clear that less dramatic means were available to the legislators. An opt-in clause that would provide for consent to disclosure of student information would have been constitutionally sound and would have achieved the purpose of section 9528. Choosing what to say or not to say is inherent to speech[124] and the Supreme Court has recognized a "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[125] The mandated disclosure scheme of the NCLB compels the speaker to express what amounts to her political or ideological views in order to protect the student's privacy. Obviously, consenting to non-disclosure of student information to military recruiters brings into question the speaker's patriotism and loyalty to the country. One consequence of objection to disclosure is public identification of the objector as unpatriotic and

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[120] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943).

[121] In applying *O'Brien* in *Forum for Academic & Inst. Rights*, the Third Circuit court stated: "And while the Government emphasizes that the Nation's military is at stake, invoking the importance of a well-trained military is not a substitute for demonstrating that there is an important governmental interest in opening the law schools to military recruiting." Forum for Academic & Inst. Rights v. Rumsfeld, 390 F.3d 219, 245 (3d Cir. 2004). By analogy, invoking the need to increase enlistment through high school recruiting does not substitute showing that mandatory disclosure is an important governmental interest.

[122] *Wooley*, 430 U.S. at 716–17.

[123] For the purpose of the NCLB, see 20 U.S.C. § 6301. Secretary Rumsfeld specified the purpose of section 9528: "Student directory information will be used specifically for armed services recruiting purposes . . . ." Dear Colleague Letter, *supra* note 50.

[124] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 11 (1985) ("*[A]ll* speech inherently involves choices of what to say and what to leave unsaid.").

[125] Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995).

opposed to a popular majority support for the Army as defender of our freedom and liberty.[126] When expressed, these views directly impact the way the speaker is perceived in the community, creating a risk of suspicion, disapproval, isolation, and ostracism. In the age of a global war on terror, when citizens' susceptibilities to prejudice and fear are heightened and vigilance against perceived enemies is increased, it is of paramount importance not to appear unpatriotic or as an opponent of the government. Section 9528 compels an individual to express her opposition to government action and, as such, is inconsistent with constitutional guarantees of the First Amendment.

VII. RIGHT TO ANONYMITY

In a landmark case involving anonymous pamphleteering, the Supreme Court recognized that the First Amendment includes the right to anonymity.[127] When Mrs. McIntyre distributed her unsigned leaflets at a public meeting expressing her opposition to a school tax levy, she engaged in "the advocacy of a politically controversial viewpoint," and thereby qualified her speech for the greatest constitutional protection.[128] The *McIntyre* Court applied "exacting scrutiny" to determine whether a law burdening "core political speech . . . is narrowly tailored to serve an overriding state interest."[129] The Court held that the state interest in preventing fraud cannot justify a prohibition of speech based on its content without a "necessary relationship to the danger sought to be prevented."[130] Celebrating a long tradition of anonymity, the Court invoked famous examples of anonymous works including the Federalist Papers, signed "Publius" rather than by their authors James Madison, Alexander Hamilton and John Jay.[131] Writing for the Court Justice Stevens stated, "[a]nonymity is a shield from the tyranny of the majority,"[132] and recognized various factors motivating anonymity such as "fear of economic or official retaliation," "concern about social ostracism," or "desire to preserve as much of one's privacy as possible."[133] Justice Stevens reiterated the right to anonymity in *Watchtower*, where the Court struck down a municipal ordinance requiring individuals to obtain a permit prior to engaging in

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[126] For a discussion on compelled subsidy, which includes some of the same issues as compelled speech, *see* Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 LAND & WATER L. REV. 101 (1999).

[127] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).

[128] *Id.* at 347.

[129] *Id.*

[130] *Id.* at 357.

[131] *Id.* at 343 n.6.

[132] *Id.* at 357.

