July 30, 2010

In the Name of Watergate -- Returning FERPA to its Original Design

Meg Penrose, Texas Wesleyan University

Available at: https://works.bepress.com/meg_penrose/1/
In The Name of Watergate: Returning FERPA to its Original Design

Mary Margaret Penrose


On June 17, 1972, Washington Post reporter Al Lewis phoned in a brief one page story detailing the crime that would ultimately unravel both a country and a presidency, a break-in at the Watergate Complex. The following day, Al Lewis detailed the “elaborate plot to bug the offices of the Democratic National Committee” by five men, three of whom he described as “native born Cubans” . . . “in a sixth-floor office at the plush Watergate.” Mr. Lewis’s story credits 24-year-old Frank Wills, a Watergate security guard, with alerting the police after noticing that someone had placed tape on a basement door in the Watergate garage to prevent the door from locking. This simple crime, that at the time was innocuously described by Mr. Lewis, became the impetus for two important events – the August 9, 1974 resignation of the 37th President of the United States, Richard Milhous Nixon and the passage of the Family Educational Rights and Privacy Act of 1974 (“FERPA”).

FERPA was ultimately signed into law by Nixon’s successor, President Gerald Ford on August 21, 1974 – a mere 12 days after Nixon’s resignation. The new law took

---

1 Professor of Law, Texas Wesleyan School of Law
3 Al Lewis, 5 Held in Plot to Bug Democrats’ Office Here, WASH. POST, June 18, 1972, at A1, A22.
4 Id.
effect ninety days later on November 19, 1974.\(^7\) As the Nation attempted to heal from
Watergate’s wounds, educators quickly learned of this new law and sought input and
immediate amendment. In fact, the first amendment would take place seven months later
on December 13, 1974, including the only amendment to date redefining “education
records.”\(^8\)

FERPA provides certain protections for students’ “education records,” though the
current definition lacks clarity, predictability and uniformity in application. This article
seeks to offer a modernized definition of “education records” that properly tracks the
legislative history, intent and goals of FERPA. To arrive at a workable definition,
however, one must begin by recalling the era of privacy that surrounded, ironically,
Watergate. It was President Nixon’s calls for citizens to have open access to their
government records, secret and otherwise – during the Watergate proceedings – that
inspired Senators to provide special protections to educational records.

The right of privacy, which is the stated goal of FERPA, began its tumultuous
history in the early 1970s. Griswold v. Connecticut, the United States Supreme Court
case that originated a Constitutional “right of privacy” was decided in 1965.\(^9\) Shortly
thereafter, in 1973, the “right of privacy” was extended to a woman’s choice to terminate
her pregnancy.\(^10\) The Warren Court, beginning in 1953 and extending through 1969, is
best remembered for enshrining, if not enlarging, Americans’ Constitutional “right to
privacy.” From decisions regarding criminal procedure rights to expanding zones of
individual privacy, the Warren Court granted comprehensive, enforceable “rights” where

\(^7\) Id.
\(^8\) Id.
none previously existed. In this fashion, the Warren Court ensured that governmental power over individuals was duly constrained.

However, as the 1970s began, the Supreme Court was not alone in the zealous advancement of individual privacy rights. Congress, and the President, both joined in the call for less governmental secrecy in the dealings of individuals. President Nixon, embroiled in the Watergate proceedings in February, 1974, gave a radio address discussing the American Right of Privacy.\(^\text{11}\) The following comments, though spoken by the President, were ideas seemingly shared by all three articles of government at the time:

> Many things are necessary to lead a full, free life – good health economic and educational opportunity, and a fair break in the marketplace, to name a few. But none of these is more important than the most basic of all individual rights, the right to privacy. A system that fails to respect its citizens’ right to privacy fails to respect the citizens themselves.

> There are, of course, many facts which modern government must know in order to function. As a result, a vast store of personal data has been built up over the years. With the advent of the computer in the 1960s, this data gathering process has become a big business in the United States – over $20 billion a year – and the names of 150 million Americans are now in computer banks scattered across the country.

> At no time in the past has our Government known so much about so many of its individual citizens. This new knowledge brings with it an awesome potential for harm as well as good – and an equally awesome responsibility on those who have that knowledge. Though well-intentioned, Government bureaucracies seem to thrive on collecting additional information. That information is now stored in over 7,000 Government computers. Collection of new information will always be necessary. But there must also be reasonable limits on what is collected and how it is used. . . . In many cases, the citizen is not even aware of what information is held on record, and if he wants to find out, he either has nowhere

to turn or he does not know where to turn.\textsuperscript{12}

These words, ominously prescient, could have, standing alone, served as the basis for FERPA. The Article II branch of government was clearly observing that too much data collection could result in problems if Americans were not given some right of access to – and some measurable limits placed on government concerning – this data.\textsuperscript{13} At the same time that President Nixon’s radio address was being broadcast to the country, the Article I branch of government, Congress, was crafting legislation to grant individuals the very rights and protections the President discussed.

The Fair Credit Reporting Act of 1970, which President Nixon mentioned in his radio address, “took a major first step toward protecting the victims of erroneous or outdated information.”\textsuperscript{14} President Nixon extolled the virtues of the Fair Credit Reporting Act by noting that “[i]t requires that an individual be notified when any adverse action, such as denial of credit, insurance or employment, is taken on the basis of a report from consumer reporting agencies. It also provides citizens with a method of correcting these reports when they do contain erroneous information.”\textsuperscript{15} President Nixon apparently placed great emphasis on two related components of privacy: (1) the right to know what information is being collected and used to make decisions about an individual; and, (2) the right to correct any misinformation collected thereby protecting against harmful decisions based on misinformation.

In this manner, President Nixon provided the blueprint for FERPA that Congress ultimately adopted for the protection of student rights. Equally relevant, and perhaps rich

\begin{flushleft}
\textsuperscript{12} \textit{Id.} \\
\textsuperscript{13} \textit{Id.} \\
\textsuperscript{14} \textit{Id.} \\
\textsuperscript{15} \textit{Id.}
\end{flushleft}
in irony, is the fact that Watergate served as the main impetus for reminding Congress of the damage that can occur when Government is left free to amass personal and secretive information regarding its citizens. Thus, while Congress sought to obtain several secret conversations recorded in the Oval Office from the Nixon Administration via subpoena, and while the country witnessed Watergate hearings in front of a Congressional committee, one Senator sought to provide the privacy rights recently given adults to students, both children and post-secondary level students.

Seemingly lost among the more notable pieces of privacy legislation passed during the early 1970s was FERPA, legislation proffered as a floor amendment to the General Education Provisions Act, thereby foregoing the traditional committee hearing and legislative history route. The legislation seemed to track President Nixon’s radio announcement forming a Domestic Council Committee on the Right of Privacy which the President desired would address three primary areas of concern, (1) the collection, (2) the storage, and, (3) the use of personal data. President Nixon asked his new Committee to examine: “[1] How the Federal Government collects information on people and how that information is protected; [2] Procedures which would permit citizens to inspect and correct information held by public or private organizations; [3] Regulations of the use and dissemination of mailing lists [records]; And, [4] most importantly, ways that we can safeguard personal information against improper alteration or disclosure.”

In this manner, as the Watergate scandal unfolded and Nixon’s days in office waned, Congress began tackling the important privacy issues highlighted by the President.

---

18 Id.
If information was being kept and relied upon by educators, students and parents had a right to know, a right to inspect and correct all such information and a right to safeguard sensitive information from disclosure. Watergate, it appears, can be credited, at least in part, for awakening the privacy consciousness of a nation. Privacy was born not in the halls of justice, but rather, sprang forth from a small piece of tape surreptitiously placed on a door in the Watergate garage discovered by Frank Wills.19 Many remember the names of Archibald Cox, John Dean, John Ehrlichman, G. Gordon Libby,20 Howard Hunt, John Sirica,21 and Woodward and Bernstein22 as they relate to Watergate. But, it was the less notable Frank Wills,23 Al Lewis24 and a first term senator from New York that transformed the Watergate break-in to legislation that would benefit the general public. In the summer of 1974, Senator James L. Buckley brought his privacy initiative for students and parents to the Senate floor. Watergate, it seems, had a silver lining.

19 See Lewis, supra notes 3 and 4.
20 G. Gorden Liddy, a former White-House aide, FBI agent and prosecutor, was convicted in Judge John Sirica’s federal court for conspiracy, burglary and the unlawful bugging of the Democratic Party Headquarters in the Watergate building. Lawrence Meyer, Last Two Guilty in Watergate Plot, WASH. POST, January 31, 1973, at A1. Liddy was found guilty on all eight counts against him and was described as the “mastermind, the boss, the money-man” of the operation by the prosecutor. Id.
21 Judge John Sirica was a federal judge appointed to the bench by President Dwight Eisenhower in 1957. See Bart Barnes, John Sirica, Watergate Judge, Dies, WASH. POST, August 15, 1992, at A1. Judge Sirica received Time Magazine’s award for Man of the Year in 1973, largely due to his role in the Watergate proceedings. Id. Judge Sirica was considered persistent “in searching for the facts while presiding over the Watergate cases that led to President Nixon’s resignation.” Id. One of the most important judicial rulings came when Judge Sirica ordered that secret tape-recorded conversations in the Oval Office had to be turned over to government prosecutors. Id. This decision was ultimately affirmed by the United States Supreme Court in United States v. Nixon, 418 U.S. 683 (1974).
22 Carl Bernstein and Bob Woodward were the two Washington Post reporters credited with exposing the enormity of the Watergate scandal. They wrote two books on their Watergate experiences, Bernstein and Woodward, ALL THE PRESIDENT’S MEN (1974) and THE FINAL DAYS (1974). The dedication for ALL THE PRESIDENT’S MEN thanked “the President’s other men and women . . . who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the Washington Post.” Bernstein and Woodward, ALL THE PRESIDENT’S MEN 7 (1974).
23 Frank Wills Security Log details that between 1:47 a.m. and 1:55 a.m. he “call[ed] police found tape in doore [sic] call police two [sic] make a inspection.” A copy of this security log is available at www.watergate.info/burglary/wills-security-log.shtml (last visited on July 24, 2010).
24 Al Lewis was the initial Washington Post reporter that covered the Watergate Hotel break-in. See supra notes 2 through 4. Only later did the reporting of Bernstein and Woodward seem to overshadow Lewis’s initial story.
II. Legislative History – How Watergate and a Parade Magazine Article Helped Provide Protection to Education Records

A one-term Conservative Party Senator from New York, James L. Buckley, the younger brother of renowned commentator William F. Buckley, served as the primary architect of FERPA.25 One author describes FERPA, also known by its primary sponsor’s name as the Buckley Amendment, as follows:

