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In the Name of Watergate: Returning FERPA to Its Original Design

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INTRODUCTION

On June 17, 1972, Washington Post reporter Al Lewis phoned in a one-page story detailing the crime that ultimately unraveled both a country and a presidency: a break-in at the Watergate Complex.[1] The following day, Lewis described 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."[2] Lewis's story credits twenty-four-year-old security guard Frank Wills 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.[3] This seemingly simple crime became the impetus for two important events: the August 9, 1974 resignation of the thirty-seventh president of the United States, Richard Milhous Nixon, and the passage of the Family Educational Rights and Privacy Act of 1974 (FERPA).[4]

FERPA was signed into law by Nixon's successor, President Gerald Ford, on August 21, 1974, a mere twelve days after Nixon's resignation.[5] The new law took effect ninety days later on November 19, 1974.[6] As the nation attempted to heal from Watergate's wounds, educators quickly learned of the new law and sought input and immediate amendment. FERPA was amended for the first time seven months later on December 13, 1974, including the only amendment to date redefining "education records."[7]

FERPA provides certain protections for students' "education records,"[8] though the current definition lacks clarity, predictability, and uniformity in application. This article offers a modernized definition of "education records" that properly tracks FERPA's legislative history, intent, and goals. FERPA's focus was ensuring that parents were able to receive, review and, where necessary, correct all educationally related documents that could affect their child's educational

1. *See The Woodward and Bernstein Watergate Papers, Al Lewis Report*, HARRY RANSOM CTR., UNIV. OF TEXAS AT AUSTIN, http://www.hrc.utexas.edu/exhibitions/web/woodstein/post/lewis_detail.html (last visited July 20, 2010).

2. Al Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST, June 18, 1972, at A1, A22.

3. *See id.*

4. 20 U.S.C. § 1232g (2006); *see also* 34 C.F.R. § 99 (2009).

5. *See* U.S. DEP'T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS 1 (June 2002), http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf.

6. *Id.*

7. *See id.* at 2.

8. This phrase is defined at § 1232g(a)(4)(A).

progress.[9] The law's legislative history suggests the distrustful climate surrounding Watergate cascaded into other privacy areas, including education.[10] Following Watergate, lawmakers were increasingly concerned that secret governmental documents could be erroneously relied upon to the detriment of individuals, most of whom had no idea that data was being kept and no method of correcting inaccurate information.[11] Thus, FERPA's purpose was to give parents access to their children's educational records to ensure that data being relied upon to classify their children was correct or correctable.[12]

In modernizing FERPA's definitional framework, we must remain loyal to the goal of open records since educators rely on such access to direct the educational future of children. Any modern definition must recognize the shift in document retention from paper records to electronic compilations. Massive information that personally identifies students is sent daily through computer servers. Thus, if the initial 1974 definition of "education records" remains intact, the burden placed on educators to retain data will increase exponentially. This modernized record-keeping scheme provides yet another reason the definition must be improved. FERPA's original wording was not intended to cover a world of Internet communications and e-mail files. It is time for transformative change.

This article seeks to proffer an improved definition for "education records" without altering the legislation's original design. Part I provides a historical account of Watergate's climate to illustrate why privacy rights blossomed during the 1970s and provided an atmosphere conducive to the passage of FERPA. Part II details FERPA's legislative history. Part III presents the statute's current definition of "education records" and evaluates how courts interpret FERPA. Part IV suggests a modernized definition that considers the computerization of education and, correspondingly, education records. The section begins with a comparison of FERPA and the Privacy Act of 1974. Thereafter, it exposes how schools are misusing FERPA to their advantage rather than protecting student privacy and parental access to records. Part IV proceeds to focus on judicial treatment of e-mail communications in the education setting, asking whether e-mails that personally identify students are truly "education records" under FERPA. The conclusion to Part IV describes how we can return FERPA to its

9. Nicholas Trott Long, *Privacy in the World of Education: What Hath James Buckley Wrought?*, R.I. B. J., Feb. 1998, at 9.

10. *See* 120 CONG. REC. 14,580 (1974).

11. *Id.*

12. *Id.*

original design. Part V calls on Congress to address this issue and improve student privacy protections; inertia and inaction are an invitation to return to the days of Watergate.

I.
THE IRONIC INFLUENCE OF RICHARD NIXON, OR, HOW WATERGATE RESULTED IN THE PROTECTION OF EDUCATION RECORDS

Watergate did not cause FERPA. Rather, Watergate and its attendant revelation that the government kept secret files about ordinary Americans created a climate that gave rise to FERPA.[13] If educators were making daily decisions about how to educate our children based on their private scribblings, parents had a right to know the basis of those decisions.[14] Additionally, if the basis for those decisions was erroneous, FERPA offered a mechanism to correct such errors.[15] The goals were to ensure that educational decisions about our children were not made in secret and not based on inaccurate assumptions or data, and to ensure parents' right to know and access all of this information.[16] That the original definition of "education records" was broad-based is therefore an understandable, if not predictable, response to the fearful climate surrounding Watergate.[17]

"Education records" are those records that parents have access to review and correct. To arrive at a workable modern definition of this term, one must recall the era of privacy that, ironically, surrounded Watergate. After all, it was President Nixon's calls during the Watergate proceedings for citizens to have open access to their government records—secret and otherwise—that inspired senators to provide special protections to educational records. The right of privacy, the stated goal of FERPA, began its tumultuous history during Earl Warren's tenure as Chief Justice of the Supreme Court.[18] Beginning in 1953 and extending through July 1969, the Warren Court is best remembered for enshrining—if not enlarging—Americans' constitutional "right to

13. *See e.g.*, Long, *supra* note 9, at 9; *see also* 120 CONG. REC. 14,580 (1974).

14. Long, *supra* note 9, at 9.

15. *Id.*

16. *Id.*; *see also* 120 CONG. REC. 14,580.

17. The Hon. Stephen Trott, *Memories of the Ellsberg Break-in*, 51 HASTINGS L.J. 765, 768 (2000); *see also Nixon Sought Dirt on Mary Jo Kopechne, Files Show*, POL. INTELLIGENCE (June 14, 2010, 4:07 PM), http://www.boston.com/news/politics/politicalintelligence/2010/06/nixon_administr.html.

18. *The Law: The Legacy of the Warren Court*, TIME MAG., July 4, 1969 ("Until the very last, the court that Warren led demonstrated its overriding concern with the rights of the individual—even though many critics complained that in some instances it had already gone too far.").

privacy."[19] From decisions regarding criminal procedure to expanding zones of individual privacy, the Warren Court granted comprehensive, enforceable rights where none previously existed. In this fashion, the Warren Court ensured that governmental power over individuals was constrained.

As a candidate in the 1968 election, President Nixon had vigorously attacked the Warren Court.[20] As time passed, however, he realized the importance of individual privacy and began pressing Congress for legislation to protect it. Thus, in the early 1970s, the Supreme Court was not the only branch of government zealously advancing individual privacy rights. Congress and the president joined in the call for less governmental secrecy in the dealings of individuals. Embroiled in the Watergate proceedings, President Nixon gave a radio address in February 1974 discussing Americans' right of privacy.[21] The following comments, though spoken by the president, were ideas seemingly shared by all three branches of government:

> 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 over 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

19. *See id.*; *see also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (establishing a marital right to access contraceptives based on the newly minted "right of privacy" emanating from various amendments to the U.S. Constitution).

20. *See The Law: The Legacy of the Warren Court*, *supra* note 18.

21. President Richard Nixon, Radio Address About the American Right of Privacy (Feb. 23, 1974), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4364 [hereinafter Nixon Radio Address].

> 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.[22]

Standing alone, these ominously prescient words could have served as the basis for FERPA. The Executive Branch was clearly observing that too much data collection could result in problems if Americans lacked some right of access to the data or, alternatively, measurable limits were not placed on the government's ability to collect it.[23] At the same time that President Nixon's radio address was broadcast to the country, 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."[24] President Nixon noted 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."[25] 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, the law that Congress ultimately adopted to protect student privacy rights.

