

Discussion

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1. Introduction

We thank the Editor of JOS for giving us the opportunity to comment on Hermann Habermann's article. We assume that we were asked to do so because, as noted below, we have written extensively on the U.S. Census Bureau's activities before and during World War II and more broadly on issues related to statistical confidentiality. Habermann does not cite our work and thus we are not sure if he is indirectly criticizing it when he writes, "alternative histories have appeared over the past decades, citing the possibility of a conspiracy of records pulled on the sly or hidden work programs. These versions ignore or are incomplete in citing evidence from the record. In addition, some of these conspiracy theories strain the limits of possibility" (Habermann 2006).

Habermann evaluates the complex legal, ethical, and administrative issues of statistical confidentiality in the context of the controversy that erupted after the 2004 revelation that in 2003 the U.S. Census Bureau had provided small area tabulations on Arab Americans from the 2000 Census to the Department of Homeland Security. Critics charged that the data release violated the trust between the U.S. Census Bureau and its publics, and they made historical comparisons with the bureau actions in assisting the forced evacuation and the incarceration of the West Coast Japanese American population during World War II. We wholeheartedly agree with Habermann when he notes that these kinds of incidents, both the original data requests and the response to them, often take the agency by surprise, and we endorse his call for an evaluation of the issues involved so that "statistical agencies" may "consider and prepare for how they will react to different situations, including ethical challenges, before they happen."

We do not, however, find the analysis that Habermann provides thus far to be an adequate and therefore useful guide to the issues involved. By way of indicating where additional research and analysis is needed, we examine several issues, historical and ethical. We add historical evidence that needs to be integrated into Habermann's analysis before conclusions can be safely made. However, we do not attempt in this response to provide definitive answers to the controversies raised.

We explore the changing legal environment of statistical confidentiality leading up to 1942, provide further information concerning the role played by senior U.S. Census Bureau leadership in these matters, and briefly review the context of government policies

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and actions directed against Japanese Americans after Pearl Harbor in light of Habermann's discussion of the conflict between the "common good" and the "particular good" during World War II. Finally, we suggest how more knowledgeable understanding would inform an ethical stance on issues that are common to the Japanese American and the Arab American controversies.

2. The Changing Legal Environment, 1939–1942

The 1929 census law defined statistical confidentiality for census respondents. Section 11 of that act (Title 13) provided that the information collected "be used only for the statistical purposes for which it is supplied. No publication shall be made . . . whereby the data furnished by any particular establishment or individual can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports." Congress further provided that "in no case shall information furnished under the authority of this Act be used to the detriment of the person or persons to whom such information relates" (quoted in Holt 1929, pp. 188–189.)

In late 1939 the Justice Department and the military intelligence agencies proposed an amendment to Title 13 to allow the FBI and the military intelligence agencies access to individual level census data (Franklin Delano Roosevelt Presidential Library, President's Official File: 3b–3c, Department of Commerce, Box 6, Folder: Commerce Department, 1939–1940, U.S. Census Bureau). According to FBI Director J. Edgar Hoover, this effort arose as a response to numerous absolute refusals from the U.S. Census Bureau for requests for information concerning persons under investigation, including specifically, a case involving a Japanese American (Memo from FBI Director J. Edgar Hoover to Attorney General Robert Jackson, 4/14/1940, Robert Jackson papers, Library of Congress, Box 93, File: Attorney General, Subversive Activities General). The measure drafted by the Department of Justice proposed amending Section 11 of the census statute to provide that

the records of the U.S. Bureau of the Census, including the individual reports, shall be available to the Federal Bureau of Investigation of the Department of Justice, Office of Naval Intelligence of the Department of the Navy, and the Intelligence Division of the Department of War in connection with violations of the laws against espionage and other matters relating to the national defense whenever, in the opinion of the Attorney General, the Secretary of War or the Secretary of the Navy, the public welfare would be served by according such access to said records.

In response to opposition by the U.S. Census Bureau, led by then Census Director Austin, this proposed legislation was abandoned early in 1940, on the grounds that it would undermine response rates for the 1940 Census and be a politically unwise move in a presidential election year (Anderson and Seltzer forthcoming).