[133] *Id*. at 341–42.

door-to-door canvassing and pamphleteering because it was overbroad, it discouraged speech, and it banned a significant amount of spontaneous speech.[134]

Section 9528 requires students or parents to identify themselves when they object to military recruitment in high school. Each opt-out consent must contain at a minimum the student's name, parent's or guardian's name, and a signature.[135] Opting out of mandatory disclosure of student directory information is a direct regulation of speech based on content. As in *McIntyre,* where the statute required that "[e]very written document covered by the statute must contain 'the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore,'"[136] section 9528 requires that every written opt-out form contains at least the names of the student and student's parent or guardian responsible for opting-out. As in *McIntyre*, where "the category of covered documents is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required markings,"[137] section 9528 equally requires identification of only those individuals submitting written forms opposing military recruitment. Analogous to the Ohio statute in *McIntyre*, the section 9528 requirement of the identification of a speaker who opposes military recruitment is "a limitation on political expression subject to exacting scrutiny."[138] Unlike their counterparts who do not oppose disclosure of student directory information to military recruiters and are entitled to remain anonymous, those who do oppose must identify themselves by submitting a written document containing their name and their opposition:

LOS ANGELES UNIFIED SCHOOL DISTRICT

REQUEST TO WITHHOLD DIRECTORY INFORMATION FORM

I do not wish to release the name, address and telephone number of the student named above to the agency or agencies

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[134] Watchtower Bible and Tract Soc'y, Inc. v. Village of Straton, 536 U.S. 150, 166–68 (2002).

[135] For an example of the opt-out forms in the following languages: English, Arabic, Bengali, Chinese, Haitian-Creole, Korean, Russian, Spanish, and Urdu languages, see New York City Department of Education Opt-Out Letter to High School Parents for Non-Disclosure of Student Contact Information to Institutions of Higher Education and Military Recruiters (posted 10/19/2004), http://www.nycenet.edu/Administration/Offices/youthdev/NCLB+Disclosure+of+Student+Information-Military+Recruiters+and+Institutions+of+Higher+Education.htm. *See* U.S. Department of Education, Model Notice for Directory Information, http://www.ed.gov/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html (last visited Dec. 12, 2005).

[136] *McIntyre*, 514 U.S. at 345.

[137] *Id*. at 345.

[138] *Id*. at 346.

I checked below:

__United States Armed Forces (Military) Recruiting agencies

__Colleges, Universities or Other Institutions of Higher Education[139]

In *Buckley* the Supreme Court struck down a Colorado statute requiring initiative petition circulators to wear badges disclosing their names and their status as volunteer or paid.[140] If a circulator was paid, the statute also compelled disclosure of the name and telephone number of the employer.[141] The Court concluded that "by forcing name identification without sufficient cause," the statute discouraged participation of the petition circulator in the political process.[142] Additionally, the Court found that compelling disclosure of paid circulators' status, income, and employer name forced paid circulators to "surrender the anonymity enjoyed by their volunteer counterparts."[143]

Section 9528 operates in the same manner, forcing students and parents who oppose military recruitment to identify themselves and to express their opposition to disclosure of student directory information to a particular entity. Not only are opponents to military recruitment compelled to surrender their anonymity, they are forced to do so in conjunction with coerced political disclosure. Their expression of an unpopular cause in this case is compelled as an affirmative revocation of consent, presumed by mandatory disclosure. Their anonymity is destroyed because the opt-out form mandates disclosure of their identity. As the Supreme Court stated in *McIntyre*, the anonymity "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[144] Contrary to a long tradition of the right to anonymity and unconnected to the purpose of the NCLB, section 9528 infringes upon students' and parents' right to anonymity and as such cannot withstand constitutional scrutiny.

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[139] Los Angeles Unified School District, Request to Withhold Directory Information Form, http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/LAUSDNET/RESOURCES/PARENTS/ENGLISH.PDF (last visited Dec.12, 2005). This form is available in English, Spanish, Armenian, Chinese, Korean, Russian, and Vietnamese.

[140] Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 205 (1999).

[141] *Id*. at 188.

[142] *Id*. at 200.

[143] *Id*. at 204 (internal quotations omitted).

[144] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

VIII. SECTION 9528 IS AN UNCONSTITUTIONAL CONDITION

There are ample reasons why the entire NCLB statute may be unconstitutional under the current Spending Clause doctrine.[145] One author correctly noted that "[t]he political expediency with which the bill was enacted, in efforts to unite our country after the threat of insecurity, suggests its flaws. In its haste to enact NCLB, Congress may have unconstitutionally extended its spending powers."[146] This paper focuses only on the constitutionality of section 9528 under the current Spending Clause doctrine as articulated by the Supreme Court in *Dole*,[147] and the unconstitutional condition doctrine under *Rust*.[148]

The Supreme Court recognized long ago that the government has no power to impose an unconstitutional condition on the recipient of a privilege.[149] More specifically, the Court stated in *Perry* that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[150] NCLB was enacted pursuant to Congress's spending power. The spending power is limited by a four-prong test articulated by the Supreme Court in *Dole*: 1) the exercise of the power must be for the general welfare; 2) the condition must be unambiguous so states understand their choice to comply and the consequences of their participation; 3) the condition must be related to the federal interest; and 4) the condition may not compromise other constitutional rights.[151]

Section 9528 is a condition imposed on schools as recipients of federal funding. It states that educational agencies receiving federal money "shall provide" a student directory to military recruiters upon request.[152] Failure to do so will result in loss of federal funding.[153] There is no doubt that the government's interest in recruiting is legitimate. However, that recruiting is a legitimate interest does not necessarily mean that it is exercised "in pursuit of general welfare" as required by the *Dole* test. Secretary

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[145] For a discussion on the validity of the NCLB under the Congressional Spending Clause power see Coulter M. Bump, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COLO. L. REV. 521 (2005).

[146] *Id.* at 522.

[147] South Dakota v. Dole, 483 U.S. 203 (1987).

[148] Rust v. Sullivan, 500 U.S. 173 (1991).

[149] Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593-94 (1926) ("It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.").

[150] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[151] *Dole*, 483 U.S. at 207–08.

[152] 20 U.S.C. § 7908(a)(1) (2005).

[153] 147 CONG. REC. H2535 (daily ed. May 22, 2001).

Rumsfeld acknowledged that "the challenges faced by military recruiters" are the main reason behind Congress's enactment of legislation requiring access to student information.[154]

There are a number of reasonable explanations for the shortage of enlistees. As of March 1, 2006, the DOD confirmed 2420 American soldiers died in Iraq since the war started in March 2003.[155] According to some statistics, 17,869 U.S. soldiers have been wounded in the Iraq war.[156] Afghanistan Operation Enduring Freedom resulted in 372 deaths of U.S. soldiers and 718 wounded American soldiers.[157] These numbers, especially in light of a failure to find any weapons of mass destruction, a growing anti-war movement across the country, and Congress's questioning of Pentagon activities[158] may signal that the majority of Americans do not find military recruitment, especially at a vulnerable age, to be in "pursuit of general welfare."

While it is arguable that section 9528 would pass muster under the first two prongs of the *Dole* test, it is doubtful it would satisfy the reasonable relationship prong. This prong is consistent with the Court's statement in *Rust* that "when the government appropriates public funds to establish a program it is entitled to define the limits of that program."[159] Military recruiting has no reasonable relation to improving the academic achievement of the disadvantaged. On the contrary, the only relation military recruiting has to the NCLB is that the NCLB provides a good screening device for the military so that it can target students failing to attain desired academic achievement. Those underperforming students are usually poor minorities and unlikely to attend college. In times when recruitment increases are desperately needed, they represent the best target for military recruiters. There is nothing in section 9528 even remotely connected with improving academic performance or achieving educational success. While the government is free to impose conditions on recipients of federal funding, such conditions cannot be arbitrary. Under *Dole* and *Rust* conditions should be in the public interest and within the bounds of, and reasonably related to, the statute providing funding. Being entirely unrelated to the NCLB, section 9528 fails this test.

The fatal flaw of section 9528 is its abridgment of First Amendment rights. A condition that violates freedom of speech cannot survive constitutional scrutiny. If the government is allowed to deny benefits to a

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[154] Dear Colleague Letter, *supra* note 50.

[155] *See* Iraq Coalition Casualty Count, http://icasualties.org/oif/ (last visited May 8, 2006).

[156] *Id.*

[157] *See* Operation Enduring Freedom, http://www.icasualties.org/oef (last visited May 8, 2006).

[158] *See* Douglas Jehl & Thom Shanker, *Congress Is Reviewing Pentagon on Intelligence Activities*, N.Y. TIMES, Feb.4, 2005, at A4, LEXIS, News Library, NYT file.

[159] Rust v. Sullivan, 500 U.S. 173, 194 (1991).

student because of that student's freedom of speech, the student's exercise of this constitutional right would be "penalized and inhibited."[160] "This would allow the government to 'produce a result which [it] could not command directly.' . . . Such interference with constitutional rights is impermissible."[161] Section 9528 infringes upon freedom of speech and represents an unconstitutional condition upon recipient of federal funds. An amendment to the military recruitment provision would suffice to transform this condition into a constitutionally permissible exercise of Congress's spending powers.

IX. OPT-IN SOLUTION

Mike Honda, Democrat Representative from California, in his effort to amend the NCLB, introduced in February 2005 a bill that would replace the opt-out with an opt-in provision.[162] Instead of consent to non-disclosure (opt-out), the bill proposes consent to disclosure (opt-in):

> (a) Military recruiters
>
> (1) Access to Student Recruiting Information – Notwithstanding section 503(c) of title 10, United States Code, each local educational agency receiving assistance under this Act shall provide, on a request made by military recruiters, access to the name, address, and telephone listing of each secondary student served by the agency if the parent of the student involved has provided written consent to the agency for the release of such information to military recruiters.
>
> (2) Notice; Opportunity to Consent – A local educational agency receiving assistance under this Act shall –
>
> (A) notify the parent of each secondary school student served by the agency of the option to consent to the release of the student's name, address, and telephone listing to military recruiters; and
>
> (B) give the parent an opportunity to provide such consent in writing.[163]

The proposed opt-in provision does not compel students or parents of students to express their opinion about military recruitment when they

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[160] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[161] *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[162] H.R. 551, 109th Cong. (2005). The bill was introduced on Feb. 2, 2005 and was co-sponsored by seventy-five members of the House (as of Mar. 1, 2006).

[163] *Id.*

would rather not speak at all. Instead, it provides those who wish to speak with the opportunity to consent to disclosure, while allowing those who do not wish to speak, the choice to remain silent, while concurrently protecting the privacy of students. Like any other true consent agreement, the opt-in provision allows the government to contact only those students who acquiesced to the release of their personal information. The opt-in provision assures the constitutionality of the condition imposed on schools in exchange for government funding.

X. CONCLUSION

Military recruiting is a legitimate act by the government. "The All-Volunteer Force has come to represent American resolve to defend freedom and protect liberty around the world."[164] However, as Justices Black and Douglas succinctly concurred in *Barnette*, "[l]ove of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representative within the bounds of express constitutional prohibitions."[165] The military should not use the NCLB as a vehicle for recruiting students from schools receiving federal funding, since the NCLB was enacted as a means to improve the education system and to correct our continuing failing schools. The mandated disclosure of student information to military recruiters does not meet the purpose of the NCLB, and furthermore, it compels speech by students and parents in opposition of such disclosure, violating clearly established law under the First Amendment. Section 9528's opt-out provision is an impermissible exercise of the government's power to regulate. It violates freedom of speech and the right to anonymity, and by so doing imposes an unconstitutional condition on recipients of federal funding.

One solution that can bring this provision in compliance with the U.S. Constitution is to amend the NCLB by passing the opt-in provision proposed by Senator Honda in H.R. 551. Another solution is to repeal this provision all together, as it does not have a reasonable connection to the purposes of the NCLB. The goals of NCLB do not require that our schools serve as recruitment fodder for the military, especially when there are legitimate ways to achieve military recruitment goals. It is time for legislators to place the lack of sufficient enlistment in proper context and to stop going around to the back door trying to ensure that no children are left behind, unrecruited, by the military.

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[164] Dear Colleague Letter on Military Recruitment, Oct.9, 2002, *supra* note 50.

[165] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black and Douglas, J.J., concurring).