At the same time the country witnessed Watergate hearings in front of a Congressional committee—including Congress' efforts to obtain President Nixon's secret Oval Office recordings—one senator sought to provide children and post-secondary level students the privacy rights recently recognized by the Supreme Court with respect to adults. Motivated by the complaints of students and their parents struggling to obtain the "private scribblings" of educators, Senator James L. Buckley found himself engineering a legislative response.[26]

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22. *Id.*

23. *See id.*

24. *Id.*

25. *Id.*

26. Telephone Interview with James L. Buckley, Former U.S. Senator and U.S. Court of Appeals Judge (Aug. 6, 2010). Senator Buckley was very concerned at the

With Watergate still in the foreground, Buckley's main concern was to prevent educators from using these secretly maintained "private scribblings" in handling a child's education and future opportunities.[27]

FERPA's goal, to provide parents with access to their children's educational records, was seemingly lost among the more notable pieces of privacy legislation passed during the early 1970s. It was originally proffered as a floor amendment to the General Education Provisions Act, thereby foregoing the traditional committee hearing and legislative history route.[28] FERPA seemed to track some of the goals of President Nixon's newly-formed Domestic Council Committee on the Right of Privacy. Nixon hoped the committee would address the "collection, storage, and use of personal data."[29] He 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; And most importantly [4] Ways that we can safeguard personal information against improper alteration or disclosure."[30]

As the Watergate scandal unfolded, Congress confronted the important privacy issues highlighted by the president. 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. It therefore appears Watergate can be credited, at least in part, for awakening the nation's privacy consciousness. 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.[31]

Many remember the names of Archibald Cox, John Dean, John Ehrlichman, G. Gordon Liddy,[32] Howard Hunt, John Sirica,[33] and

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time that secret information "could have devastating effects on the education of a child." *Id.*

27. *Id.*

28. *See* LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS, *supra* note 5.

29. Nixon Radio Address, *supra* note 21.

30. *Id.*

31. *See* Lewis, *supra* note 2.

32. G. Gordon Liddy, a former White House aide, FBI agent, and prosecutor, was convicted of conspiracy, burglary, and the unlawful bugging of the Democratic Party Headquarters. Lawrence Meyer, *Last Two Guilty in Watergate Plot*, WASH. POST, Jan. 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.*

Woodward and Bernstein.[34] However, it was the less notable Frank Wills,[35] Al Lewis,[36] and a first term senator from New York, James L. Buckley, who used the Watergate break-in as the impetus for legislation that would benefit the general public. In the summer of 1974, Senator Buckley brought his privacy initiative for students and parents to the Senate floor. Watergate, it seems, had a silver lining.

II.
LEGISLATIVE HISTORY—HOW WATERGATE AND A *PARADE* MAGAZINE ARTICLE HELPED PROVIDE PROTECTION TO EDUCATION RECORDS

James L. Buckley, a one-term Conservative Party Senator from New York and the younger brother of renowned commentator William F. Buckley, served as FERPA's primary architect.[37] Echoing President Nixon's call to protect privacy rights, Senator Buckley explained that individual privacy and a citizen's right to know what information the government had collected were the motivating forces behind his floor amendment to the General Education Provisions Act.[38] Discussing his amendment on the Senate floor, Senator Buckley tied his desired education bill to Watergate's lingering effects.[39]

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33. Judge John Sirica was appointed to the bench in 1957. *See* Bart Barnes, *John Sirica, Watergate Judge, Dies*, WASH. POST, Aug. 15, 1992, at A1. He received *Time Magazine*'s award for Man of the Year in 1973, largely due to his role in the Watergate proceedings. *See id.* Judge Sirica was recognized for his persistence "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 in the Watergate proceedings came when Judge Sirica ordered that secret tape-recorded conversations in the Oval Office had to be turned over to government prosecutors. *See id.* This decision was ultimately affirmed by the United States Supreme Court in United States v. Nixon, 418 U.S. 683 (1974).

34. Carl Bernstein and Bob Woodward were the *Washington Post* reporters credited with exposing the enormity of the Watergate scandal. They co-wrote two books about their Watergate experiences: ALL THE PRESIDENT'S MEN and THE FINAL DAYS. The dedication for the former 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." CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

35. Frank Wills' Security Log notes that between 1:47AM and 1:55AM he "call[ed] police found tape in doore [sic] call police two [sic] make a inspection." *Frank Wills' Watergate Security Log*, WATERGATE.INFO, http://www.watergate.info/burglary/wills-security-log.shtml (last visited July 24, 2010).

36. Al Lewis was the initial *Washington Post* reporter to cover the Watergate break-in. *See* Lewis *supra* note 2. Only later did the reporting of Bernstein and Woodward seem to overshadow Lewis's initial story.

37. Long, *supra* note 9, at 9.

38. *See* 120 CONG. REC. 14,580 (1974).

39. Senator Buckley stated:

Echoing President Nixon's radio address, the senator's plea for greater transparency in education records was due to his concern 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. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student."[40]

The timing of this amendment was undoubtedly crucial to its hasty (some would argue uninformed) passage.[41] In the aftermath of Watergate, protecting privacy became the government's paramount mission. Stressing the urgency of the situation, Senator Buckley referenced secret records, "the violation of privacy by personal questionnaires," and confidentiality violations involving personal data.[42] These matters resonated potently during Watergate, a time when egregious violations of personal privacy were in the news. For instance, President Nixon had allegedly arranged for Daniel Ellsberg's records to be stolen from his psychiatrist's office following the release of the Pentagon Papers.[43] As this example illustrates, the Watergate era bred a climate of fear, perhaps even paranoia, of access to and misuse of private information and secret data collection coupled with an equally compelling desire to know precisely who possessed what information. Senator Buckley wanted the Senate to act with authority to curb information abuses by schools and educators.[44]

Speaking 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

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

Id.

40. *Id.*

41. *See* ELLEN M. BUSH, THE BUCKLEY AMENDMENT AND CAMPUS POLICE REPORTS 4 (Aug. 8, 1992), http://www.eric.ed.gov/PDFS/ED351677.pdf. Bush reports that a mere five days after Senator Buckley offered his amendment, it was adopted by voice vote without a roll call after less than one hour of debate. *Id.*

42. 120 CONG. REC. 14,580–81 (1974).

43. Trott, *supra* note 17.

44. 120 CONG. REC. 13,952 (1974) ("[I]t is time we take the lid off secrecy in our schools.").

children from this protection."[45] Senator Buckley assured his colleagues that the amendment would "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."[46]

Senator Buckley's proposed legislation was student focused and student friendly. In fact, the initial title of his legislation was "Protection of the Rights and Privacy of Parents and Students."[47] The added expenses and inconveniences for schools and educators were neither relevant nor troubling to Senator Buckley, as his only concern was protecting privacy rights of students in American schools.[48] Indeed, disturbed by the "[t]he secrecy and the denial of parental rights that seem to be a frequent feature of American education," Senator Buckley argued that his law was necessary to curtail the unchecked collection and dissemination of private data regarding students which—in the case of minor children—was often collected without the consent or knowledge of their parents.[49]

Senator Buckley relied heavily on 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."[50] Ms. Divoky reported numerous anecdotal incidents involving the "increasingly fat folders maintained by the schools."[51] Her article was both a 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

45. *Id.*

46. *Id.*

47. *Id.*

48. 120 CONG. REC. 14,581 ("To that argument I must reply that I am not 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."). 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.*

49. *Id.* at 14,580–81. 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.* at 14,581.

50. *Id.* at 13,951. The article was so compelling that Senator Buckley requested that it be placed in full in the Congressional Record. *Id.*

51. *Id.* at 13,953 (referencing Diane Divoky, *How Secret School Records Can Hurt Your Child*, PARADE, Mar. 31, 1974, at 14).