Senator Buckley discovered that since students and their parents generally were not permitted to view their school records, students could be victimized by errors that were put into their transcripts and other education records and then passed on to other schools, the military, other government agencies, and prospective employers. Whether the errors were the result of sloppiness or malice didn’t matter. Without the prospect of an external examination, schools had no incentive to ensure that their student records were accurate. Senator Buckley therefore proposed and Congress passed, the Family Education Rights and Privacy Act of 1974, more commonly known as the Buckley Amendment or FERPA. The statute gives students the right to have access to their educational records, the right to challenge the accuracy of the records, the right to be notified of their rights under the law, and, with some notable exceptions, the right to prevent the release of their records to third parties without their advance knowledge and consent.26

Senator Buckley unequivocally explained, echoing the call of President Nixon, that individual privacy and a citizen’s right to know what information the Government has collected was the motivating force behind his floor amendment to the General Education Provisions Act to protect privacy.27 In proffering his Amendment, Senator Buckley directly tied his desired education bill to the lingering effects of Watergate.28

Speaking on the Senate Floor, Senator Buckley stated:

[T]he revelations coming out of Watergate investigations have underscored the dangers of Government data gathering and the

26 Id.
27 Congressional Record, Senate, May 14, 1974, at 14580.
28 Id.
abuse of personal files, and have generated increased public demand for the control and elimination of such activities and abuses. It is appropriate, therefore, that we take this opportunity to protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federally assisted educational activities.29

The Senator’s plea for greater transparency in education records was due to his concern, echoing President Nixon’s radio address, that “[w]hen parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful materials can creep into the records.”30 “Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student.”31

The timing of this Amendment was undoubtedly crucial to its hasty, and some would argue uninformed, passage.32 With Articles of Impeachment being drawn up by the House of Representatives against President Nixon, Watergate seemed to penetrate every branch of the federal government, oftentimes hovering like a black cloud.33

---

29 Id.
30 Id.
31 Id.
32 Ellen M. Bush, The Buckley Amendment and Campus Police Reports, AEJMC Montreal Conference Law Division, at 4 (August 8, 1992)(paper on file with author). Bush reports that a mere five days after Senator Buckley offered his Senate floor amendment entitled “Protection of the rights and Privacy of Parents and Students,” the Amendment was adopted after less than one hour of discussion. Bush further reports that the Amendment passed on a voice vote without a roll call. Id. at 5.
33 Watergate: The Storms and Struggles Resume, TIME MAGAZINE, October 1, 1973. The opening paragraph of Time’s article explained the gravity of the situation:

For Richard Nixon, the lull in the Watergate tempest is over. The week Senator Same Ervin’s committee reopens its public hearings, and by next Week the U.S. Court of Appeals in Washington will rule on whether the President must surrender his secret Watergate tapes to a federal grand jury. In addition, more indictments are expected shortly in connection with both the Watergate break-in and the burglary at the office of the psychiatrist of Pentagon Papers Defendant Daniel Ellsberg. Said one presidential advisor: “It’s like sitting here waiting for 24,000 volts. You know it’s coming, but you don’t know when.”

Id.
falling shadows of Watergate made protecting privacy the paramount mission of Government.

Stressing the urgency of the situation, Senator Buckley spoke eloquently about “secret” records, “the violation of privacy by personal questionnaires” and confidentiality violations with “personal data,” matters that resonated potently during Watergate. After all, President Nixon had allegedly arranged for the psychiatric records of Daniel Ellsberg to be stolen from his psychiatrist’s office following the release of the Pentagon Papers. The Watergate era bred a climate of fear, perhaps even paranoia, of “private” information and “secret data collection” attended by an equally compelling desire to know precisely who had what information in their possession. Senator Buckley wanted the Senate to act with authority to curb information abuses of schools and educators.

Speaking on May 9, 1974, just days prior to FERPA’s passage, Senator Buckley explained, that “[i]n the wake of recent scandals over Government spying and secrecy, President Nixon announced the establishment of a high-level committee to provide a ‘personal shield for every American’ against all invasions of privacy. Surely we must not exclude our children from this protection.” Senator Buckley assured his colleagues that this Amendment “will help provide parents with access to their children’s school records, to prevent the abuse and improper disclosure of such records and data, and to restore the rights of privacy to both students and their parents.”

34 Congressional Record, Senate, May 14, 1974, at 14580 – 14581.
36 Congressional Record, Senate, May 9, 1974, at 13952. Senator Buckley exclaimed, “it is time we take the lid off secrecy in our schools.”
37 Id.
38 Id.
Without any doubt, this law was student focused and student friendly. In fact, the initial title of Senator Buckley’s legislation was “Protection of the Rights and Privacy of Parents and Students.”\(^{39}\) The added expenses and inconveniences for schools and educators were neither relevant nor troubling to Senator Buckley.\(^{40}\) What mattered – the only thing that mattered – was protecting the privacy rights, nascent though they were, of students in American schools.\(^{41}\)

“The secrecy and the denial of parental rights that seem to be a frequent feature of American education is disturbing,” Senator Buckley exclaimed.\(^{42}\) His law was necessary, he urged, to curtail the unchecked collection and dissemination of private data regarding students – often collected from children without the consent or knowledge of their parents.\(^{43}\) Senator Buckley relied heavily upon an article by Diane Divoky in Parade magazine that described what he termed “[t]he serious problems and dangers posed by secret files in our schools.”\(^{44}\) Ms. Divoky’s Parade article entitled, “How Secret School Records Can Hurt Your Child,” was so compelling Senator Buckley requested that the article be set forth in full in the Congressional Record.\(^{45}\)

\(^{39}\) Congressional Record, Senate, May 9, 1974, at 13952.
\(^{40}\) Id. Senator Buckley responded to criticisms regarding the burden on schools by explaining: “To that argument I must reply that I am no so much concerned about the workload or convenience of the educational bureaucracy but, rather, with the personal rights of America’s children and their parents.”
\(^{41}\) Id. Senator Buckley championed his Amendment as one that “broadens the protection of civil rights to include the civil rights of parents and students vis-à-vis the schools.” Id.
\(^{42}\) Id. at 14580.
\(^{43}\) Id. at 14581. Senator Buckley warned that the individual cases he presented on the Senate Floor, such as a case involving a school in the Eastern District of Pennsylvania, were but “a microcosm of the problems addressed by [his] amendment – the violation of privacy by personal questionnaires, violation of confidentiality and abuse of personal data – with its harm to the individual – and the dangers of ill-trained persons trying to remediate the alleged personal behavior or values of students. It describes the potential harm that can result from poorly regulated testing, inadequate provisions for the safeguarding of personal information, and ill-devised or administered behavior modification programs.” Id.
\(^{44}\) Congressional Record, Senate, May 9, 1974, at 13951.
\(^{45}\) Id.
Diane Divoky reported numerous anecdotal incidents involving the “increasingly fat folders maintained by the schools.”\textsuperscript{46} The Divoky article was both harbinger and command for change:

Student records – any teacher or school counselor will tell you – are used more and more to get a picture of the “whole child,” his family, and his psychological, social and academic development. So besides hard data, such as IQ scores, medical records, and grades, schools are now collecting files of soft data: teachers, [sic] anecdotes, personality rating profile, reports on interviews with parents and “high security” psychological, disciplinary and delinquency reports. These are routinely filed away in school offices or stored in computer data banks.

You, the parent, probably can’t see most of these records, or control what goes into them, much less challenge any untrue or embarrassing information they might contain. But a lot of other people – the school officers, welfare and health department workers, Selective Service board representatives, and just about any policeman who walks into the school and flashes a badge – have carte blanche to these dossiers on your child. And to top it all off, parents are never told who’s been spying on their children.\textsuperscript{47}

This information – which was eerily similar to the allegations of secret government files maintained during Watergate – motivated many Senators to act to protect “two of the largest classes of Americans,” students and their parents.\textsuperscript{48} The Senators tied their legislation to the spending power of Congress, using the threat of federal financial aid as incentive for change.\textsuperscript{49}

\textsuperscript{46} \textit{Id.} at 13953.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 13951.
\textsuperscript{49} Both the original version of the Protection of the Rights and Privacy of Parents and Students and the current version of FERPA hinge federal financial aid to schools compliance with FERPA. \textit{Id.} at 13952. The original law begins, “[n]o federal funds shall be made available . . .” Were a school to display a policy or practice of refusing to provide access to FERPA protected materials or were such school to disclose protected materials to third parties without first obtaining proper consent, the federal government has the right to withdraw all federal funding from the offending school. To date, no school has ever had their federal funding withdrawn or otherwise affected due to FERPA violations. Most commentators believe that the sanction is so extreme as to make it a hollow threat. Further, a policy or practice - not merely isolated errors or violations – are required to result in the withdrawal of federal financial aid.
Interestingly, the language of Senator Buckley’s original Amendment tracked many of Ms. Divoky’s concerns, using a broad definition of the records protected. Likewise, the first amendment to FERPA in late 1974 focused on protecting only those records “maintained” by the school – a verb first used by Ms. Divoky in her Parade Magazine article -- language that persists even under the law today.

The original language of Senator Buckley’s Protection of the Rights and Privacy of Parents and Students protected:

all official records, files, and data directly related to their children, including all material that is incorporated into each student’s cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.  

This definition would prove to be very short lived. A mere seven months later, Senator Buckley’s Protection of the Rights and Privacy of Parents and Students would be replaced by FERPA and his broad laundry list of protected records and files would be replaced by the simple, though ambiguous, term “education records.”

In a Joint Statement with Senator Pell, Senator Buckley refined his prior definition to the shorter version of “education records.” Beginning on December 13, 1974, though made retroactive to November 19, 1974 when FERPA became effective, the law protected students’ school files “generically as ‘education records,’ eliminating the long list of illustrative examples contained in existing law. ‘Education records’ are

50 Id. at 13952.
51 Congressional Record, Senate, December 13, 1974, at 39862-39863 (Joint Statement of Senators Buckley and Pell supporting FERPA).
52 Id.
described as those records, files, documents, and other materials directly related to a
student which are maintained by a school or by one of its agents.”

This new definition was intended to empower students and their parents to “know, review, and challenge all information – with certain limited exceptions – that an institution keeps on [a student], particularly when the institution may make important decisions affecting [the student’s] future, or may transmit such personal information to parties outside the institution.”

With the new brevity, Senator Buckley sought to emphasize that the core focus of FERPA protections are those items, files and records that are used to place or otherwise categorize students in ways that can, and often do, effect their future. Though not explicitly stated, it appears that Senator Buckley’s aim was to protect academic and academically-related records, not simply tangential records that might be located somewhere within the school building. The earlier definition, this author believes, was not wholly abandoned and should be referenced and evaluated when, hopefully, Congress revisits the issue to provide greater clarification about the records protected under FERPA.