In early 1941 Director Austin was forced to retire and was replaced as Census Director by J.C. Capt. Within days of his appointment Capt began working with the Secretary of Commerce to modify Title 13 to permit the military and civilian intelligence agencies access to individual level census data. Such legislation was introduced in the Senate in June 1941 (*Congressional Record*, Volume 87, p.4995). The language of Capt's June 1941 bill was milder than that of the 1939 draft bill, with some additional safeguards, but

was aimed at accomplishing the same end: “That notwithstanding any other provision of law, any individual census report or any information contained therein may be used in connection with the national defense program under such rules and regulations as may be prescribed, with the approval of the President, by the Secretary of Commerce.” Over the next several months Director Capt supported this legislation in both Senate and House hearings. The measure passed in the Senate but became bogged down in the House.

A few days after the Japanese attack on Pearl Harbor, Director Capt wrote to Commerce Secretary Jones to remind him that the U.S. Census Bureau was still constrained by the confidentiality requirements of Title 13, and formally proposed that an Executive Order be issued to get around the ban (National Archives and Records Administration (NARA), RG40, General Records of the Department of Commerce, Office of the General Council, General Counsel’s Subject and Index File, 1903–1946, Box 152, File 5706 -33. Memorandum from J.C. Capt to the Secretary of Commerce, 12/11/41).

When the effort to have an Executive Order introduced failed and the Director of the Bureau of the Budget refused to include the confidentiality repeal in the administration draft of the Second War Powers bill, Capt persisted, and arranged that an “amendment to the omnibus war-powers bill . . .” be communicated to Chairman of the House Judiciary Committee on February 4, 1942 to, among other things, “make this and other information now obtained by the Department of Commerce under the seal of confidence available to other war agencies.” (Letter from Commerce Secretary Jones to Hatton Sumners, Chairman, Judiciary Committee, dated 2/4/1942. Reproduced in U.S. Congress, 1942).

The Judiciary Committee quickly approved this amendment, and at least according to a *New York Times* story dated 2/6/1942, the purpose of the amendment was clear,

. . . The House Committee on the Judiciary before giving its approval today to the Senate adopted Second War Powers Bill, amended the measure to take back the promise it made in 1940 to that all data obtained by the Census takers would be held strictly confidential, even from other bureaus and agencies . . . Some agencies of the government want data now as a matter of national safety. They seek some of the information obtained particularly from Japanese and others who since have become enemy aliens, especially about those in coastal areas from which they have been ordered evacuated by the Department of Justice . . . [Such] data, now a secret under law, government officers believe, would be of material aid in mopping up those who had eluded the general evacuation orders.” (NY Times, “SPY DATA SOUGHT FROM 1940 CENSUS.” 2/7/1942, p. 9).

A later *Washington Post* story (3/20/1942) also associated the relaxation of the Census confidentiality protections of Title 13 permitted by the Second War Powers Act explicitly with efforts aimed against Japanese Americans. Furthermore, during a March 13, 1942 Senate hearing on a measure to make it a felony to violate an exclusion order, Senator Warren Austin’s (R-Vermont) observed,

we are now considering . . . legislation that would empower the [government] to requisition from the Commerce Department, Bureau of the Census, what the census shows about these people. That would give an enumeration of the Japanese and it would also give names and residences, so that, when the Army makes its evacuation it can . . .

compare its list of evacuees against the census and have some knowledge of whether this has been an effective protection or not.” (U.S. Congress. Senate. Committee on Military Affairs. “S. 2352.” Unprinted hearing report prepared by Ward and Paul, official reporters, 77th Congress, 2nd Session, March 13 1942, pp.8–9. Bancroft Library, Banc MSS 67/14c FILM, Reel 4, frame 69).

Capt’s amendment remained in the bill and became Section 14 of the Second War Powers Act in late March 1942.

3. Other Information Concerning Census Director J.C. Capt

In addition to his determined (and ultimately successful) effort to set aside the Census confidentiality protections of Title 13, Director Capt repeatedly expressed a willingness, if not an eagerness, to use U.S. Census Bureau staff and materials to pursue Japanese Americans. For example, during a discussion of the release of 1940 Census tract data on Japanese Americans to the military intelligence agencies at the January 1942 meeting of the Census Advisory Committee, Capt made the unsolicited observation, that

We’re by law required to keep confidential information by individuals. If the defense authorities . . . wanted the names of [missing] Japs . . . I would give them further means of checking individuals. (National Archives and Records Administration (National Archives and Records Administration (NARA), RG 29, Entry 148, Census Advisory Committee, January 1942: 20–21).

Similarly, Director Capt’s telegraphed instructions to Calvert Dedrick, the U.S. Census Bureau’s chief statistician in the Division of Statistical Research, sent on March 21, 1942, before the Second War Powers Act became law, were explicit:

Your instructions confirmed by wire to Colonel Bendetsen gave you authority to act for this Bureau. Any information available to you should be used in accordance with good judgment as dictated by the needs of the national war effort. I am relying on you to be prompt, practical and effective in the performance of your duties without being hampered by old Bureau habits, precedents, and practices that are not in complete accord with the urgent, rapidly shifting necessities of the times as they develop from hour to hour. Of course you understand that it is important to the Bureau that it receive official and public recognition for all its work. J. C. Capt – Director – Census. (National Archives and Records Administration (NARA), RG40, Commerce, Entry 1, Box 144, File no. 67104).

What does this narrative add to the controversies about the U.S. Census Bureau’s actions in 1942? We think it is important to know that the bureau was under pressure to repeal census confidentiality from 1939 on. We also think it is important to know that Census Director J.C. Capt led the legislative effort for repeal.

Habermann acknowledges that “Congress could decide to change that law (Title 13) and remove all the protections that now exist.” He does not, however, acknowledge that it was the Roosevelt administration and particularly the leadership of the U.S. Census Bureau, not Congress, that initiated the confidentiality repeal in World War II, and thus weakened the commitment to confidentiality during the war.

4. The Historical Context of the Exclusion Orders

Habermann claims that the evacuation and incarceration of the West Coast Japanese American population in 1942 was “the common good as understood in 1942 by the government.” He does not, however, acknowledge that the decision to evacuate the West Coast Japanese was contested at the time. That is, though President Franklin Roosevelt issued Executive Order 9066, and Congress and the federal courts upheld his decisions during the war, strong doubts were expressed at the time over the legality and the necessity of the evacuation and incarceration program by persons inside and outside of the government. Indeed, significant components of the intelligence community questioned the need for treating the bulk of Japanese Americans as a threat. For example, FBI Director J. Edgar Hoover argued that “the case to justify the mass evacuation for security grounds had not been made” and an experienced naval intelligence officer, Lt. Commander K. D. Ringle, who had spent considerable time assessing the loyalty of the Japanese American community on the West Coast, independently reached the conclusion that there was “no need for mass action against people of Japanese ancestry.” (CWRIC 1997, pp.53–55).

Over the decades these doubts grew, and the program was ultimately repudiated by Congress, the first Bush administration and the federal courts in the 1980s (Grodzins 1949; tenBroek et al. 1954; Conn et al. 1964; Daniels 1971; Weglyn 1996 (first published 1976); Daniels 1982; CWRIC 1997 (first published 1982); Irons 1983; Irons 1989; Robinson 2001). By the 1980s, all three branches of government acknowledged that the program was a blot on American ideals. As the Commission on Wartime Relocation and Internment of Civilians concluded:

The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it – detention, ending detention and ending exclusion – were not driven by analysis of military conditions.

The commission found, as well, that federal officials knew at the time that the rationale of military necessity was flawed. The commission instead found different causes for the order, evacuation, and incarceration:

The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of Japanese Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II. (CWRIC 1997, p. 18).

In other words, one cannot accept without question the notion that the decision to evacuate the Japanese represented “the common good” at the time, or in retrospect. Habermann does not acknowledge that Karl Bendetsen’s justification for his actions, e.g., “that it makes no sense in hindsight to ask if the decision was a mistake based on what is known in the future,” was rejected by the Commission (and by almost all the other key participants in the evacuation program in later years) (cf. de Nevers 2004).

5. Ethical Issues

Habermann's article raises a number of ethical issues. In Part II of his article ethics is explicitly addressed, but many ethical issues arise in Part I of the article as well. The discussion in the article of these ethical issues is confounded in several places with ambiguities in the use of concepts and terminology. We will discuss both these topics under two headings: (a) the common good and individual and group harm, and (b) the responsibilities of staff and leadership in a statistical agency.

5.1. *The Common Good and Individual and Group Harm*

Habermann, drawing upon V. Bradley Lewis, initially defines the "common good" as "the regulative principle of social and political life. Its most basic meaning is that the community and its institutions should serve the good of all its citizens and not just the restricted good of a particular ruler or class." Subsequently, however, Habermann seems to equate the "common good" only with "those responsible for overall direction of the common good." To us, this sounds like an effort to rationalize any action by the leadership of a statistical agency as long as they receive an order from above. This is a particularly disquieting thought, given the emphasis of the current Bush administration on the constitutional concept of a unitary executive. This certainly may not be the author's intention, but the line of thinking advocated does provide the intellectual justification for misusing a statistical system to identify or target vulnerable individuals or population subgroups as being "in the national interest."

Habermann also argues that the data statistical agencies disseminate, at various levels of aggregation, and used by governments to make decisions will inevitably benefit some members of the public and "harm" others. He characterizes this practice of government as being essentially a "zero sum game" for allocating costs and benefits. We agree with this formulation and also agree that, absent deliberate distortion of such allocation formulas or the use of substantively dubious or legally impermissible categories, the "harm" created by such data use does not normally present any special policy or ethical problems for statistical agencies.

However, the two uses of census outputs that Habermann deals with in his article – the use of census block and minor civil division tabulations of persons of "Japanese race" from the 1940 Census to target Japanese Americans for forced expulsion from their homes and the use of 5-digit zip (postal) code by detailed primary and secondary ancestry from the 2000 Census to target Arab Americans for some unknown purpose by the Department of Homeland Security³ – has nothing to do with allocating costs or benefits or any sort of zero sum game. Such applications transform a statistical system with statistical objectives into a military-investigative surveillance system with military or intelligence objectives. This is particularly troubling when the categories involved – race and ancestry – have historically been associated with governmental mistreatment in many countries.

³ We assume that the objective stated by the DHS, to "guide in language needs for airport signage," is patently absurd.

Furthermore, imputing a propensity to disloyalty or worse to all members of a racial, ethnic, or ancestry group is statistically and ethically repugnant. In these circumstances, we believe that statistical agencies and their leadership and staff have a special duty to protect against this sort of targeting and related harms.

To facilitate the identification by statistical agencies of potentially risky outputs, we have proposed the use of a three-way classification, macro data, meso data, and micro data. As we have written elsewhere,

in discussing issues related to data disclosure and . . . harm, three different types of data are usefully distinguished: macro data, meso data, and micro data. Macro data refer to tabulated aggregates for national or large geographic areas. Meso data to tabulated data for sufficiently small geographic areas that the results can be used operationally to identify and target a vulnerable population subgroup. Micro data identify records for each individual. While the relative protection offered by the statistical aggregates of macro data and the relative vulnerability of individual records that constitute micro data have long been recognized, the special risks posed by meso data have only been explicitly examined in the past few years. (Seltzer and Anderson 2003).

The category of meso data was developed because such small area tabulations were frequently found to be associated with targeting and serious human rights abuses. (Indeed many national statistical agencies have special disclosure standards for small area data.) Unfortunately, Habermann ignores this distinction and returns to a two-way classification of micro data (protected by traditional statistical confidentiality law) and aggregated data (where no protection is offered). Undoubtedly taking potential misuses of agency outputs into account complicates life for a statistical agency. Defining concepts such as “targeting” or “potentially risky outputs” may not be easy (neither are the definitions, for example, of “urban” or “employed”), but they are all part of the work of a responsible statistical agency.

5.2. *The Responsibilities of Staff and Leadership in a Statistical Agency*

In discussing the ethical dimensions of the assistance provided by the U.S. Census Bureau to the War Department in the forced removal of Japanese Americans from their homes, Habermann focuses almost exclusively on the role of one statistician in the U.S. Census Bureau, Calvert Dedrick. From a careful examination of the record it is clear that Dedrick played a central role in the implementation of the U.S. Census Bureau’s policy to “proactively” (Prewitt 2000 quoted in U.S. Bureau of the Census 2004, p. 16) assist the Army in the efficient forced removal of the Japanese Americans from the West Coast. What is not apparent from the article is that the record is equally clear as to the fact that the actions taken by Dedrick were upon the explicit instructions of the recently appointed Census Bureau Director, Mr. J. C. Capt. In other words, the policy implemented by Dedrick was set by Director Capt. We ourselves initially made the same mistake (compare Seltzer and Anderson 2000 and Seltzer and Anderson 2003). The fact that Census Bureau’s Director set the policy here is particularly relevant for considering the ethical issues involved.

Of course there are also implications for the current leadership of the U.S. Census Bureau. We would stress three:

First, from this brief summary it is clear that the civilian and military intelligence agencies wanted access to the confidential micro records from the 1940 Census, that Census Director Capt did all he could to provide this information, and that eventually Congress approved such a release. In each case, Japanese Americans were contemporaneously identified as the main target. In these circumstances, we question whether the U.S. Census Bureau's persistent dismissal of the possibility of such disclosures is justified. We are willing to believe Habermann's assertion that the U.S. