

## Extended Abstract

### **CENSUS CONFIDENTIALITY UNDER THE SECOND WAR POWERS ACT (1942-1947)**

By William Seltzer and Margo Anderson

Beginning in late 1939 the FBI and the military intelligence agencies sought legal sanction to relax the confidentiality provisions of Title 13 so that they could gain access to individual-level data collected by the US Census Bureau. This effort was initially unsuccessful because the Census Bureau, under its then-director William Lane Austin, mobilized opposition to the proposed legislation before it could be introduced. After the 1940 Presidential election, however, the administration forced Austin's retirement as Director. His replacement, Mr. J.C. Capt, was a long-time political functionary first in the WPA and then as a confidential assistant to Austin, handling patronage appointments in connection with the 1940 Census. Within days of his confirmation, Capt arranged to revive this legislative effort. Indeed, a bill was introduced and passed in the Senate, but became tied up in intercommittee bickering in the House. Immediately after the Japanese attack on Pearl Harbor on December 7, 1941 Capt attempted again to revive the effort to waive the confidentiality protections of Title 13.

The Second War Powers Act was passed by Congress and became law on March 27, 1942. As a result of Director Capt's persistence it included a provision – section 1402 – that authorized the Secretary of Commerce to provide information to other Government agencies, including micro data collected under a pledge of confidentiality, if the data were needed “for use in connection with the conduct of the war.” One element in Capt's success appears to have been the linking of this legislation with the perceived need for information to assist in mopping up operations related to the forced removal of Japanese Americans from the West Coast. (Anderson and Seltzer, forthcoming; Seltzer and Anderson, 2003, pp. 12-14; National Research Council, 2003, p.119)

How much actual use was made of section 1402 between 1942 and 1947, when that portion of the Second War Powers Act was repealed, has been disputed. For example, members of the Japanese American community have often asserted that micro-data from the 1940 Census was used to target them (see, for example, Okamura, 1981). On the other hand, Census Bureau leadership and staff have generally denied that any such disclosures at the micro-level occurred, although one recent unpublished report explicitly acknowledges that business data were disclosed (Jones, 2005).

These denials ranged from the guarded to the categorical. For example, former Census Director Barabba (1980) wrote that “we have no evidence ... that identifiable confidential information was ever released during this period because of the [War Powers] act.” Long-time Bureau staff member, Ed Goldfield (1991) seemed more definite in his oral history, admittedly based on information provided by others,

From what Calvert [Dedrick] said to me, the relocation of Japanese is to this day misunderstood and an embarrassment to the Census Bureau. There have been oral and printed allegations that the Bureau turned over a list of names and addresses of all the Japanese living in the United States to the War Department. It identified these individuals from our list and then picked them up. That was not the case! ... As I understand it, what was finally worked out in the Japanese relocation and similar cases was that the Census Bureau provided what amounted to statistical information, but it did not identify individual Japanese. I do not think it even gave specific addresses, even without names, but rather small-area tabulations.

After we documented the information then available on the Bureau's involvement in the roundup of Japanese Americans (Seltzer and Anderson, 2000), the then Census director Prewitt (2000, cited in US Census Bureau, 2005, p.16) wrote,

The historical record is clear that senior Census Bureau staff proactively cooperated with the internment, and that census tabulations were directly implicated in the denial of civil rights to citizens of the United States who happened also to be of Japanese ancestry. The record is less clear whether the then in effect legal prohibitions against revealing individual data records were violated.

Most recently Deputy director Habermann (2005) observed, "A review of the historical record conducted by the Census Bureau concluded that there was no violation of the confidentiality provisions of the existing Census Law and no individual records were used in the program. The historical record and various accounts support this assertion." He also concluded,

The Census Bureau uses the authority of Title 13 to make a promise — a pledge — to the individual to protect the confidentiality of their information. In the history of the Census Bureau, there is no record of intentional violation of this pledge. Over time there have been allegations this pledge was violated. When examined, however, they have always been found to be wanting.

Somewhat inexplicably, he cited the work of Jones (2005) to support his position. Jones' findings seem far more circumspect:

While the Census Bureau's archives offer examples of such data requested and provided to agencies such as the War Production Board and the Office of Emergency Management, there is no record of a War Department request for data on individual Japanese persons in the Census Bureau's archives. (Jones, 2005)

In our work we had, until now, maintained the position that there was substantial evidence both for and against the use of micro-data from the 1940 Census to assist in the

war-time measures directed against the Japanese Americans and for other investigative purposes (Anderson and Seltzer, forthcoming; Seltzer and Anderson, 2003, table 2). The Committee on National Statistics' Panel on Institutional Review Boards, Surveys, and Social Sciences Research reached a similar conclusion (National Research Council, 2003, p. 120).