III. Amendments and Inertia – Ingredients for a flawed Falvoian Definition

FERPA has been amended a total of nine times since its initial passage in August, 1974. However, the only time that Congress has amended the general definition of records protected under FERPA was in December, 1974. The same language proffered by Senators Buckley and Pell in their 1974 Joint Statement protecting “education

53 Id. at 39862.
54 Id.
55 Id. The Joint Statement confirms that “[i]t is intended . . . to open the bases on which decisions are made to more scrutiny by the students, or their parents about whom decisions are being made, and to give them the opportunity to challenge and to correct – or at least enter an explanatory statement – inaccurate, misleading, or inappropriate information about them which may be in their files and which may contribute, or have contributed to an important decision made about them by the institution.” Id.
records” remains in effect today. That definition is currently codified at 20 U.S.C. § 1232g(a)(4)(A) as follows:

For purposes of this section, the term “education records” means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –

(i) contain information directly related to a student; and
(ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.56

This definition seems to suggest that only those documents affirmatively kept or collected by a school are subject to FERPA protection. Because the word “maintained” is a verb, one could argue that the school must intend to locate and keep the information for a particular reason, presumably academic or professional in nature. Such interpretation follows the “rule of reason” interpretation urged by Senators Buckley and Pell in their 1974 Joint Statement.57

It would be over twenty-five years before the United States Supreme Court would address any portion of FERPA.58 Not surprisingly, the first decision issued relating to FERPA addressed what documents or files are considered “education records.”59 The narrow, perhaps even naïve, interpretation of education records provided by Justice

56 20 U.S.C. § 1232g(a)(4)(A), 34 C.F.R. Part 99. Exclusions for records that do not satisfy the FERPA “education records” definition are codified directly below the “education records” definition at 20 U.S.C. § 1232g(a)(4)(B). Because the exclusions to “education records” are not a primary focus of this article, the author will not be addressing the exclusions beyond offering citation to their definition at 20 U.S.C. § 1232g(a)(4)(B).
57 Congressional Record, Senate, December 13, 1974, at 39862.
59 See id. While the “education records” definition ultimately provided is considered by many to be dicta in the case, this dictum is the closest guidance Americans have received from our courts since FERPA’s passage.
Kennedy and the Court in Owasso Independent School District v. Falvo demonstrate just how pressing the development of a modern definition is. 60

Kristja Falvo, a parent with children in the Owasso School District, challenged the Oklahoma school district’s practice of permitting students to grade one another’s papers, thereby allowing other students to learn, and possibly reveal, the results of her children’s work. 61 Ms. Falvo expressed that this grading approach embarrassed her children. 62 The Court countered that this practice of “peer grading” is common throughout the country. 63 Justice Kennedy described the practice as one where:

the students exchange papers with each other and score them according to the teacher’s instructions, then return the work to the student who prepared it. The teacher may ask the students to report their own scores. In this case it appears the student could either call out the score or walk to the teacher’s desk and reveal it in confidence, though by that stage, of course, the score was known to at least one other student who did the grading. 64

As the Court explained, “[b]oth the grading and the system of calling out the scores are in contention here.” 65

The school district vigorously defended the lawsuit and successfully obtained a summary judgment dismissing the case from the federal trial court. 66 The federal district court held that grades put on papers by another student fall outside the governing

60 Id. Falvo was unanimous in its conclusion that peer grading is not implicated under FERPA and nearly unanimous in its articulation of what qualified as “education records.” Justice Scalia, however, authored a brief concurring opinion to highlight his disagreement with the Court’s definition of “education records.” See id. at 436.
61 Id. at 429.
62 Id. Falvo originally brought the suit as a class action in the United States District Court for the Northern District of Oklahoma. Id. at 430. Falvo named the school district, the Superintendent Dale Johnson, Assistant Superintendent Lynn Johnson, and Principal Rick Thomas as defendants in the action. Id. at 429 (indicating that the Falvo children’s “teachers, like many teachers in this country, use peer grading”).
63 Id. at 429.
64 Id.
65 Id.
66 Id. at 430.
definition of education records because “grades put on papers by another student are not, at that stage, records ‘maintained by an educational agency or institution or by a person acting for such agency or institution.’” The Tenth Circuit Court of Appeals reversed finding that “the very act of grading was an impermissible release of the information [gleaned from “education records”] to the student grader.”

The Supreme Court was left with two extreme positions: a narrow reading of “education records” and a more literal, expansive definition of “education records.” Important to the ultimate decision in the case, the United States joined the Owasso School District as amicus curiae before the Supreme Court. The United States took the position, in light of FERPA’s legislative history, that “education records” covered by FERPA “consist of documents retained or preserved as institutional records, not student homework or classroom work.”

The Amicus’ focus, and main purpose in submitting its brief, was to emphasize that FERPA’s legislative history buttressed the school district’s position that “education records” limit protection only to those “institutional or official record[s] of a student.” Throughout the amicus brief, the United States emphasized that the statutory history of FERPA underscores a limited definition for “education records.” While there are suggestions that FERPA has only minimal legislative history due to its unique passage as a floor amendment to another, larger bill, there is sufficient evidence in the existing materials that Congress – both at the House and Senate level – sought only to protect the

67 Id.
68 Id.
70 Id. at *11.
71 Id.
72 Id. at *10-11.
“official records” of students, “including the material ‘incorporated into each student’s
cumulative records folder.’”\textsuperscript{73} The United States’ brief urges that “[t]he statements on
the floor of both the Senate and the House, as well as the Conference Reports, relating to
FERPA both as originally enacted, and as amended by the insertion of the term
‘education records,’ all refer to “institutional records,” “school records,” and similar
descriptions . . . .”\textsuperscript{74}

In developing its argument, the United States argued that “Congress addressed
FERPA to records that are maintained, as an \textit{institutional} matter, by school officials, and
that therefore are of some lasting significance outside the classroom.”\textsuperscript{75} FERPA’s focus
is “on institutional records,” not homework or classwork even if graded by other
students.\textsuperscript{76} The Supreme Court, ultimately, embraced the United States’ position that
focused on the verb, “maintained,” in the “education records” definition. As the United
States proffered, a narrow definition “is further reinforced by the ordinary meaning of
‘maintain,’ which is ‘to keep in existence or continuance; preserve; retain.’”\textsuperscript{77}

Finally, the United States explained that “FERPA’s use of the term ‘maintained’ –
in conjunction with ‘records,’ ‘files,’ ‘documents,’ and ‘institution,’ – in the definition of
‘education records,’ thus further supports an interpretation that refers to the official or
permanent records that are retained by an institution,” not transitory pieces of information,
like homework or classwork.\textsuperscript{78} The reason that “education records” encompass such
items as grade point averages, standardized test scores, intelligence and psychological

\textsuperscript{73} \textit{Id.} at *10.
\textsuperscript{74} \textit{Id.} (emphasis added).
\textsuperscript{75} \textit{Id.} at *12 (emphasis in original).
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.} at *13.
\textsuperscript{78} \textit{Id.}
tests, attendance reports, and disciplinary proceedings is precisely because these records “are part of the institutional record of the student.”

The United States urged a narrow definition of “education records” concluding that “education records” “consist only of the materials, typically permanent in nature, that are part of a school’s institutional records pertaining to a student and therefore have the potential for the sort of lasting impact on the student that would warrant the formal procedural protections” of FERPA.

In considering how broad or narrow to craft the definition, the Supreme Court necessarily relied upon the United States’ amicus brief. The essence of the United States position is that the legislative history protected records of a permanent nature, those that could cause lasting damage to students if misrepresenting their status or mischaracterizing their capabilities. An erroneous response on an individual test or homework assignment was never contemplated for FERPA protection. Rather, the more lasting, serious institutional records permanently collected, kept and disseminated by schools were FERPA’s target.

Central to the Court’s holding in Falvo that peer grading is not implicated by FERPA’s protections is the definition ultimately adopted for “education records.” Apparently influenced by the United States’ position, Justice Kennedy, in writing for the Court, announced that:

The word “maintain” suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled. The student graders only handle assignments for a few moments as the teacher calls out the

---

79 Id. (emphasis added).
80 Id. at *17.
81 See supra, legislative history at notes 20 through 46.
answers. It is fanciful to say they maintain the papers in the same way the registrar maintains a student’s folder in a permanent file.\(^82\)

The Court relied upon the United States’ narrow definition by focusing on the “ordinary meaning” of the word maintain.\(^83\) “Maintain,” the Court explained, implies something that is “[kept] in existence or continuance; preserve[d]; retain[ed].”\(^84\)

In the final assessment, the Court found that:

Congress contemplated that education records would be kept in one place with a single record of access. By describing a “school official” and “his assistants” as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar . . . .\(^85\)

The Supreme Court’s opinion, at times, appears to be a mere extension of the United States’ Amicus Brief. Justice Kennedy, and the Court, was obviously influenced by the United States’ recommendation that only “institutional” or “permanent” records be given refuge in FERPA. And, while Justice Scalia appropriately challenges the Court’s “central custodian” approach in his brief concurrence, the Court’s opinion does seem well grounded in both legislative history and legislative intent.\(^86\)

FERPA was intended to combat “secret files” – not merely secret individual documents of a transitory or temporary nature. The Watergate effect reminded members of both the House and Senate that “fat files” kept on the nations’ students were as

---

\(^82\) \textit{Falvo}, 534 U.S. at 433.

\(^83\) \textit{Id.} It appears that the Supreme Court used the exact definition for the verb “maintain” proffered by the United States Amicus Brief, using the Random House Dictionary citation provided in the amicus brief at page 13.


\(^85\) \textit{Id.} at 434-35.

\(^86\) \textit{Id.} at 436 (Scalia, J., concurring)(emphasizing that he “cannot agree, however, with the . . . ground repeatedly suggested by the Court: that education records include only documents kept in some central repository at the school”).

problematic as secret files being kept on adults. Much like the Fair Credit Reporting Act was never intended to cover individual credit transactions, for instance, of a daily coffee or newspaper, FERPA was not intended to protect abstract or random documents that did not, eventually or ultimately, have some potential to cause lasting damage.

FERPA was not crafted to combat individual grades on individual tests or homework assignments. Rather, as the legislative history reveals, FERPA took a far-sighted approach to isolate only those records of a permanent nature that could be relied upon by third parties (the police, the Selective Service) or other schools to categorize a student in an erroneous manner. That transitory records were not intended for FERPA protection is evident from the statutory language itself. Those “records” that are not “maintained” by the institution but, rather, remain solely with the maker (or individual teacher) are not covered under FERPA. And, yet, what an individual teacher thinks (or writes) about a particular student could have as damaging and lasting effect on a student as what a personality test, misread, might have. Equally damaging could be the teacher’s visual observations verbally communicated to a third party – also, not considered “education records” under FERPA.

Clearly, FERPA was not envisioned as a panacea. Instead, FERPA was born out of privacy concerns revealed during the Watergate era. President Nixon reminded us all, ironically before his downfall, of the importance in protecting data that is collected, maintained and, subsequently, disseminated. The records that were being protected during this legislative push for privacy were similar in character and similar in quality.