> 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, 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.[52]

Eerily similar to the allegations of secret government files maintained during Watergate, this information motivated many senators to act to protect "two of the largest classes of Americans," students and their parents.[53] The senators tied their legislation to Congress' spending power, using the threat of withholding federal financial aid as incentive for change.[54]

Interestingly, the language of Senator Buckley's original amendment tracked many of Ms. Divoky's concerns by broadly defining protected records. Likewise, the first amendment to FERPA in late 1974 focused on protecting only those records "maintained"—a verb first used by Ms. Divoky in her *Parade Magazine* article—by the school.[55]

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52. *Id.*

53. *Id.* at 13,951.

54. Both the original version of the Protection of the Rights and Privacy of Parents and Students, *id.* at 13,952, and the current version of FERPA, 20 U.S.C. § 1232g(1)(A)–(B) (2006), hinge federal financial aid on schools' compliance with FERPA. 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 would have the right to withdraw all federal funding from the offending school. To date, no school has ever had its federal funding withdrawn or otherwise affected due to FERPA violations. *See* Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 11 n.60 (2001). 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—is required in order for federal financial aid to be withdrawn. *See* 20 U.S.C. § 1232g(1)(A) (2006).

55. This language persists in the law to this day. *See infra* notes 83–93 and accompanying text.

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

> [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.[56]

In a Joint Statement with Senator Pell seven months later, however, Senator Buckley refined his prior definition, replacing the laundry list of protected records and files with the more concise (yet ambiguous) phrase "education records."[57] 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' [were] 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."[58]

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."[59] With the new brevity, Senator Buckley sought to emphasize that the core focus of FERPA protections was to be those items, files, and records used to place or otherwise categorize students in ways that can, and often do, affect their future.[60] It appears that Senator Buckley's aim was to protect academic and academically-

56. 120 CONG. REC. 13,952 (1974).
57. *Id.* at 39,862–63 (1974).
58. *Id.* at 39,862.
59. *Id.*
60. *Id.* ("[The amendment] 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.").

related records, not tangential records that might be located within the school building. This author believes that the initial definition was not wholly abandoned and should be referenced and evaluated, as it will provide greater clarification about the scope of FERPA's protection when (hopefully) Congress revisits the issue.

III.
AMENDMENTS AND INERTIA: INGREDIENTS FOR A FLAWED *FALVOIAN* DEFINITION

FERPA has been amended nine times since its initial passage in August 1974. However, the only time that Congress 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 records" remains in effect today. That definition currently reads:

> 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.[61]

This definition suggests that only those documents affirmatively kept or collected by a school are subject to FERPA protection. Since "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 an interpretation is supported by the "rule of reason" interpretation urged by Senators Buckley and Pell in their 1974 Joint Statement.[62]

It would be over twenty-five years before the United States Supreme Court would have the opportunity to address any portion of FERPA.[63] Not surprisingly, the first decision interpreting FERPA addressed the definition of "education records."[64] The Court's narrow, perhaps even naïve, interpretation of "education records" in *Owasso*

61. 20 U.S.C. § 1232g(a)(4)(A) (2006); *see also* 34 C.F.R. § 99.3 (2009). Although not the primary focus of this article, the reader should note that exclusions for records that do not satisfy the FERPA "education records" definition are codified directly following the "education records" definition. 20 U.S.C. § 1232g(a)(4)(B).

62. 120 CONG. REC. 39,862 (1974).

63. *See* Owasso Indep. Sch. Dist. No. I-011 v. Falvo *ex rel.* Pletan, 534 U.S. 426 (2002).

64. *See id.* at 429. While the "education records" definition ultimately provided is considered by many to be dicta in the case, *see id.* at 436, this is the closest guidance Americans have received from our courts since FERPA's passage.

Independent School District v. Falvo demonstrates the pressing need to develop a modern definition.[65]

Kristja Falvo, a parent with children in the Owasso School District, challenged the 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.[66] Ms. Falvo contended that this grading approach embarrassed her children.[67] However, the school district vigorously defended the lawsuit and initially won a motion for summary judgment.[68] The federal district court held that the issue of grades marked on papers by another student falls outside the governing 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.'"[69] 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."[70] Ultimately, the Supreme Court disagreed with Ms. Falvo and the Tenth Circuit, asserting that the practice of "peer grading" is common throughout the country.[71]

The Supreme Court was presented with two extreme positions: a narrow reading of "education records" and a more literal, expansive definition of the term. Important to the ultimate decision in the case, the United States joined the Owasso School District as amicus curiae

65. The Court 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." *Id.* at 433–34 ("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 . . . . Under the Court of Appeals' broad interpretation of education records, every teacher would have an obligation to keep a separate record of access for each student's assignments . . . . We doubt Congress would have imposed such a weighty administrative burden on every teacher . . . ."). Justice Scalia, however, authored a brief concurring opinion to highlight his disagreement with the Court's definition of "education records." *See id.* at 436 (Scalia, J., concurring).

66. Falvo originally brought the suit as a class action in the United States District Court for the Northern District of Oklahoma. *Id.* at 429–30. She named the school district, the superintendent, assistant superintendent, and principal as defendants. *Id.*

67. *Id.* at 429.

68. *See id.* at 430.

69. *Id.* (citation omitted).

70. *Id.* (citing Falvo *ex rel.* Pletan v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203, 1216 (10th Cir. 2000)).

71. *Id.* at 429 (noting that the Falvo children's "teachers, *like many teachers in this country*, use peer grading") (emphasis added). The practice of peer grading involves the following activities: students exchange papers with one another, score them according to the teacher's instructions, and then return the papers to their authors. The students then report their scores to the teacher.

before the Supreme Court.[72] The amicus's focus and main purpose was to emphasize that FERPA's legislative history buttressed the school district's position that "education records" limit protection only to "institutional or official record[s] of a student" and "not student homework or classroom work."[73]

In its amicus brief, the United States stressed that the statutory history of FERPA underscores a limited definition of "education records."[74] Its brief urged 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 . . . ."[75] The United States further emphasized that "Congress addressed FERPA to records that are maintained, as an *institutional* matter, by school officials, and that therefore are of some lasting significance outside the classroom."[76] FERPA's focus, it continued, is not homework or class work—even if graded by other students.[77] The Supreme Court ultimately embraced the United States' position that focused on the verb "maintained" in the "education records" definition.

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' . . . further supports an interpretation that refers to the official or permanent records that are retained by an institution" and not transitory pieces of information, like homework or class work.[78] The reason that "education records" encompass such items as grade point averages, standardized test scores, intelligence and psychological tests, attendance reports, and disciplinary proceedings is precisely because these records "are part of the *institutional* record of the student."[79]

72. Brief for U.S. as Amicus Curiae Supporting Petitioners, Owasso Indep. Sch. Dist. No. I-011 v. Falvo *ex rel.* Pletan, 534 U.S. 426 (2002) (No. 00-1073), 2001 WL 1057046.

73. *Id.* at *11.

74. *Id.* at *20–27. While there are suggestions that FERPA has only minimal legislative history due to its unique passage as a floor amendment to another bill, there is sufficient evidence in the existing materials that both the House and Senate sought only to protect the "official records" of students, "including the material 'incorporated into each student's cumulative records folder.'" *Id.* at *10.

75. *Id.* (emphasis added).

76. *Id.* at *12 (emphasis in original).

77. *See id.*

78. *Id.* at *11.

79. *Id.* (emphasis added).

The United States therefore urged a narrow definition of "education records." It concluded 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]."[80] It argued that a narrow definition "is further reinforced by the ordinary meaning of 'maintain,' which is 'to keep in existence or continuance; preserve; retain.'"[81]

At times, the Supreme Court's opinion appears to be a mere extension of the United States' amicus brief. For instance, in considering how broad or narrow to craft the definition, the Supreme Court relied upon the United States' position. The essence of the United States' stance was that the legislative history protected records of a permanent nature, such as those that could cause lasting damage to students by 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 and serious institutional records permanently collected, kept, and disseminated by schools were FERPA's target.[82]

The definition ultimately adopted for "education records" is central to the Court's holding in *Falvo* that peer grading is not implicated by FERPA's protections. 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 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.[83]

The Court thus relied upon the United States' narrow definition by focusing on the ordinary meaning of the word maintain.[84] In its final assessment, the Court found that:

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80. *Id.* at *17.

81. *Id.* at *13 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1160 (2d ed. 1987)).

82. *See id.* at *20–27; *see also supra* Part II.

83. Owasso Indep. Sch. Dist. No. I-011 v. Falvo *ex rel.* Pletan, 534 U.S. 426, 433 (2002).

84. *Id.* ("The ordinary meaning of the word 'maintain' is 'to keep in existence or continuance; preserve; retain." (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 81.)) In doing so, the Supreme Court used the exact

> 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]

Justice Kennedy was also influenced by the United States' recommendation that only "institutional" or "permanent" records be given refuge under FERPA. Although Justice Scalia appropriately challenged the Court's "central custodian" approach in his brief concurrence,[86] the majority opinion seems well grounded in both legislative history and legislative intent.

The Court's opinion reflects a belief that 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 nation's students were as problematic as secret files being kept on adults. Much like the Fair Credit Reporting Act was never intended to cover individual credit transactions such as a daily coffee or newspaper, FERPA was not intended to protect documents that did not have some potential to cause lasting damage to students.

The Court's reasoning was rooted in an understanding that FERPA was not crafted to combat disclosure of grades on individual tests or homework assignments. Rather, the legislative history reveals that FERPA took a far-sighted approach to isolating only those records of a permanent nature that could be relied upon by third parties or other schools to erroneously categorize a student. That transitory records were not intended for FERPA protection is also evident from the statutory language itself. "Education records" that remain solely with the maker—or individual teacher—are not covered under FERPA.[87] Yet what an individual teacher thinks or writes about a particular student could have the same damaging and lasting effect on a student as a misread personality test. Equally damaging could be the teacher's visual observations verbally communicated to a third party, which are also not considered "education records" under FERPA.[88]

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definition for the verb "maintain" proffered by the United States' amicus brief. *See* Brief for U.S. as Amicus Curiae Supporting Petitioners, *supra* note 72, at *13.

85. *Owasso*, 534 U.S. at 434–35.

86. *Id.* at 436–37 (Scalia, J., concurring) ("I 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").

87. *See* 20 U.S.C. § 1232g(a)(4)(B)(i) (2006).

88. *See id.* § 1232g(a)(4)(A).

FERPA was not envisioned as a panacea. It was instead born out of privacy concerns revealed during the Watergate era.[89] During the era's legislative push for privacy, the focus was on protecting data that is collected, maintained, and subsequently disseminated.[90] The *Falvo* Court therefore correctly limited FERPA's protection to documents of a more permanent nature.

Nevertheless, the *Falvo* definition myopically refuses to embrace computers and data collection systems as they exist in the twenty-first century. Today, nearly all schools have computerized data retention systems. Many, if not most, also regularly use e-mail to communicate about and with students. Are these documents considered "education records"? There is certain sagacity to the *Falvo* concurrence, which recognized that "education records," however defined, are not usually kept in a central location at a single repository.[91] In fact, it is doubtful that only one "file" exists for each student.

Increasingly, colleges and universities maintain numerous files on their students. One such file will undoubtedly be permanently retained in the Registrar's Office. However, there will likely be additional files in the student's particular college or field of study office, in the financial aid office, and, if applicable, in a given extracurricular office. Since the vision of a single file in a single room seems unrealistic, if FERPA's true intent is to protect students and their parents, then the locations of each file must be made known and available for inspection. In some measure, the narrow *Falvo*ian definition actually provides greater protection to schools than to those that FERPA should protect—students.

IV.
"EDUCATION RECORDS"—A MODERN, WORKABLE DEFINITION IN THE DIGITAL ERA

Given these facts, why revisit the definition now? Schools have had years to adapt to FERPA and develop appropriate policies that comply with the law. Likewise, Congress has had ample opportunity to correct any deficiencies observed in *Falvo*. Yet when FERPA was amended, Congress did not alter or expand "education records." In fact, no Congressional effort has been made to respond to Justice Ken-

89. *See* 120 CONG. REC. 14,580 (1974).

90. Nixon Radio Address, *supra* note 21.

91. *Owasso*, 534 U.S. at 436 (Scalia, J., concurring); *see also* Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 72 (2008) (criticizing the majority's suggestion of a single file cabinet containing student records).

nedy's one file, one file room definition for "education records."[92] We can only assume that Congress either agrees with the high court or is unconcerned with the issue.[93]

Yet, while the need to protect student rights remains as vital today as it was in 1974, the world has not remained stagnant. The fluid nature and evolution of technology requires a reassessment of which records deserve protection under FERPA's original design. Technology has greatly altered the record-keeping landscape; consequently, a new, modern definition of "education records" is warranted. 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. Schools must therefore ensure that any definition they adopt locally furthers FERPA's initial goal: 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.

A. FERPA's Original Intent

The proper starting place for any newly proposed FERPA definitions is 1974.

FERPA was passed months before the Privacy Act of 1974, having been "the first major legislation to become law" during President Ford's brief Administration.[94] Similar to FERPA but broader in its reach and protection, the privacy act sought to protect individuals'

92. *Cf.* Daggett, *supra* note 91, at 77–78 (noting that Congress has not made substantive changes to FERPA since 2001). This author strongly agrees with Professor Daggett's criticism of Congressional inertia in relation to FERPA.

93. *See, e.g.*, *id.* at 84.

94. President Gerald R. Ford, Statement on the Education Amendments of 1974 (Aug. 21, 1974), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=4576. In speaking about the broader education legislation, President Ford noted his pleasure that the:

> [N]ew safeguards . . . 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.

records maintained by federal governmental agencies.[95] Both FERPA and the privacy act sought to protect records of individuals maintained by the government[96] and were heavily influenced by the events of Watergate.[97] Yet, the two pieces of legislation have marked differences in definitional application and enforcement provisions. From an enforcement perspective, FERPA is silent as to any potential civil remedy that exists to ensure compliance.[98] In contrast, the privacy act unequivocally provides for civil remedies in federal court, including injunction, attorneys' fees, litigation costs, and actual damages.[99]

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. For this reason, the Privacy Act of 1974 provides the best blueprint for improving FERPA's "education records" definition. The privacy act, which protects individuals that are either citizens or aliens lawfully admitted for permanent residency,[100] includes

95. The act consisted of numerous amendments to the Freedom of Information Act (FOIA). *See* Scott Shane, *Recent Flexing of Presidential Powers Had Personal Roots in Ford White House*, N.Y. TIMES, Dec. 30, 2006, at A13.

96. Like FERPA, the definition of "individuals" under the privacy act is narrow in scope. The privacy act protects only those "individuals" that qualify as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2) (2006).

97. Emphasizing that the residual effects of Vietnam and Watergate fortified efforts at uncovering governmental secrecy, a *Washington Post* editorial argued that:

> [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.

See Editorial, *Information: A Vital Gift*, WASH. POST, Nov. 23, 1974, at A14.

98. The United States Supreme Court has properly found that FERPA's plain language forecloses individual civil relief. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 287 (2002) ("[T]here is no question that FERPA's nondisclosure provisions fail to confer enforceable rights.").