As a result of recent research, we have been able to identify a number of instances, during the years that section 1402 of the Second War Powers Act was operative, where other federal agencies requested individual-level data from the Census Bureau, information that was originally collected under a pledge of statistical confidentiality. These requests related to information on businesses and persons, including micro-level information on persons obtained from the 1940 Census. In one instance, the request sought names, addresses and other demographic and social information from the 1940 Census for all members of a vulnerable population group in a large metropolitan area.

Requests for individual-level information on businesses, enterprises, and establishments were made by such agencies as War Production Board and the Office of Emergency Management, as identified by Jones (2005) as well as by other agencies. The reasons cited for these requests ranged from the most benign (for example, compiling an address list to distribute posters for a War Bond drive) to those that related to regulatory or investigative purposes. Requests for individual-level data on persons were made by the Federal Bureau of Investigation and other intelligence and protective agencies. On principle, the FBI would not provide reasons for its requests. Although most requests cited section 1402 of the Second War Powers Act, not all did.

It is also clear from the available correspondence and other materials that the Census Bureau responded to these requests by providing the sought for information on a routine basis. In some cases the archival record is thin and we have been able to locate only a single letter or memorandum from the files of one or another agency. In other cases, the record is quite complete with copies of correspondence from both the sending and receiving agencies available.

In the most serious and best documented example, both the signed original of a communication and the first carbon copy, showing the initials of the originating staff and more senior clearance officers involved, are available. Based on the new evidence we present on disclosures of micro-level data from the 1940 Census, the paper will briefly discuss its implications for our understanding of the possible role of such disclosures had in measures directed against Japanese Americans.

In the post World War II period, the Census Bureau vigorously sought to end the confidentiality violations sanctioned by the Second War Powers Act. This was not always an easy task as a number of investigative agencies had grown accustomed to the relatively easy access they had had to Census Bureau micro-data during the war years. Indeed, the history of war time disclosures puts a somewhat new light on Ed Goldfield's recollection that,

Later on, when I had some major responsibilities for Census Bureau policy, including policy on access to individual records, I had the occasion to turn down people from the Secret Service, the Federal Bureau of Investigation, and elsewhere who came to the Bureau thinking that I could provide them with names and addresses of businesses or individuals. I always had difficulties persuading them that even though they represented an important Government concern, the Census Bureau would not cooperate with them, at least not to that degree. (Goldfield, 1991)

The Census Bureau has rightly been proud of its success in the six decades since the repeal of the Second War Powers Act in resisting efforts of other government agencies that sought access to micro-data collected under the protection of Title 13. What seems more problematic has been the persistent efforts to deny that such disclosures ever took place. The paper discusses some of the factors that may have given rise to this situation. In this connection, we have no reason to doubt that the subsequent denials made in recent decades by senior Bureau staff and management were in good faith.

Although the disclosures documented in this paper took place many decades ago and under the special conditions of war time, the implications of these findings remain highly relevant today. Accordingly, the discussion section of the paper briefly reviews the implications of the new findings presented here for four current issues:

First, since 9/11 we have in many respects been on war-time footing; we frequently hear today many of the same arguments that were used to justify such war time measures as the exclusion of Japanese American citizens from the West Coast as potential saboteurs or section 1402 of the Second War Powers Act to assist in the mopping up of Japanese Americans still at large. Indeed, in the immediate aftermath of the 9/11 terrorist attack, the USA Patriot Act was enacted into law. One provision of the Patriot Act, section 508, permitted the Department of Justice to gain access to micro-level information collected by the National Center for Education Statistics (NCES) collected under a pledge of statistical confidentiality (Seltzer and Anderson, 2002). The parallels between section 1402 of the Second War Powers Act and section 508 of the Patriot Act are obvious.

Second, efforts at using US Census data for racial and ethnic based targeting seemed to have re-emerged (see for example, El Badry and Swanson, forthcoming; Habermann, 2005; and Seltzer, 2005).

Third, for the 2000 Census the Census Bureau appears to have abandoned its traditional operational safeguard of separating name and address information from other information. This reduction in protection was initially justified on the grounds that it was needed to permit computer-based case-by-case matching of the 100 percent census file to assist in the post-census evaluation program. The evaluation studies were completed several years ago, but the linked data file apparently remains. (Seltzer and Anderson, 2002; 2003).

Fourth, the Census Bureau's unconditioned pledge of statistical confidentiality, based on the strong language of Title 13 and a staff committed to its defense, has been the gold standard of such protections in the United States and around the world. Do the new findings presented here alter the ethical, policy, or practical circumstances of demographic data collection?

In addition, the paper will suggest additional avenues of further scholarly research, as well as the possibility of legislative inquiry, to (a) better determine the extent of Census Bureau disclosures in the 1942-1947 period and (b) assess and, if needed, enhance current policies and arrangements designed to protect such disclosures now and in the future.

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