87 Exclusions for records that do not satisfy the FERPA “education records” definition are codified at 20 U.S.C. § 1232g(a)(4)(B).
88 See e.g., 20 U.S.C. § 1232g(a)(4)(B).
89 See supra note 29.
90 Supra note 12.
The *Falvo* Court correctly limited FERPA’s protection to documents of a more permanent nature.

But, the *Falvo* definition myopically refuses to embrace computers and data collection systems as they exist in the twenty-first century, not as they were described by President Nixon in 1974. Today, nearly all schools have computerized data retention systems and many, if not most, regularly use email to communicate about and with students. Are these documents considered “education records”? There is certain sagacity to the *Falvo* concurrence. Surely the Supreme Court appreciates that “education records,” however defined, are not always – or even usually – kept in one central location at a single repository.\(^91\) Perhaps this may occur at the early stages in primary education. But, as students progress through their educational journeys, it is highly improbable that a student’s records are kept in a single “file cabinet in a records room at the school.”\(^92\) There may not be a unitary permanent file. In fact, it is doubtful that only one “file” exists for each student.

Increasingly, colleges and universities maintain numerous files on their students. One will undoubtedly be permanently retained in the Registrar’s Office. But, in addition, there will likely be other files in the particular college or field of study office, in the financial aid office and, if applicable, in a given extracurricular office such as athletics. Thus, the vision of a single file in a single room seems unrealistic. And, if the true intent of FERPA is to provide protection to students and their parents, the various locations of each file must be made known and made available for inspection. The narrow *Falvoian*


\(^92\) *Falvo*, 534 U.S. at 433.
definition, in some measure, actually provides greater protection to schools than to those that FERPA seeks to protect – students.

IV. Education Records -- A Modern, Workable Definition in the Digital Era

So why revisit the definition? Why now? Why ever? Schools have had years now to adapt to FERPA and to develop appropriate local policies that comply with the law. And, Congress has had ample opportunity to correct any deficiencies observed in *Falvo*. Even as amendments have been made to FERPA, no alteration or expansion has been given by Congress to the cursory term “education records.” In fact, no Congressional effort has been made to respond to Justice Kennedy’s one file, one file room definition for “education records.” We can only assume that either Congress agrees with the high court or that Congress has more important matters at hand.

Yet, the need to protect student rights remains as vital today as it was in 1974. The need has not changed and the world has not remained stagnant. Rather, the fluid

---

93 See Lynn M. Daggett, FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students, 58 CATH. U. L. REV. 59 (2008). This author strongly agrees with Professor Daggett’s criticism of Congressional inertia in relation to FERPA. Professor Daggett notes:

Congress’s approach to FERPA in the twenty-first century may be characterized primarily by inattention. Congress has not substantively amended FERPA since 2001. To the extent Congress has addressed FERPA issues, it has done so in relatively minor ways, and often in an indirect manner by amending other statutes rather than amending FERPA itself. Moreover, most of the changes Congress has made have been to lessen protection of student privacy.

*Id.* at 77-78.

94 See e.g., *id.* at 84. Professor Daggett explains that:

Congress’s failure to reexamine or to significantly amend FERPA, and the modest changes Congress has made which actually work to weaken protection of student privacy, is conspicuous in the face of the Supreme Court’s first-ever FERPA decisions [*Falvo* and *Gonzaga University*], which work to effect drastic changes in FERPA by removing meaningful enforcement of FERPA and perhaps narrow the records FERPA protects.

*Id.*
nature and evolution of technology requires a reassessment of what records truly deserve protection under the original design of FERPA. Schools must ensure that any definition they adopt, locally, continues to further the initial design of FERPA, protecting students’ rights to access, view and potentially correct information relied upon by the school to make decisions about the student and his or her future. Technology has greatly altered the record keeping landscape and merits a new, modern definition. Otherwise, society risks the return to a pre-FERPA world of “secret files” and “fat folders” – digitally retained by the school without the knowledge of students and their parents.

A. 1974

The proper starting place for any newly proposed FERPA definitions is 1974. Watergate and its attendant damage were slowly receding. But, the bitterness of those memories and the vulnerabilities revealed to the American public motivated Congress to address various pieces of privacy legislation. Foremost among the legislation was FERPA, signed by President Gerald R. Ford in August, 1974. Following close behind FERPA was the Privacy Act of 1974,95 vetoed by President Ford on October 17, 1974.96 Congress, however, passed the legislation over President Ford’s veto to ensure that any

---

95 See Beth Givens, A Review of State and Federal Privacy Laws: Testimony to the California Legislature Joint Task Force on Personal Information and Privacy, available at the Privacy rights Clearinghouse www.privacyrights.org (last visited on July 23, 2010). Director Givens testified that the Privacy Act of 1974 had its genesis in the United States Department of Health Education and Welfare’s task force that issued the “Code of Fair Information Practices. Id. at 1. The Code of Fair Information Practices, which has not yet been codified “as is” in the United States, sets forth five principles for dealing with computer data. Id. at 1-2. The first principle is openness, the second disclosure, the third secondary usage, the fourth correction and the fifth security. Id. at 2. These five principles have been incorporated into much of the American privacy law, including both the Privacy Act of 1974 and FERPA.

96 President Ford issued the written veto to the United States House of Representatives, emphasizing that his reluctance in signing the bill was primarily due to military and national security issues, including FBI files. See President Ford Veto, a copy of which is available from the National Security Archives and is on file with the author. For a good historical explanation of Watergate’s role in the passage of the Privacy Act of 1974, see Veto Battle 30 Years Ago Set Freedom of Information Norms (November 23, 2004), edited by Dan Lopez, Thomas Blanton, Meredith Fuchs and Barbara Elias, a copy of which is on file with the author.
vestiges of Watergate’s atmosphere of secret governmental files would be permanently ceased.\textsuperscript{97}

More than any other existing legislation, the Privacy Act of 1974, which remains viable today, provides the best blueprint for improving FERPA’s “education records” definition. The laws similarity, if not unity, in purpose raises the question of why more symmetry did not exist between these laws in 1974. The Privacy Act even covers “education” records, but only among the other categories of documents for which it provides protection.\textsuperscript{98} As set forth above, FERPA defines “education records” covered by FERPA as follows:

For purposes of this section, the term “education records” means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which –

(i) contain information directly related to a student; and
(ii) are maintained by an educational agency or institution, or by

\textsuperscript{97} Scott Shane, \textit{Recent Flexing of Presidential Powers Had Personal Roots in the Ford White House}, N.Y. TIMES (Dec. 30, 2006). Mr. Shane’s article details how three modern political veterans suffered their first legislative defeat by encouraging President Ford to veto the Privacy Act of 1974. \textit{Id.}

Just days after arriving at the White House, [Richard Cheney and Donald Rumsfeld] saw Mr. Ford suffer an important defeat. At the urging of a Justice Department official named Antonin Scalia, who would later join the Supreme Court, Mr. Ford vetoed the Freedom of Information Act amendments, which he believed infringed the secrecy of the intelligence agencies and the F.B.I.

Newspaper editorials denounced what they said was a violation of Mr. Ford’s pronounced policy of openness. A defiant Congress overrode the veto, by a vote of 371 to 31 in the House and 65 to 27 in the Senate.

\textit{Id.}

\textsuperscript{98} 5 U.S.C. § 552a(a)(4) states that:

the term “record” [covered under this Act] means any item, collection or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph

\textit{Id.} (emphasis added).
a person acting for such agency or institution.⁹⁹

FERPA, chronologically, came months before the Privacy Act of 1974, having been “the first major legislation to become law” during President Ford’s brief Administration.¹⁰⁰ Shortly thereafter, Congress presented President Ford with a privacy bill similar to FERPA but broader in its reach and protection, the Privacy Act of 1974, which sought to protect individuals’ records maintained by federal governmental agencies.¹⁰¹

Both FERPA and the Privacy Act sought, and continue to seek, to protect the governmentally maintained records of individuals.¹⁰² Both were heavily influenced by the events of Watergate.¹⁰³ Yet, the two pieces of legislation have marked differences in definitional application and enforcement provisions. From an enforcement perspective,

¹⁰⁰ Statement of President Gerald R. Ford on the Education Amendments of 1974, located at www.presidency.ucsb.edu/ws/index.php?pid=4576 (last visited on July 23, 2010). In speaking about the broader education legislation, President Ford noted his pleasure at the “new safeguards to protect the privacy of student records. Under these provisions, personal records will be protected from scrutiny by unauthorized individuals, and, if schools are asked by the Government or third parties to provide personal data in a way that would invade the student’s privacy, the school may refuse the request. On the other hand, records will be made available upon request to parents and mature students. These provisions address the real problem of providing adequate safeguards for individual records while also maintaining our ability to insist on accountability for Federal funds and enforcement of equal education opportunity.” Id. (on file with the author).
¹⁰² The definition of individuals under the Privacy Act is similarly narrow in scope to FERPA. The Privacy Act only protects those “individuals” that qualify as “a citizen of the United States or an alien lawfully admitted for permanent residence.” See 5 U.S.C. § 552a(a)(2). In contrast, the Freedom of Information Act permits any individual, citizen or non-citizen to obtain limited records from federal agencies. The main difference between FOIA and FERPA/the Privacy Act is that the latter seek to protect records on individuals – not merely the records of agencies.
¹⁰³ The Washington Post published an editorial entitled “Information: A Vital Gift,” on Saturday, November 3, 1974. Information: A Vital Gift, WASH. POST, A14 (Nov. 23, 1974). The editorial emphasized that the residual effects of Vietnam and Watergate fortified efforts at uncovering “secrecy in government.” Id. “[S]ecrecy in government is a threat to the functioning of democracy. If people cannot know of the actions taken in their behalf, they are in no position to object. Without the ability to object, they are in no position to temper the actions of government with the reasoned debate that only disclosure can facilitate.” Id.
FERPA is silent as to any potential civil remedy that exists to ensure compliance. In contrast, the Privacy Act unequivocally provides for “civil remedies” in federal district court including injunction, attorneys’ fees and litigation costs and actual damages to those injured by violation of the Act.

More salient to this discussion, however, are the definitional variances between FERPA and the Privacy Act – both of which seek to protect individuals by providing access to their governmental files, permitting review and correction of erroneous information contained in governmental files and limiting disclosure by governmental actors of these same files. The Privacy Act gives protection to “individuals” that are either citizens or aliens lawfully admitted for permanent residency. This protection includes the right to locate, receive, review, correct and protect against improper dissemination of “record[s]” “maintain[ed]” by federal governmental agencies.

The similarly of protection between FERPA and the Privacy Act both begins and ends with the terms “record[s]” and “maintain.” As set forth above, FERPA protects those “education records” that are “maintained” by the educational institution or agency. The verb “maintained” is not further defined and is literally part of the

---

104 However, as set forth supra, the United States Supreme Court has found, properly this author believes, that the plain language of FERPA forecloses individual civil relief. See Gonzaga Univ. v. Doe, 536 U.S. 273 (2002)(finding “there is no question that FERPA’s nondisclosure provisions fail to confer enforceable rights”).

105 5 U.S.C. § 552a(g). Subsection (g) provides that “the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.” Id. Subsection (g) further provides that any such federal judicial review of matters under the Act are to occur “de novo” and that the universe of available sanctions includes injunction (§ g(3)(A)), actual damages (§ g(1)(4)(A)), specific performance in requiring “the agency to amend the individual’s record in accordance with his request or in such other way as the court may direct,” (§ g(2)(A)), and in all three instances, empowering the court to “assess . . . reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.” See 5 U.S.C. § 552a (g)(2)(B), (g)(3)(B), (g)(4)(B).


definition of what qualifies as an “education record.” In this respect, the current FERPA definition seems circular. Education records are essentially anything you (the school) claim you (again, the school) “maintain” on behalf of the student. Of course, since entering the digital era there is not likely a single repository for students to fully learn what documents are being kept, collected or used – even when the school does not envision these same documents are being “maintained” under FERPA.

In contrast, the Privacy Act further delineates what rights are intended by first defining the term “maintain” to “include[] maintain, collect, use or disseminate.” Immediately following this definition, the Act further defines the term “record” to mean:

> any item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Thus, in comparing this language the two laws seem molded after each other, with the Privacy Act retaining the laundry list approach that was removed from FERPA via amendment mere months after its initial passage.

So, how should one utilize the Privacy Act in updating FERPA’s definitional approach to records? First, Congress must understand that schools and universities are not capable of providing consistent or uniform responses to what qualifies as an “educational record.” Schools generally provide greater protection to themselves, in avoiding unwanted disclosures, then they reciprocally provide to students. In fact,

112 See supra note 50.
schools routinely rely upon FERPA for defensive protection and, thus, thwart the very protections that were intended under the original design. In our modern era of litigation, FERPA has been conveniently, and consistently, inverted to empower schools, often without any knowledge on behalf of the students, to withhold documents that the schools themselves do not provide to students as “education records.” Emails, athletic department files, and other items are regularly withheld, purportedly under FERPA, by schools and universities – often in an attempt to protect the school, not the student. This inversion was never intended by Senator Buckley. This inversion is contrary to the spirit of FERPA. This inversion only continues because the definition afforded “education records” is vague and malleable enough to allow schools refuge when refuge for schools was never sought.

The time has come for a return to the protection of student privacy, not school protection.

B. Change is Needed . . . Now

For years, schools have been hiding behind FERPA and intentionally preventing disclosure of records to third parties that the school or university claim might be covered under FERPA without securing this same broad interpretation to student requests for their record review. One of the more notable instances, drawing the ire of Senator Buckley himself, was a 2009 study conducted by the Columbus Ohio Dispatch newspaper. The paper sought information from all 119 institutions in the Football Bowl Subdivision.

---

113 Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen, COLUMBUS DISPATCH May 31, 2009. The study was a “six-month Dispatch investigation” into the inner workings of large football programs and the “$5 billion college-sports world that is funded by fans, donors, alumni, television networks and, at most schools, taxpayers.”

114 Id. The Football Bowl Subdivision is the modern reference for what was formerly known as Division 1-A. Most of the larger, well know universities fall within this category.
The information sought included: “airplane flight manifests for football-team travel, lists of people designated to receive athletes’ complimentary admission to football games, football players’ summer-employment documents and reports of NCAA violation.”

During the six-month long study, the Dispatch learned that these large universities, many with impressive in-house university counsel, give “wildly different legal interpretations” to FERPA. In fact, the Dispatch reported that FERPA is often “interpreted different[ly] even within the same state.”

To the surprise of Senator Buckley, several of the universities withheld vast amounts of the information sought. The Columbus paper reported that Senator Buckley decried it time “for Congress to rein in” FERPA as such withholding of documents was never intended under his law. Joining Senator Buckley in his concern about misuse of FERPA, was Paul Gammill, whom the Dispatch reported recently took over the federal education department that monitors FERPA. Echoing the concerns voiced by the Senator, Mr. Gammill stated that “[i]t sounds like some institutions are using this act to hide things.” And, Mr. Gammill is correct.

Schools understand the wide latitude that FERPA provides and have commonly used that latitude to the school’s advantage. The Dispatch noted that schools had no problem singing the praises of athletes who had excelled in the classroom, even reporting

---

115 Id.
116 Id.
117 Id. To reinforce the variances, the Dispatch compared three major Ohio Universities: Kent State, Miami University and Ohio State University. However, the paper reported that the in-state distinctions are not simply located in Ohio. Id.
118 Id.
119 Id. Senator Buckley indicated that the documents sought by the Dispatch are examples that “provide zero harm to the kids,” and further exclaimed that “[t]hings have gone wild. These are ridiculous extensions. One likes to think common sense would come into play. Clearly, these days, it isn’t true.” Id.
120 Id.
121 Id.
their exact grade-point-averages, documents that would clearly qualify as “education records,” when the information was favorable to the institution. In contrast, when information was sought about misbehavior or embarrassing actions of athletes, the schools were notably “less forthcoming.”

Most university counsel offices would confess that FERPA’s definition of “education records” is far from clear. Ohio’s then Attorney General, Richard Cordray, explained that “[i]f the federal guidance leaves latitude, then you’re going to get different institutions interpreting [the law] differently, because some of them want to disclose more and some of them don’t. . . .That kind of guidance isn’t very helpful . . . .It’s more like we’re saying we’re punting and leaving it up to you.” This admission by the Ohio Attorney General underscores the importance of amending the current definition. Laws should not be so uncertain that uniformity is impossible to achieve. Even the President of Ohio State University desires greater clarity.

The Dispatch article reminds that Senator Buckley designed FERPA “to keep academic records from view,” not to insulate major college sporting programs from public scrutiny. Yet, the law has been transformed by institutions to benefit institutions, not the students for whom it was originally passed. The institutions are surely not placing these same items they withhold from entities like the Dispatch in the

---

122 Id.
123 Id.
124 Id.
125 Id. Ohio State University President E. Gorden Gee was quoted in the article as stating, “[s]ome clarity would be helpful to us.” Id.
126 Id. The article reports that “[m]any violations across the country remain unknown to fans, faculty members and the public, diminishing accountability at a time when an NCAA study shows that schools are increasingly using more general-fund money, sometimes even tax dollars, to pay for athletics as higher-education costs soar.” Id. Of greater concern, “[c]ritics of big-time college athletics say that keeping records secret hides disparities in the treatment of men and women, whites and blacks, star athletes and walk-on players.” Id.
permanent “education record” of the student. Having worked recently with two different major national universities on this very issue, this author is convinced that the issue of reciprocity – of students having full access to all records that the institution claims they “maintain” on a student – is no longer being vindicated by FERPA. Rather, the schools have both the sword and the shield and students are not capable of knowing with any certainty what records are truly being kept and monitored by the schools they are attending.

The time for change has come. The time for change has passed. The right of full access to student records must be restored by Congress in redefining, with some measure of clarity, certainly and consistently what items truly qualify as “education records.” The digital era, and savvy universities, have mandated that serious change occur.

C. Digital records – Electronic Mail, Facebook & University servers

Facebook. Twitter. Text messaging. Electronic mail. These digital methods, among others, are increasingly utilized by educators and students alike to further the education experience. How are such digital records to be classified when they are “maintained” by the school or university – meaning they have been posted on, recorded by, or transmitted using the school’s computer server? Are student and faculty emails really considered “education records” under FERPA?

Literally speaking, schools may, in fact, “maintain” these items that, although not academically related, fall within the current purview of FERPA’s “education record” definition. For example, an email sent among a small group of faculty members discussing students in their respective classes would seemingly be a “file[], document[], or other material[] which – contains information directly related to a student; and is
maintained by an educational agency or institution, or by a person acting for such agency or institution.” 127 But, even if these, and similar, documents are literally “maintained” by the school or university due to computerized storage capabilities, would that same email be given to a student who requests their FERPA-protected “education record” directly from the school? Probably not.

While the United States Supreme Court has yet to address whether digital records, and emails in particular, qualify as “education records” under FERPA, two lower courts have done so. Not surprisingly, the two courts gave differing answers to the same question, each resolution depending on the respective court’s interpretation of FERPA’s provisions.

A.   **S.A. v. Tulare County Office of Education**

In the most recent opinion discussing electronic communications and their characterization under FERPA, the Eastern District of California gave the most appropriate resolution: “it depends.” 128 Parents of a special education student sought “a copy of any and all electronic mail sent or received by the [Tulare County Office of Education] concerning or personally identifying” their child. 129 Tulare provided the parents with only those copies of emails that had been placed in the student’s permanent file. 130 All other emails, the Department advised, had been purged. 131 A federal lawsuit followed challenging that “all emails that specifically identify [the student], whether printed or in electronic format, are ‘education records’” subject to FERPA protection. 132

---

130 *Id.*
131 *Id.*
The court, in granting summary judgment against the parents of the student, found that “an email is an education record only if it both contains information related to the student and is maintained by the educational agency.” However, this explanation, somewhat circular in nature, provides little guidance for those seeking to know what precisely qualifies as “maintain[ing]” emails. The court was merely reciting the conjunctive requirements of FERPA’s current definition.

Fortunately, the court went further. Invoking the Supreme Court’s opinion in Falvo, the court held that only those emails that are in a student’s permanent file qualify as “education records” under FERPA. The court explained:

Emails, like assignments passed through the hands of students, have a fleeting nature. An email may be sent, received, read and deleted within moments. As such, [plaintiff’s] assertion that all emails that identify [students], whether in individual in boxes or the retrievable electronic database, are maintained “in the same way the registrar maintains a student’s folder in a permanent file” is “fanciful.” Like individual assignments that are handled by many student graders, emails may appear in the in boxes of many individuals at the educational institution. FERPA does not contemplate that education records are maintained in numerous places. As the [Supreme] Court set forth above, “Congress contemplated that education records would be kept in one place with a single record of access. Thus, [defendant’s] position that emails that are printed and placed in [plaintiff’s] file are “maintained” is accordant with the case law interpreting the meaning of FERPA. . . .

This holding, while commendably loyal to the Falvoian interpretation of a “single file,” fails to appreciate that there must be some discretion exercised in determining which emails are selected for placement in a student’s permanent file – again, assuming for immediate purposes that only one such file exists. Senator Buckley’s goal was to protect

---

133 Id. at *5 (emphasis in original).
135 Id. at *7.
136 Id. at *7 (emphasis in original)(internal citations omitted).
students and their parents from falling victim to secret files being kept and relied upon for important educational and career decisions.

Courts, and legislators, must never stray from the original purpose of FERPA and the climate in which the law was passed. To properly assess electronic records in this digital age and to properly analyze whether such records would be considered “education records” “maintained” by a school, one must never lose sight that the primary goal of FERPA was to prevent the accumulation of secret government records. If schools and universities are able to determine on an ad hoc basis the particular emails that they want to include in a student’s “permanent file,” then there is no guarantee that FERPA’s purpose or goal is being met. Just as one cannot permit the fox to guard the henhouse, one cannot allow the government to assure us that it is not keeping, much less relying on, secret records to make decisions affecting an individual.

Courts, and legislators, need to return to the mindset of post-Watergate legislation. And, unfortunately, that mindset disclaims empowering government to self-regulate and assure us that we have nothing to fear from our government. Instead, the legacy of Watergate remains that laws must be passed to rein in the government, to reveal all the documents kept on individuals and to grant some method of access so that individuals can ensure that life-altering decisions are not based upon erroneous information contained in secret government files.


In 2001, the Androscoggin Superior Court of Maine was asked to decide whether emails, non-academic in nature, sent by students to a faculty advisor of a Jewish student
organization constituted “education records” under FERPA.\textsuperscript{137} One student in the student organization sent two e-mails to the faculty advisor, one from themselves and one from another student who did not know that their e-mail (from one student to another) had been forwarded to the faculty member.\textsuperscript{138} Without student knowledge or permission, the faculty member gave both e-mails to officers of the Congregation.\textsuperscript{139} There are no allegations that either e-mail was academic in nature or dealt with the students’ academic credentials or performance. Both e-mails appeared to be complaints about the rabbi and spiritual leader of the local Congregation and, ultimately, played a substantial role in the rabbi’s dismissal.\textsuperscript{140}

\textsuperscript{137} President and Trustees of Bates College v. Congregation Beth Abraham, et al., CV-01-021 (Feb. 23, 2001). The memorandum opinion explains the case as follows:

As a member of the Bates faculty, Steven Hochstadt is expected to offer services to the college community over and above his teaching requirements. Part of this function is fulfilled by his appointment by the college president as the faculty advisor to the [Jewish Cultural Community]. In this role he is expected to interact with the students, to assist them in participating in their faith and to act as liaison with Congregation Beth Abraham.

During October of 2000, it came to Hochstadt’s attention that there was an uneasiness and tension between the Jewish students on campus and [the spiritual leader of the Congregation]. He was concerned that [the spiritual leader’s] conduct was interfering with the relationship of Bates’ students and the Congregation and the practice of their faith. Hochstadt sent a letter to [the spiritual leader] and talked with several students. As a result of his talking with the students, one person (Student A) sent an e-mail over Bates’ on-campus email system complaining about [the spiritual leader’s] inappropriate conduct and detailing certain examples and named other students to whom he could speak.

Student A also forwarded to Hochstadt a copy of an e-mail that Student A had received from Student B in March of 2000. This e-mail contained additional names and facts about specific instances of misconduct. When the e-mail messages were sent to Hochstadt, Student A specifically requested that the e-mail from Student B remain confidential and that Hochstadt not reveal its contents to any other person.

\textsuperscript{138} Id. at 2-3. Hochstadt, however, did subsequently reveal these student e-mails to others in the Congregation and this lawsuit filed by Bates College sought to retrieve the student e-mails. \textit{Id.}

\textsuperscript{139} Id. at 3.

\textsuperscript{140} Id. at 3 and 5.
Nonetheless, Bates College, filed suit for injunctive relief seeking the return of the student e-mails under FERPA.\textsuperscript{141} Interestingly, neither student whose e-mails were forwarded was a named plaintiff or sought intervention. The court, in evaluating the e-mail issue, gave a very strict and non-contextual interpretation to the documents FERPA protects. Reading the statute in its most literal fashion, the Court found that “[e]ven though [these emails] are documents generated outside normal academic exercises, the court concludes they are records covered by the Act.”\textsuperscript{142} The Court continued:

Although the e-mail correspondence may be of a different character than most records, files and documents maintained by an educational institution, the statute, § 1232(g)(a)(4)(A) does not limit the definition of “other materials.” As such, that term [in FERPA] ought to be liberally construed to be inclusive rather than exclusive to carry out the Act’s purpose and intent for the protection of students.\textsuperscript{143}

The Bates College court found itself duty bound to key in on the literal definition contained in FERPA.\textsuperscript{144} Yet, the court noted the context of the emails at issue:

The e-mail messages here were generated by students and directed to the faculty advisor assigned by the college president to assist and guide students in the interaction of their academic lives and practice and maintenance of their faith. Although the messages were directed at the conduct of a person outside the college community, they named several students and their involvement with a spiritual leader . . . whose duty it was to interact with them and assist in the spiritual enrichment of their lives. The records directly related to the named students and sought the advice and assistance of a person acting for the college.\textsuperscript{145}

The context of both the e-mails being sent and their role in the academic lives of students seems less relevant to this court than FERPA’s literal language. Ironically, the court, in providing a liberal interpretation to the term “education records” decided that the “term

\textsuperscript{141} Id. at 1-2.
\textsuperscript{142} Id. at 7.
\textsuperscript{143} Id. at 8.
\textsuperscript{144} Id. at 7.
\textsuperscript{145} Id. at 7-8.
ought to be liberally construed to be inclusive rather than exclusive to carry out the Act’s purpose and intent for the protection of the students."\textsuperscript{146} Yet, none of the students apparently sought to participate in a lawsuit seeking retrieval of their university emails. Instead, it was the college – and not the students – seeking to have the provisions of FERPA strictly enforced.

\textit{Bates College} precedential value is questionable. The court’s FERPA discussion is largely dicta as the court held that Bates College did not have proper standing to “enforce” FERPA and that none of the named defendants were subject to the Act.\textsuperscript{147} This decision, and its dictum regarding e-mails and “education records,” however, is one of only two opinions that address a blossoming issue. Surely subsequent courts will look to the opinion for guidance in resolving a still unresolved issue. Are student e-mail communications subject to protection under FERPA? And, equally important, though nowhere addressed in the court’s opinion, did Bates College “maintain” those same e-mails on behalf of every student that was named in the e-mails, just the two student senders of the e-mails or was the College simply seeking to protect itself?

Even after finding a lack of standing on part of the plaintiffs and finding also that the defendants were not subject to FERPA’s provisions, the court still found that, in the name of student privacy, “the Congregation shall redact the document to strike the names of any students and any student address mentioned, including electronic addresses or e-mail identifiers.”\textsuperscript{148} Why should student emails to a faculty advisor complaining about a non-school employee and their behavior be considered information protected by Senator Buckley’s Amendment, or even student privacy? Nearly all schools and colleges have

\textsuperscript{146} Id. at 8.
\textsuperscript{147} Id. at 10.
\textsuperscript{148} Id. at 12.
polices that inform students that they have no expectation of privacy in any messages they send through their school email accounts. How does the *Bates College* decision actually further student privacy? Does context play any role in the application of FERPA?

This author believes that the *Bates College* case stands as testament to one of the problems facing schools and universities because one could interpret FERPA to strip all judgment in applying the current “education records” definition. FERPA was never intended to help an errant professor, and his Administration, retrieve emails that he was asked not to show or forward to any other person. Senator Buckley himself has recently gone on record as noting the “ridiculous” nature of literal interpretations where a more considered application would not affect or otherwise injure a student. Senator Buckley would argue, and this author would agree, that schools and universities should constrain any modern application to FERPA’s main goal: student privacy. Applying the statute’s definition devoid of context nullifies FERPA’s purpose and stature. And, it is doubtful that if these same students sought their “education records” from the school, the school would have contacted all the faculty and faculty advisors to ensure that any materials they had that individually referenced the student was provided to the Administration.

In fact, this one-way definition whereby schools refrain from disseminating information to others but fail to collect and retain the very same information to be released to students under FERPA is sufficient reason to amend the current definition. FERPA was meant to protect student privacy, not to enable schools and universities to shield themselves from inspection. Schools have conveniently inverted FERPA in rather
self-righteous fashion. And in doing so, tragically, have minimized the fortitude that FERPA promised in the area of student privacy.

D. The Important Right of Reciprocity

FERPA was undoubtedly passed to protect and further the rights of students and their parents. FERPA was not intended to help schools shield non-academic records from others.\(^\text{150}\) However, during the past thirty-five years, FERPA has been used more by schools to their own benefit, regardless of any student privacy stake at issue. It is time to enshrine a right of reciprocity in FERPA so that schools return to the main impetus for FERPA’s protections: student privacy.

As one observer has noted, “Congress’s approach to FERPA in the twenty-first century may be characterized primarily by inattention.”\(^\text{151}\) Where Congress has acted, “it has done so in relatively minor ways, and often in an indirect manner by amending other statutes rather than amending FERPA itself. Moreover, most of the changes Congress has made have been to lessen protection of student privacy.”\(^\text{152}\) As Professor Daggett aptly observes, Congress, through its inattention, has allowed FERPA to become less and less of what the law was intended to be. The time is ripe for Congress to return to Senator Buckley’s concerns and ensure that students’ privacy is protected and that their academic records are open to student and parent review but kept shielded from the voyeuristic eyes of third-parties.

There must be a single, uniform and easily applied definition of “education records” for all schools and institution. Most importantly, that definition must contain a

\(^{150}\) But See President and Trustees of Bates College v. Congregation Beth Abraham, et al., CV-01-021 (Feb. 23, 2001).


\(^{152}\) Id. at 77-78.
reciprocal right of duty and access. Schools must have a duty to “maintain,” or collect and keep, certain standard categories of documents on every individual. The question of what documents must be “maintained” cannot be a source of interpretation or an act of faith on schools to behave appropriately. Rather, the term “maintain” must be redefined to encapsulate the very goal of FERPA – that no secret files or documents are allowed to exist upon which life and career-altering decisions may be based.

Congress must step up and take this important issue under consideration. The current definition permits machinations of all kinds by schools and universities without offering any real protection to students and parents, FERPA’s intended beneficiaries. Congress must give a clearer and easily applied definition of the “education records” that must be collected and kept to protect against schools reverting to the days of “secret files.” Digital storage only enhances the opportunities for schools to engage in secreting fat files away from view.

This author invites Congress to reconsider the definition of “education records” so that schools and universities will uniformly, and consistently, collect and keep all records intended for protection under Senator Buckley’s original design. At this point, the Senator remains available for consult and advice. But, even without the architect’s input, Congress must recognize that any modern definition must impose upon schools and universities an affirmative minimal obligation so that we no longer see the defensive use of FERPA to schools’, and not students’, benefit. Any record that a school would shield from outsiders’ eyes must be “maintained” as an “educational record” under FERPA. If the school seeks shelter under the shadow of the law, then that protection sought should
have, first and foremost, already been provided to the student in the form of placing the sought after materials in the student’s true “education record.”