99. 5 U.S.C. § 552a(g) ("[T]he 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."). It further provides that any review is to occur de novo, and that available sanctions include injunction, *id.* § 552a(g)(3)(A), actual damages, *id.* §§ 552a(g)(1)(4)(A), and specific performance requiring "the agency to amend the individual's record in accordance with his request or in such other way as the court may direct." *Id.* § 552a(g)(2)(A). In all three instances, the act further empowers 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 id.* §§ 552a(g)(2)(B), (g)(3)(B), (g)(4)(B).

100. *See id.* § 552a(a)(2).

the right to locate, receive, review, correct, and protect against improper dissemination of "record[s]" "maintain[ed]" by federal agencies.[101]

The laws' similarity—if not unity—in purpose raises the question of why more symmetry did not exist between them in 1974. The similarity of protection between FERPA and the privacy act begins and ends with the terms "record[s]" and "maintain." The privacy act even covers "education" records, but only among the other categories of documents for which it provides protection.[102] As set forth above, FERPA defines the "education records" it covers as those containing information directly relating to a student that are maintained by the school. FERPA protects "education records" that are "maintained" by the educational institution or agency.[103] The verb "maintained" is not further defined and is part of the definition of what qualifies as an "education record."[104] In this respect, the current FERPA definition seems circular: education records are essentially anything the school claims it "maintain[s]" on behalf of the student. Furthermore, in the digital era, it is unlikely that there is a single repository where students can fully learn what documents are being kept, collected, or used—even when the school does not envision that these same documents are being "maintained" under FERPA.

In contrast, the privacy act further delineates what rights are included by defining "maintain" to include "maintain, collect, use or disseminate."[105] Immediately following this definition, the act further defines the term "record" to mean:

> [A]ny 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.[106]

Comparing this language seemingly indicates that the two laws were molded after each other, with the privacy act retaining the laundry list approach removed from FERPA mere months after its initial passage.[107]

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101. *See id.* § 552a(b)–(d).
102. *See id.* § 552a(a)(4).
103. *See* 20 U.S.C. § 1232g(a)(4)(A)(ii) (2006).
104. *See id.*
105. 5 U.S.C. § 552a(a)(3).
106. *Id.* § 552a(a)(4).
107. *See supra* note 57 and accompanying text.

B. *Change Is Needed . . . Now*

So how should one utilize the privacy act to update FERPA's definition of "education records"? First, Congress must understand that schools and universities are incapable of providing consistent or uniform responses to what qualifies as an "education record." Schools generally provide greater protection to themselves than they reciprocally provide to students in order to avoid unwanted disclosures. In fact, schools routinely rely upon FERPA for defensive purposes, thwarting the very protections that were intended. In our modern era of litigation, FERPA has been conveniently and consistently inverted to empower schools, often without students' knowledge, to withhold documents that the schools themselves do not provide to students as "education records." For instance, schools and universities regularly use FERPA to withhold e-mails, athletic department files, and other items—often in an attempt to protect the school, not the student. This inversion was never intended by Senator Buckley and is contrary to the spirit of FERPA. It only continues because the definition of "education records" is vague and malleable enough to allow schools refuge. It is time to return the law's focus to Senator Buckley's core concern: protecting *student* privacy.

For years, schools have been hiding behind FERPA and intentionally preventing disclosure of records to third parties that the school or university claims might be covered by FERPA without securing this same broad interpretation to student requests to review their records. One of the more notable instances, which drew the ire of Senator Buckley himself, was a 2009 study conducted by the *Columbus Dispatch*.[108] The paper sought information from all 119 institutions in the Football Bowl Subdivision, including "airplane flight manifests for football-team travel to road games; lists of people designated to receive athletes' complimentary admission to football games; football players' summer-employment documents; and reports of NCAA violation."[109] Through the study, the *Dispatch* learned that these universities—even those within the same state—give "wildly different legal interpretations" to FERPA.[110]

108. Jill Riepenhoff & Todd Jones, *Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen*, COLUMBUS DISPATCH, May 31, 2009, at 1A. The study was a "six-month *Dispatch* investigation" into the inner workings of the "$5 billion college-sports world that is funded by fans, donors, alumni, television networks and, at most schools, taxpayers." *Id.*

109. *Id.*

110. *Id.* While noting that such in-state distinctions are not specific to Ohio, the study found that "Kent State and Miami University are much more open than Ohio State University . . . ." *Id.*

To the surprise of Senator Buckley, several of the universities withheld vast amounts of the information sought.[111] The revelation caused the senator to declare it time "for Congress to rein in" FERPA, as such withholding of documents was never intended under the law.[112] Senator Buckley was joined in his concern about misuse of FERPA by Paul Gammill, who had recently taken over the federal education department responsible for monitoring FERPA.[113] Echoing the senator's concerns, Gammill stated that "[i]t sounds like some institutions are using this act to hide things."[114]

Schools understand the wide latitude FERPA provides and have commonly used it to their advantage. Schools had no problem singing the praises of athletes who excelled in the classroom, even reporting their exact grade-point-averages—information contained in documents that would clearly qualify as "education records"—when the information was favorable to the institution.[115] In contrast, schools were "far less forthcoming" when information was sought about athletes' misbehavior or embarrassing actions.[116]

Most university counsel offices would confess that FERPA's definition of "education records" is far from clear.[117] Ohio's former 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."[118] This admission underscores the importance of amending the current definition so that a uniform interpretation becomes possible.

The *Dispatch* article reminds that Senator Buckley designed FERPA "to keep academic records from public view," not to insulate major college sporting programs from public scrutiny.[119] Yet institu-

111. *Id.*

112. *See 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.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. School administrators, the parties responsible for administering FERPA, also desire greater clarity. President E. Gordon Gee of the Ohio State University, for instance, has been quoted as stating, "[s]ome clarity would be helpful to us." *Id.*

118. *Id.*

119. *See id.*

tions have transformed the law for their own benefit, seemingly ignoring the original intent of protecting students. The institutions are surely not placing the items they withhold from entities like the *Dispatch* in the permanent "education record" of the student. The issue of reciprocity—of students having full access to all records that the institution claims it "maintains" on its students—is no longer being vindicated by FERPA. Rather, schools have both the sword and the shield, and students are incapable of knowing with any certainty what records are truly being kept and monitored by the schools they attend.

The digital era and savvy universities have mandated that the time for serious change has come. Congress must restore the right of full access to student records by redefining with some measure of clarity, certainty, and consistency what items qualify as "education records."

C. Digital Records—Electronic Mail, Facebook, and University Servers

Facebook, Twitter, text messaging, and electronic mail are just some of the digital mechanisms upon which educators and students alike increasingly rely to further the educational 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?[120] Are student and faculty e-mails really considered "education records" under FERPA?

Literally speaking, schools may "maintain" items that, though not academically related, fall within the current purview of FERPA's "education record" definition. For example, an e-mail sent among a small group of faculty members discussing students in their respective classes would seemingly fall within FERPA's literal definition of education records if it directly relates to a student and is maintained by the school.[121] Nevertheless, even if this and similar documents are literally "maintained" by the school or university through computerized storage capabilities, that same e-mail would probably not be given to a student who requests her FERPA-protected "education record" directly from the school.

While the United States Supreme Court has yet to address whether digital records, and e-mails in particular, qualify as "educa-

120. *See, e.g.*, Simson Garfinkel, *Privacy Requires Security, Not Abstinence: Protecting an Inalienable Right in the Age of Facebook*, MIT TECH. REV., July/Aug. 2009, *available at* http://www.allbusiness.com/print/12572885-1-22eeq.html (last visited July, 2010).

121. *See* 20 U.S.C. § 1232g(a)(4)(A) (2006).

tion records" under FERPA, two lower courts have done so, providing differing answers to the same question.

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

In the more recent opinion discussing electronic communications and their characterization under FERPA, the Eastern District of California gave the most appropriate resolution: it depends.[122] Parents of a special education student sought a copy of all e-mails that personally identified their child.[123] The Office of Education provided the parents with only those copies of e-mails that had been placed in the student's permanent file, stating that all other e-mails had been purged.[124] A federal lawsuit followed, with the plaintiffs arguing that "all e-mails that specifically identify [the student], whether printed or in electronic format, are 'education records'" afforded FERPA protection.[125]

Granting summary judgment against the student's parents, the court found that "an e-mail is an education record only if it *both* contains information related to the student *and* is maintained by the educational agency."[126] However, this somewhat circular explanation provides little guidance for those seeking to know what precisely qualifies as "maintain[ing]" e-mails, for the court merely recited the conjunctive requirements of FERPA's current definition.[127]

Fortunately, the court went further. Invoking the Supreme Court's opinion in *Falvo*, it held that only those e-mails that are in a student's permanent file qualify as "education records" under FERPA.[128] 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 inboxes 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 inboxes of many individuals at the educational institution. FERPA does not contemplate that ed-

122. *See* S.A. v. Tulare Cnty. Office of Ed., No. CV F 08-1215, 2009 WL 3126322 (E.D. Cal. Sept. 24, 2009); *see also* S.A. v. Tulare Cnty. Office of Ed., No. CV F 08-1215, 2009 WL 3296653 (E.D. Cal. Oct. 6, 2009).

123. Tulare Cnty Office of Ed., 2009 WL 3296653, at *1.

124. *Id.*

125. Tulare Cnty Office of Ed., 2009 WL 3126322, at *4.

126. *Id.* at *5 (emphasis in original).

127. *See* 20 U.S.C. § 1232g(a)(4)(A) (2006).

128. *See* Tulare Cnty Office of Ed., 2009 WL 3126322, at *7.

> ucation 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 . . . .[129]

While commendably loyal to the *Falvo*ian interpretation of a "single file," this holding fails to appreciate that there must be some discretion exercised in determining which e-mails 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 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 not 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 analyze whether such records would be considered "education records" "maintained" by a school, one must not lose sight of the primary goal of FERPA—to prevent the accumulation of secret government records. If schools and universities are able to determine on an *ad hoc* basis which particular e-mails 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 the public that it is not keeping—much less relying on—secret records to make decisions affecting an individual. Watergate's legacy continues to teach us that laws must be passed to rein in the government, to reveal *all* documents kept about 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.

2. Bates College v. Congregation Beth Abraham

In 2001, the Superior Court of Maine was asked to decide whether e-mails—non-academic in nature—sent by students to a faculty advisor of a Jewish student organization constituted "education records" under FERPA.[130] One student in the organization sent two e-

129. *Id.* (emphasis in original) (citations omitted).

130. President & Trs. of Bates Coll. v. Congregation Beth Abraham, No. CV-01-21, 2001 Me. Super LEXIS 22, at *2–3 (Me. Super. Feb. 13, 2001). Hochstadt subsequently revealed these student e-mails to others in the Congregation, and the lawsuit filed by Bates College sought to retrieve the student e-mails. *Id.*

mails to the faculty advisor, one written personally and another forwarded from another student who did not know that the e-mail (originally sent from one student to another) had been forwarded to the faculty member.[131] Without student knowledge or permission, the faculty member gave both e-mails to officers of the Congregation.[132] There were 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, which ultimately played a substantial role in the rabbi's dismissal.[133] Nonetheless, Bates College sued for injunctive relief, seeking the return of the student e-mails under FERPA.[134]

In evaluating the e-mail issue, the court gave a very strict, noncontextual interpretation of the documents FERPA protects. Reading the statute in its most literal fashion, the court found that "[e]ven though [the e-mails] are documents generated by students outside normal academic exercises . . . they are records covered by the Act."[135] 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.[136]

The court found itself duty bound to key in on the literal definition contained in FERPA.[137] Yet, the court noted the context of the e-mails at issue.[138] The context in which the e-mails were sent and the role they played in the academic lives of students seemed less relevant to the court than FERPA's literal language. Ironically, in providing a liberal interpretation to the term "education records," the court decided that the "term ought to be liberally construed to be inclusive rather than exclusive to carry out the Act's purpose and intent of pro-

131. *Id.* at *3.

132. *Id.* at *4. In fact, the opinion reports that one student "specifically requested that the e-mail from [the other student] remain confidential and that Hochstadt not reveal its contents to any other person." *Id.* at *3–4.

133. *Id.* at *3, *6.

134. *See id.* at *1–2. Interestingly, neither student whose e-mails were forwarded was a named plaintiff or sought intervention.

135. *Id.* at *9.

136. *Id.* at *10.

137. *See id.* at *9–10.

138. *Id.* at *10.

tecting students."[139] Yet, neither student apparently sought to participate in the lawsuit to retrieve their e-mails. It was the college, not the students, that sought to have FERPA's provisions strictly enforced.

Bates College's precedential value is questionable. The court's FERPA discussion is largely dicta, since it held that Bates College lacked standing to enforce FERPA and that none of the named defendants was subject to the Act.[140] However, since this decision is one of only two opinions to address a blossoming issue, subsequent courts will most likely look to the opinion for guidance in settling unresolved issues. For instance, after *Bates College*, are student e-mail communications subject to protection under FERPA? 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?

Despite finding that the plaintiffs lacked standing and 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 student and any student address mentioned, including electronic addresses or e-mail identifiers."[141] Why should student e-mails to a faculty advisor complaining about a non-school employee's behavior be considered information protected by FERPA, or even an issue of student privacy? Nearly all schools and colleges have policies informing students that there should only be a limited expectation of privacy regarding messages sent through their school e-mail accounts.[142] How does the *Bates College* decision actually further *student* privacy? Does context play any role in the application of FERPA?

Bates College stands as a testament to one of the problems facing schools and universities, since one could interpret FERPA to strip all judgment in applying the current "education records" definition. FERPA was not intended to help an errant professor or administrator

139. *Id.* at *10.

140. *Id.* at *12–13.

141. *Id.* at *17.

142. *See Computing and Electronic Communications*, DUKE UNIV., www.studentaffairs.duke.edu/conduct/resources/computing (last visited Sept. 10, 2010) ("[T]he ultimate privacy of messages and files cannot be assured."); *see also Student Email Policy*, GONZAGA UNIV., http://www.gonzaga.edu/campus+resources/Offices+and+Services+A-Z/Information-Technology-Services/Administration/Policies-and-Procedures/Proposed-Student-Email-Policy.asp ("[A]lthough Gonzaga's e-mail system and governing policies may grant some privacy to student e-mail, students should treat all e-mail as if they were public documents.").

retrieve e-mails that he was asked not to show or forward to any other person. Senator Buckley himself has recently gone on record noting the "ridiculous" nature of literal interpretations where a more considered application would not affect or otherwise injure a student.[143] Senator Buckley correctly argues that schools and universities should constrain any modern application to FERPA's main goal: student privacy.[144] Applying the statute's definition devoid of context nullifies FERPA's purpose and stature. It is also doubtful that if these same students sought their "education records" from the school, the school would have contacted all faculty and faculty advisors to ensure that *any* materials they had that individually referenced the student were provided to the administration.

In fact, this one-way definition, which enables schools to refrain from disseminating information to others while failing 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 a self-righteous fashion that tragically minimizes the fortitude that FERPA promised in the area of student privacy.

D. The Important Right of Reciprocity

FERPA was undoubtedly intended to protect and further the rights of students and their parents, not to help schools shield non-academic records from others.[145] However, during the past thirty-five years, FERPA has been used more by schools to their own benefit, regardless of any student privacy issue at stake. It is time to codify a

143. *See* Riepenhoff & Jones, *supra* note 108.