E. Returning to the Academic Nature of “Education Records”

The earliest version of FERPA protected only those records that were truly academic in nature. Following the first amendment, seven months after FERPA’s initial passage, the definition expanded greatly to cover any document that identifies an individual student and is “maintained” by the institution. This definition has had unfortunate unintended consequences. Schools, out of either misplaced concerns about losing federal funding or zeal in inverting the law to their favor, have usually given the broadest possible definition to “education records.”

Yet, Senator Buckley recently shared his views on this problem with the 

*Columbus Dispatch* in “Secrecy 101.” Educators, the Senator urged, should use

---

153 Senator Buckley’s limited FERPA’s coverage to education records as follows:

[A]ll official records, files, and data directly related to their children, including all material that is incorporated into each student’s cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.

Congressional Record, Senate, May 9, 1974, at 13952.

154 No school, since FERPA’s passage in 1974 has ever lost federal funding due to improper disclosure of “education records.” Most likely, this is due to the fact that lost federal funding requires a policy or practice of improper disclosures. Isolated instances, unfortunately, carry no sanction and, following the Supreme Court’s opinion in *Gonzaga*, individuals have no recourse for isolated errors causing them damage.

common sense in applying FERPA. 156 FERPA was meant to protect “education records,”
or those records that have some academically related function. The Dispatch reported
that “Senator Buckley said it’s time for Congress to rein in [FERPA], which he crafted to
keep academic records from public view.” 157 Upon learning that schools were shielding
themselves by refusing to disclose non-academic information, Senator Buckley
exclaimed that “[t]hat’s not what we intended. . . . The law needs to be revamped.
Institutions are putting their own meaning into the law.” 158

When one reviews the original laundry list definition of records intended to
receive FERPA protection, notes between students and notes between students and
faculty members (pre-digital analogies to electronic mail) were not provided specific
coverage due, largely one could assume, to their non-academic nature. 159 FERPA’s
genesis sought to protect against secret “files” – not merely information sent and received
between students or between students and faculty. 160 FERPA’s sponsors feared that
students would suffer career limiting consequences if their permanent academic folders
contained misinformation with an academic link, not simply a random note from another
student. 161

Case law interpreting FERPA in the digital age must not veer from the
legislation’s initial impetus. Facebook, text messaging and email, coupled with
seemingly limitless computer storage capabilities, may have increased the methods of

156 Id. Senator Buckley was quoted as having observed that “[t]hings have gone wild. . . . These are
ridiculous extensions. One likes to think common sense would come into play. Clearly, these days, it isn’t
true.” Id.
157 Id. (emphasis added). The Dispatch reported that the results of their six-month study “stunned Buckley,
a retired federal judge from Connecticut who, as a U.S. Senator, crafted the law to shield students’ report
cards and transcripts. He can’t understand why any information about athletes would be withheld.” Id.
158 Id.
159 See supra note 50 and accompanying text.
160 See supra notes 34 through 50 and accompanying text.
161 Id.
communication between students and their teachers. But, these advancements have not automatically enlarged the official schools records that are kept on students. Schools’ hyper-vigilant attempts to guard all “records” identifying a student lack appreciation that the goal of FERPA was to protect academically-related materials.

There are two clear solutions to this dilemma. First, Congress must heed Senator Buckley’s admonishment to rein in FERPA. And, the most important method of doing so is to revamp the definition of “education records” in light of FERPA’s goals, history and modern application. Congress must somehow sculpt a new definition that provides protection only to academic materials and records, not all items within a school’s possession – even fleetingly on an email server – that somehow reference or mention a student.

This author would suggest that Congress begin its new definition of “education records” as follows:

For purposes of this section, the term “education records” means, except as may be provided otherwise in subparagraph (B), all official records, files, documents, and other materials, whether prepared, kept, collected or stored electronically, which –

(i) contain information directly related to a student’s academic potential, academic progress, or academic performance, and
(ii) are intentionally maintained by an educational agency or institution, or any person acting for such agency or institution, in any official school or university file or folder.162

In addition, this author would urge Congress to further amend FERPA to require that every school covered under the Act provide students with annual notice of the location and purpose of every official school file or folder on each particular student.

162 This author considers it beyond the scope of this article to address amending any of the numerous exceptions contained in 20 U.S.C. § 1232g(a)(4)(B), accordingly the “except as may be provided otherwise in subparagraph (B)” language is used in the proffered amending language.
maintained by the school that qualifies for FERPA protection. The combination of a newly improved “education records” definition that returns to Senator Buckley’s design with the added obligation for schools to identify all official files and folders on each student will truly protect the privacy of FERPA’s intended beneficiaries: students.

Further, such amendments will force schools to take their FERPA requirements more seriously and to inform students of the location and purpose of any files that are being “maintained” on students. This simple definitional amendment would also discontinue schools’ practices of being coy with documents in their possession that name or references students. Two small language changes could return FERPA to its intended purpose and return the privacy protection to its rightful beneficiaries.

The second necessary solution is a law with teeth. In other words, Congress should amend FERPA to provide students, and their parents, with a private right of action that mirrors the Privacy Act of 1974. Without giving students and their parents a method of curtailing individual breaches of FERPA, FERPA remains a one-sided boondoggle for schools. Since the federal government has never imposed the lone penalty available under FERPA, the loss of federal funding, it seems decreasingly likely that such penalty will ever be imposed. And, a right without a remedy, as most recognize, offers little assurance of protection.

F. FERPA Comes of Age – Providing Civil Remedies for Violations

This author believes that students should have full privacy rights in relation to their academic records. Much like Senator Buckley desired, students should have full knowledge of the academic records being kept, collected and maintained on them; have

---

full access to those same records; have a right to seek correction of erroneous information contained in the records; have the right to refuse release of their records to third parties; and, equally importantly, have a remedy for a school’s failure to secure the students’ rights.

It is difficult, intellectually, to appreciate why the Privacy Act of 1974 gives adults a civil remedy to enforce federal privacy legislation that provides a right of access and opportunity to correct improper information maintained in government files yet withholds that same measure to children and young adults under FERPA. Why should adults be given both the protection and message that adult privacy rights are somehow more sacred, more valuable than those of our offspring? FERPA reminds us how valuable ensuring the rights of all individuals is, not simply the rights of adults. And, a right without a remedy often proves to be a hollow right after all.

Take a recent litigation example. School A is sued by a former employee terminated by the school. The employee is told that student complaints are a main reason for the termination. The former employee seeks all records relating to the termination, including all student complaints. What would one expect the school to disclose? If the *Columbus Dispatch* article is any indication, one might expect the school to stonewall and refuse to provide any documents that specifically identify any student that is “maintained” by the school – even if the maintenance of the documents are solely for the purpose of litigation.

But imagine further. Imagine that the school fails to fully review its materials and sends the former employee an appeal file that lists the names, home addresses, dates of birth and social security numbers for all these same students. Under FERPA there is
hardly a more blatant depiction of a violation. So what could the students do? What if the former employee uses the social security numbers to perform an investigation on the students and learns of very damaging information relating to some of these individuals that is revealed during litigation? FERPA informs us that these students have absolutely no recourse. Well, no recourse of value.

Professor Lynn Dagget, of Gonzaga Law School explains FERPA’s current remedial scheme as follows:

FERPA violations amount to tort and other common-law claims only under unusual circumstances. The federal government may sue to enforce FERPA, but has done so only once. Administrative complaints may be filed with the Family Policy Compliance Office (FPCO). The FPCO can investigate these complaints and seek voluntary compliance by the offending school. There is no hearing requirement, no timeline for processing complaints, nor, in fact, any requirement that complaints be processed, and no compensation or other recourse for the student. As the dissent in Gonzaga notes, the FPCO complaint and termination of federal funding remedies “provide[] no guaranteed access to a formal administrative proceeding or to federal judicial review; rather, it leaves to [FPCO] discretion the decision whether to [even] follow up on individual complaints.

As Professor Daggett notes, FERPA does allow students to file a complaint with the federal government. Thereafter, the federal government will, or may, perform some level of investigation to discern if the school has a policy or practice of releasing

164 To fully appreciate this hypothetical, based loosely on actual events, one must understand that information disclosed in documents and/or testimony during litigation is immune from defamation and other tort actions. Thus, the injured students will have their privacy violated and exposed in the very manner that FERPA seeks to guard against with absolutely no remedy.


166 Id.

167 Id.
students’ “education records.”\textsuperscript{168} And, since no such policy or practice has ever occurred meriting the withdrawal of federal funds, it is unlikely that the students will have any legal recourse for the violation of their privacy rights.\textsuperscript{169} FERPA is toothless.

Accordingly, this author recommends that Congress amend FERPA to provide students, and their parents, with a private right of action that resembles the civil action available to those injured under the Privacy Act of 1974. Any amendment should give a civil remedy, including injunctive relief, for schools’ refusal to provide access to a student’s “education records,” however those are ultimately defined, and a civil remedy for schools’ improper disclosure of a student’s “education records.”

\textit{Tinker v. Des Moines} assured students that they do not shed their rights at the schoolhouse gate.\textsuperscript{170} But the only way to ensure protection of student rights is to provide a remedy of private enforcement. The fact that FERPA was passed under Congress’s

\textsuperscript{168} \textit{Id.} Professor Daggett does an exceptional job of not only explaining the limited nature of FERPA’s current remedial scheme, but also of explaining the secondary effects of this scheme. She writes as follows:

\begin{quote}
    The \textit{Gonzaga} holding that FERPA is not actionable under § 1983 is obviously a bad result for prospective [student] plaintiffs, and a good one from the perspective of schools trying to minimize their liability and litigation costs. The decision also has less obvious, potentially far-reaching implications. First, with no apparent private vehicle to get a court to address FERPA violations, a lessening of judicial guidance on FERPA is inevitable. This is unfortunate because FERPA’s text is in many respects unclear, a reality the [Supreme] Court has recognized.
\end{quote}

\textit{Id.} at 66.

\textsuperscript{169} \textit{Id.} at 67 (noting that “[c]ourts are increasingly holding or suggesting that FERPA is only violated by a pattern of policy of misconduct, rather than individual violations”).

\textsuperscript{170} 393 U.S. 503, 506 (1969). The actual case, and the actual quote at issue in \textit{Tinker} focused on both students’ and teachers’ First Amendment rights. The quote reads as follows:

\begin{quote}
    First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.
\end{quote}

\textit{Id.} However, since \textit{Tinker} was issued, courts and scholars alike have read the opinion to infer that students do not lose their legal rights simply by entering school.
spending powers does not limit the opportunity to attach a private right of enforcement to the legislation. In fact, the primary method of Title IX enforcement, also passed under Congress’s spending powers, is civil litigation.\textsuperscript{171} Were Congress to continue to turn a blind eye to the lack of enforcement powers under FERPA, students would know that the promise of \textit{Tinker} remains unfulfilled. We must remind students that their privacy rights are as valuable as the privacy rights of adults. Congress must step in, act and provide real protection to student privacy. FERPA, in its current state, is a hollow promise inverted to the benefit of schools, not students. There is no doubt that Senator Buckley remains disappointed that his grand vision has never reached its potential.

V. An Invitation to Congress – Remember Watergate

On August 9, 1974, in a curt one-sentence letter directed to Secretary of State Henry A. Kissinger, Richard Milhous Nixon became the only individual ever to resign the Presidency of the United States.\textsuperscript{172} But, it was the many events leading up to this resignation that served as the impetus for protecting student privacy in FERPA. Senators Buckley, Pell, Biden,\textsuperscript{173} Ervin,\textsuperscript{174} Curtis, Goldwater, Tower, Dole, Brock, McClure, Gurney, Helms, and Thurmond were convinced that the inability of students to access information that was being used to classify or otherwise base a potentially career-defining


\textsuperscript{172} See \url{www.archives.gov/exhibits/american_originals/resign.jpg} (last visited July 7, 2010). The letter simply states, “Dear Mr. Secretary: I hereby resign the Office of the President of the United States. Sincerely, Richard Nixon.”

\textsuperscript{173} Congressional Record, Senate, May 14, 1974, at 14584. Senator Biden, now serving as Vice President of the United States, explained that he was “an early co-sponsor of this amendment.”\textsuperscript{174} Id. (indicating his pleasure to be co-sponsoring “the amendment concerning right to privacy and school records proposed by Senator Buckley”). Senator Ervin expressed his support by explaining that in his mind, “school officials should not be allowed to maintain any records outside of the reach of parents, much less records of such a personal nature as those that we have seen. A parent has every right to know exactly what information is being collected concerning his children, and the provisions of this amendment constitute what I feel are minimum considerations in the protection of that right.” Id.
decision upon them would cause unparalleled harm. After all, spying and secrecy had just brought down an entire Presidential Administration resulting in numerous criminal prosecutions. In 1974, it seemed un-American to allow educators to collect and maintain secret data on their pupils. And, so it is now – or, perhaps, should be.

Nearly thirty years later, privacy rights remain a stalwart feature of American society. With the advent of the Freedom of Information Act, the Privacy Act of 1974, FERPA, the Video Privacy Protection Act, the Driver’s Privacy Protection Act of 1994 and, most recently, the Health Insurance Portability and Accountability Act, Americans feel increasingly entitled to receive information that in past decades was considered “private” or “confidential.” Still, privacy rights are only as strong as the privileges they create. Rights without remedies are hardly rights at all. As courts have consistently, and properly, held that FERPA does not provide individuals a civil right of action for monetary damages, students have suffered privacy violations without any

175 The Freedom of Information Act, “FOIA,” was signed into law in 1966 by President Lyndon B. Johnson. FOIA allows “any person” to obtain certain information from federal government agencies. See 5 U.S.C. § 552. FOIA is broader than most federal privacy legislation because the law empowers “any person” to file a FOIA request, including U.S. citizens, foreign nationals, organizations, associations, and universities. Two main amendments have occurred since FOIA was passed. The first major amendment came in 1974, following Watergate, seeking to require greater federal agency compliance. Similar to the genesis of FERPA, the “Watergate-effect” helped spur the passage of FOIA amendments to protect against secret government files. Then, in 1996, a second major amendment took place focusing on the unique issues related to electronically stored information.

176 The Privacy Act is codified at 5 U.S.C. § 552a and was passed in the wake of Watergate.

177 Simon Garfinkel, Privacy Requires Security, Not Abstinence: Protecting an Inalienable Right in the Age of Facebook, ALL BUSINESS, at 4, reports that “the Video Privacy Protection Act was passed after Judge Robert Bork’s video rentals were obtained by the Washington D.C., weekly City Paper in an attempt to dig up embarrassing information while the U.S. Senate was debating his 1987 nomination to the Supreme Court.” Id.

178 Id. Professor Garfinkel similarly notes that “[t]he Driver’s Privacy Protection Act of 1994 was passed after actress Rebecca Schaeffer was murdered in 1989 by a crazed fan, who had hired a private investigator to track down her address. The investigator was able to get the information through the California Department of Motor Vehicles, which had required Schaeffer to provide her home address when she applied for a license.” Id.

179 The Privacy Regulations regarding the Health Insurance Portability and Accountability Act (HIPPA) are located at 45 C.F.R. Part 160 (2002).
recourse. But, modern times call for more effective measures. And, the time for inertia has passed.

The greatest change between 1974 and 2010 is the ubiquitous reliance on computers for amassing and disseminating data. While President Nixon spoke of heavy computer use in his February 1974 radio address regarding privacy, that address came years before the internet, electronic mail (email), portable document format (PDF), chat rooms, instant messaging, the vastly increased storage capacity of computers, the vastly increased speed of transmitting data and the complete reliance on computers in the educational community to retain records. And, though we are far from a paperless society, many post-secondary institutions provide students with the opportunity to transact the majority of their education virtually – or “online.” Students can now review a school’s admission policies, student policies and procedures, submit applications for admission, communicate with university and college officials, converse with other students, attend class through distance learning, present school work, submit projects, take exams, receive letters of recommendation and other information from faculty members, submit grade appeals, schedule classes, add classes, drop classes and retrieve grades via computer.

The digital era pervades most American campuses. Conversations that in days past would have taken place in the hallways of an institution are increasingly being conducted among faculty, students and administrators in the virtual world of email. Are these communications – if they are “maintained” on the school server – truly intended to be “education records” under FERPA? If so, what maintenance responsibilities are then placed on institutions regarding data retention? And, more importantly, what duty do
schools have to notify students of the existence and location of these numerous “education records” that float throughout a campus, from office to office?

This author believes that while Justice Kennedy’s *Falvo*ian definition is ill-suited to a digital era, the drafters of FERPA could not have envisioned the seemingly limitless nature of electronic communications predominating modern education. Rather than ignore the context of a particular communication, this author would focus on the actual information being communicated as opposed to the medium being used. Simply because an item is transmitted (or “maintained” in the most literal sense) over a university or college server should not automatically result in that information falling under the rubric of FERPA. Such broad-based definition is at odds with the original language utilized by Senator Buckley when he first proposed FERPA, protecting:

any and all official records, files, and data directly related to their children, including all materials that is incorporated into each student’s cumulative record folder, and intended for school use, including but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.\(^{180}\)

It is time to return to the goal of protecting academic records, not merely records that identify a student. The modern focus should remain on the academic qualities of the data being transmitted, not simply the medium used to transmit the data. As the United States asserted in *Falvo*, records that are permanent and institutional in nature are deserving of FERPA protection.\(^{181}\)

---


Computers are nothing more than digital file cabinets, mailboxes, chalkboards, classrooms, hallways and other places where education records could be retained. But, the fact that a computer is involved in transmitting information should not, standing alone, alter the classification of an otherwise unprotected document. The information that is transmitted, not the means of transmission, should properly remain the focus of FERPA. An “education record” should be discernable without reference to the method of delivery.

Another important factor in any revised “education records” definition is the fact that FERPA was created to protect students and parents – not educational institutions. A broad-based definition finding that all computer related documents are “education records” within the meaning of FERPA would give greater power to schools to determine what documents to keep and “maintain” and what documents to ignore. Further, there is little doubt that schools make feeble, if any, attempts to discover the universe of documents sent via computer or through the university email system when responding to student requests for their “education records.”

When a student seeks his or her “education records” under FERPA, it would be unusual for the school to send a general message to faculty and administrators seeking items that may be in the possession of individual faculty members or administrators relating to the student. Schools, we know, do, in fact, maintain permanent records on students. And, there may be multiple locations, files or official records that are kept, collected and maintained on each student.

But students may never learn of these existence of the numerous discreet files maintained on them. Schools acting under a FERPA request routinely provide students very limited access to documents, regularly limiting disclosure to those few documents
retained in the Registrar’s Office or College Dean’s office. And, yet, schools often know that other files exist in locations unknown, and maybe unknowable, to the student. Secret, fat files have not disappeared since Watergate. In fact, data collection and retention has multiplied since that small piece of tape was found by Frank Wills in the Watergate garage.

Accordingly, any modern definition must put equal responsibility for retrieval and maintenance on the school. In other words, what a school seeks to withhold from third parties they must be willing to collect, keep and maintain to provide access to students. Students must be given notice of all the official files maintained by the school relating to their academic potential, academic progress and academic performance. Otherwise, we return to the pre-FERPA dilemma of a school having secret files on students that may form the basis of decisions that could harm a particular student and negatively affect his or her career.

Keeping in mind the Watergate era, any modern definition must remain student-focused, granting reciprocal rights to both students and schools. After all, the intent of FERPA and the privacy legislation of the early 1970s were to uncover the information being retained and relied upon by entities without a person’s knowledge, to allow access to this information and to provide an ability to correct erroneous information. FERPA must be restructured to ensure that schools and universities are not wielding the FERPA shield against third parties while simultaneously denying the FERPA sword to its intended beneficiaries, students.

Senator Buckley sought to protect students, and their parents, against the harms created when schools maintain secret, fat files on students. This concern remains as acute
today as it was in 1974. However, technology has made it easier for schools to hide their secret, fat folders from the searching eyes of students, and their parents, simply by keeping the data separated from any “official” student file. Congress must not forget the lessons of Watergate – government checks on agencies and its employees are essential to ensure that the privacy rights of ordinary citizens are not transgressed. Watergate also reminded us that no branch of government, no individual, can be allowed to operate above or outside the law. If the withdrawal of funding – a penalty that has never been invoked – is the only potential sanction against schools under FERPA, then the affirmative rights afforded its beneficiaries should be zealously guarded. The right to review one’s “education records” should be a right that is clear (and clearly understood), consistently interpreted and vigorously enforced.

Without a clear – and consistent – understanding of what records truly are considered “education records” in this digital era, the Buckley Amendment will fail to live up to its potential, and intended, purpose. If Brown v. Board of Education was correct in pronouncing that “education is perhaps the most important function of state and local governments,” then Congress has a duty to ensure the larger Government

---


Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
continues to protect those most vulnerable to its abuses. FERPA sought to protect students. It is time that this protection was firmly enshrined and vigorously enforced. A call to action by Congress will ensure that Watergate has its silver lining.

Id. Brown, a unanimous pronouncement by the United States Supreme Court, reminds us all that protecting our children in the education setting is vital to individual success. FERPA, while certainly not as revolutionary as Brown, certainly builds on the notion that fairness and openness of education form an essential part of a democratic society.