144. Telephone Interview with James L. Buckley, *supra* note 26. Senator Buckley explained that "[t]hings have been read into the legislation that were never intended." Instead, the concerns he originally stressed were the "private scribblings of educators" that parents should have a right to review and—potentially—refute. *Id.*

145. *But see President & Trs. of Bates Coll.*, 2001 Me. Super. LEXIS 22, at 10–11 (finding that "[a]lthough the [e-mail] messages were directed at the conduct of a person outside the college community, they named several students and their involvement with a spiritual leader (Shorr) 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 . . . [The court having found that these extracurricular e-mail communications constitute "education records"] the obligation to protect student's privacy is placed squarely upon Bates. The expected confidentiality was unquestionably and unjustifiably broken by Hochstadt, who received the information in his role as a college official and student advisor.").

right of reciprocity in FERPA so that schools return to the main impetus for FERPA's protections: student privacy.

Reciprocity should require that whatever "records" the school shields from outside eyes must be made available to students and their parents for viewing. Currently, when students and parents seek review of their education records, the documents provided tend to be very limited in scope, usually confined to academic records.[146] Yet, due to the current lack of clarity, when outsiders seek information about students, schools tend to argue that they are preserving additional records on the students' behalf, records that are not released to students or parents during a traditional FERPA request.[147]

It is vitally important to include a right of reciprocity in an improved FERPA definition. The current absence of such a right permits schools to invert the law as a shield without providing students the benefits the law intended. Thus, the lack of a clear right of reciprocity undermines FERPA's goal of protecting students and their parents.

The reciprocity element simply underscores the importance of a single, uniform, and easily applied definition of "education records" for all schools and institutions. It is critical that any such definition include reciprocal rights of both duty and access. Schools must have a duty to "maintain"—or collect and keep—certain standard categories of documents for every individual. The question of which documents must be "maintained" cannot be a source of interpretation or an act of faith that schools will behave appropriately. Rather, "maintain" must be redefined to encapsulate FERPA's goal that no secret files or documents exist upon which life or career-altering decisions may be based.

Congress must 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. Developments in digital storage only enhance the opportunities for schools to revert to the days of secret "fat files." Thus, Congress must give a clearer, more easily applied 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.

The senator remains available for consultation and advice. Yet even without the architect's input, Congress must recognize that any modern definition must impose upon schools and universities an affirmative obligation to students so that FERPA is no longer used de-

146. *See e.g.*, Riepenhoff & Jones, *supra* note 108.

147. *Id.*

fensively to the benefit of schools, as opposed to students. 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 law, that protection should be 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.[148] Following the initial amendment seven months after FERPA's passage, the definition was expanded greatly to cover *any* document that identifies an individual student and is "maintained" by the institution. This definition has, however, had unfortunate unintended consequences. Out of either misplaced concerns about losing federal funding[149] or zeal in inverting the law in their favor, schools have usually given the broadest possible definition to "education records."

Senator Buckley recently argued that educators should use common sense in applying FERPA,[150] which was meant to protect "education records," or those records that have some academically related function. The *Dispatch* reported, "Senator Buckley said it's time for Congress to rein in [FERPA], which he crafted to keep *academic records* from public view."[151] Upon learning that schools were shielding themselves by refusing to disclose non-academic information, Senator Buckley stated, "[t]hat's not what we intended . . . . The law needs to be revamped. Institutions are putting their own meaning into the law."[152]

When one reviews the original laundry list definition of records intended to receive FERPA protection, notes among students and

148. 120 CONG. REC. 13,952 (1974).

149. Since FERPA's passage in 1974, no school has ever lost federal funding due to improper disclosure of "education records." Most likely, this is because losing federal funding requires a policy or practice of improper disclosures. Isolated instances carry no sanction and, following the opinion in *Gonzaga*, individuals have no recourse for isolated errors that cause them damage. Gonzaga Univ. v. Doe, 536 U.S. 273, 287–89 (2002). *Gonzaga* reminds that FERPA's provisions do not indicate "the requisite congressional intent to confer individual rights enforceable" by federal civil rights laws. *Id.* at 289.

150. *Id.*

151. *Id.* (emphasis added). The findings of the 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.*

152. *Id.*

notes between students and faculty members (pre-digital analogies to electronic mail) were not specifically covered, due, largely one could assume, to their non-academic nature.[153] FERPA instead sought to protect against secret "files," not merely information sent and received among students or between students and faculty.[154] 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.[155]

Jurisprudence interpreting FERPA in the digital age must not veer from the legislation's initial impetus. Facebook, text messaging, and e-mail, coupled with seemingly limitless computer storage capabilities, may have increased the methods of communication between students and their teachers; however, these advancements have not automatically enlarged the official school records that are kept on students. Schools' hyper-vigilant attempts to guard all "records" identifying students fails to appreciate that FERPA's goal 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. It must 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 e-mail server—that somehow reference or mention a student.

Congress should 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),[156] 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.

In addition, Congress should 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

153. *See supra* note 56 and accompanying text.

154. *See supra* Part II.

155. *See* 120 CONG. REC. 14,580 (1974).

156. It is beyond the scope of this article to address amending any of the numerous exceptions contained in 20 U.S.C. § 1232g(a)(4)(B) (2006).

folder on each particular student maintained by the school that qualifies for FERPA protection. The combination of a definition of "education records" that returns to Senator Buckley's design and the added obligation 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 FERPA requirements more seriously and to inform students of the location and purpose of any files that are being "maintained" about them. The simple definitional amendment would also discontinue schools' practice of being coy with documents in their possession that name or reference students. These two small language changes would return FERPA to its intended purpose and return the privacy protection to its rightful beneficiaries.

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

The second necessary solution is creating a law with teeth. Congress should amend FERPA to provide students and their parents with a private right of action that mirrors the right provided in the Privacy Act of 1974. Without providing a method to curtail individual breaches of FERPA, schools will remain free to continue using the law as a shield or a sword whenever it suits their purposes. Since the federal government has never imposed the lone penalty available under FERPA—loss of federal funding—it seems unlikely that such a penalty will ever be imposed.[157] As most recognize, a right without a remedy offers little assurance of protection.

It is intellectually difficult to appreciate why Congress gave adults a civil remedy to enforce the Privacy Act of 1974 yet continues to withhold that same measure from children and young adults protected under FERPA. Why should adults be given both this protection and the message that adult privacy rights are somehow more sacred and valuable than those of their offspring? FERPA was intended to end this discriminatory treatment by protecting the privacy rights of all individuals, not simply adults.

Consider a hypothetical based on a recent litigation example. School A is sued by a former employee terminated by the school. Told that student complaints are a main reason for the termination, the former employee seeks all records relating to the termination, including any such complaints. If the *Columbus Dispatch* article is any indication, one might expect the school to stonewall the ex-employee and

157. *See* Daggett, *supra* note 91 at 65–66.

refuse to provide any documents that specifically identify any student and are "maintained" by the school, even if maintenance of the documents is solely for the purpose of litigation.

Now imagine that the school fails to fully review its materials and sends the former employee a file that lists the names, home addresses, dates of birth, and social security numbers for these same students. There can hardly be a more blatant violation of FERPA. What if the former employee then uses the social security numbers to perform an investigation of the students and learns of damaging information relating to some of them that is revealed during litigation?

FERPA informs us that these students have absolutely no valuable recourse.[158] Professor Daggett notes that FERPA allows students to file a complaint with the federal government.[159] Thereafter, the federal government may perform some level of investigation to discern if the school has a policy or practice of releasing students' "education records."[160] As indicated by the fact that no policy or practice meriting the withdrawal of federal funds has ever been found,[161] it is unlikely that students will have any legal recourse for violation of their privacy rights. FERPA therefore appears toothless.

Accordingly, Congress should amend FERPA to provide students and their parents with a private right of action resembling the civil action available to those injured under the Privacy Act of 1974. The amendment should provide a civil remedy, including injunctive relief, for a school's 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."

Tinker v. Des Moines Independent Community School District assured students that they do not shed their rights at the schoolhouse

158. *See id.*

159. *Id.* at 66.

160. *See id.* Professor Daggett does an exceptional job of not only explaining the limited nature of FERPA's current remedial scheme but also of explaining its secondary effects:

> The *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.

Id. (citations omitted).

161. *Id.* at 67 ("Courts are increasingly holding or suggesting that FERPA is only violated by a pattern or policy of misconduct, rather than individual violations.").

gate.[162] Yet, without a private enforcement remedy for violations of FERPA, *Tinker*'s assurance rings hollow and students' rights are being trampled. The fact that FERPA was passed under Congress's spending powers does not limit the opportunity to attach a private right of enforcement. In fact, the primary method of Title IX enforcement, which was also passed under Congress's spending powers, is civil litigation.[163] In its current state, FERPA is a hollow promise inverted to the benefit of schools, not students. There is no doubt that Senator Buckley's vision has never reached its potential.[164] Congress must provide real protection to student privacy to remind students that their rights are as valuable as those of adults.

V.

AN INVITATION TO CONGRESS—REMEMBER WATERGATE

On August 9, 1974, in a one-sentence letter to Secretary of State Henry A. Kissinger, Richard Milhous Nixon became the only individual ever to resign the Presidency of the United States.[165] The events leading to this resignation served as the impetus for protecting student privacy through FERPA. Senators Buckley, Pell, Biden,[166] and Ervin,[167] among others, vigorously argued that students' inability to ac-

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162. *See* 393 U.S. 503, 506 (1969). The case focused on both students' and teachers' First Amendment rights, noting that:

> 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.

Id. However, since *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. *See, e.g.*, Bd. Of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 829 (2002) (citing to *Tinker*, 393 U.S. at 506).

163. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (denied admission to medical school); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992) (sexual harassment); Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (sexual harassment); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (sex discrimination).

164. *See* Riepenhoff & Jones, *supra* note 108.

165. *See* Letter from Richard Nixon, President of the United States, to Henry A. Kissinger, United States Secretary of State (Aug. 9, 1974), *available at* www.archives.gov/exhibits/american_originals/resign.jpg ("Dear Mr. Secretary: I hereby resign the Office of the President of the United States. Sincerely, Richard Nixon").

166. 120 CONG. REC. 14,584 (1974). Senator Biden, now serving as Vice President of the United States, explained that he was "an early cosponsor of this amendment." *Id.*

167. *Id.* (indicating Senator Ervin's 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:

cess information being used to classify them or otherwise make potentially career-defining decisions about them would cause unparalleled harm. After all, spying and secrecy had just brought down an entire presidential administration and resulted in numerous criminal prosecutions. In 1974, it seemed un-American to allow educators to collect and maintain secret data on their pupils. The same view should hold true today.

More than thirty years later, privacy rights remain a stalwart feature of American society. With the advent of the Freedom of Information Act,[168] the Privacy Act of 1974,[169] FERPA, the Video Privacy Protection Act,[170] the Driver's Privacy Protection Act of 1994,[171] and, most recently, the Health Insurance Portability and Accountability Act,[172] Americans feel increasingly entitled to information about themselves 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 suffer privacy violations without any recourse. Modern times call for more effective measures; 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

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> 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.

168. FOIA was signed into law in 1966 by President Lyndon B. Johnson. It allows "any person" to obtain certain information from federal government agencies. *See* 5 U.S.C. § 552 (2006). FOIA is broader than most other pieces of federal privacy legislation because it empowers "any person" to file a FOIA request, including U.S. citizens, foreign nationals, organizations, associations, and universities. Two significant amendments have occurred since FOIA was passed. The first came in 1974—following Watergate—and sought to require greater federal agency compliance. Similar to the genesis of FERPA, the "Watergate effect" spurred passage of FOIA amendments to protect against secret government files. Then, in 1996, a second major amendment focused on the unique issues related to electronically stored information.

169. 5 U.S.C. § 552a. The privacy act was also passed in the wake of Watergate.

170. The 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." Garfinkel, *supra* note 120, at 67.

171. *Id.*

172. The privacy regulations regarding the act are located at 45 C.F.R. § 160 (2009).

President Nixon spoke of heavy computer use in his February 1974 radio address regarding privacy, that address came years before technological innovations greatly enhanced the educational community's reliance on computers to retain records. Moreover, though we are far from a paperless society, many post-secondary institutions give students the opportunity to transact the majority of their education online. Students can now review a school's admission policies and 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 computers.

Conversations that in the past would have taken place in an institution's hallways are increasingly conducted in the virtual world of e-mail. If these communications are "maintained" on the school server, are they truly intended to be "education records" under FERPA? If so, what maintenance responsibilities are then placed on institutions regarding data retention? More importantly, what duty do schools have to notify students of the existence and location of these numerous "education records" that float throughout campus from office to office?

While Justice Kennedy's *Falvo*ian definition is ill-suited to a digital era, FERPA's drafters could not have envisioned the limitless nature of electronic communications predominating modern education. Rather than ignore the context of a particular communication, the focus should be on the actual information communicated, not the medium used. Simply transmitting, or "maintaining," an item over a university server should not automatically result in that information falling under FERPA's rubric. Such a broad-based definition is at odds with the original language Senator Buckley utilized when he first proposed FERPA.[173]

It is time to return to the goal of protecting academic records, not merely records that identify a student. As the United States government asserted in *Falvo*, records that are permanent and institutional in nature deserve FERPA protection.[174] Thus, the method of delivery should be irrelevant to determining what constitutes an "education record." Since computers are simply the digital equivalent of file cabinets, mailboxes, chalkboards, classrooms, hallways, and other places

173. 120 CONG. REC. 13,952 (1974).

174. Owasso Indep. Sch. Dist. No. I-011 v. Falvo *ex rel.* Pletan, 534 U.S. 426, 431–32 (2002).

where education records *could be* retained, the fact that a computer is involved in transmitting information should not alter the classification of an otherwise unprotected document. The modern focus must remain on the academic qualities of the data being transmitted, rather than the medium used to transmit it.

Another important factor in any revised definition of "education records" is the fact that FERPA was created to protect students and parents from the "private scribblings" of educators. FERPA was never intended to insulate educational institutions from searching eyes. In fact, it was quite the opposite motivation that spurred FERPA. 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 which documents to "maintain." 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 e-mail system when responding to student requests for their "education records."

If a student were to seek 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 relating to the student that may be in the possession of individual faculty members or administrators. However, schools do maintain permanent student records that may be held in multiple locations, files, or official records. Secret, "fat files" have not disappeared since Watergate. In fact, data collection and retention has multiplied since Frank Wills found that small piece of tape in the Watergate garage. Despite a school's administrative awareness of these discreet files, students may never learn of their existence because schools acting under a student's FERPA request routinely restrict disclosure to those few documents retained in the Registrar's or Dean's offices.

Accordingly, a modern definition must put equal responsibility for retrieval and maintenance on the school. If a school seeks to withhold certain documents from third parties, it must be willing to collect, keep, and maintain these same documents for students to access. Students must be given notice of all official files maintained by the school relating to their academic potential, progress, and performance. Failure to take these steps may signal a return to the pre-FERPA dilemma of a school having secret files about students that might form the basis of decisions that could harm a particular student and negatively affect his or her career.

Cognizant of lessons learned in the Watergate era, any modern definition must remain student-focused, granting reciprocal rights to

both students and schools. FERPA's objective was to uncover the information being retained and relied upon by entities without a person's knowledge. Thus, individuals should have access to this information and an ability to correct any errors. FERPA must be restructured to ensure that schools and universities are not wielding a shield against third parties while simultaneously denying the FERPA sword to students, the law's intended beneficiaries.

To uphold the Supreme Court's pronouncement that "education is perhaps the most important function of state and local governments,"[175] Congress has a duty to ensure that the Government continues to protect those most vulnerable to its abuses. FERPA's purpose of protecting students must be firmly enshrined and vigorously enforced. A call for Congress to act will ensure that Watergate has its silver lining.

175. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). *Brown* eloquently summarizes the role of education:

> 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.

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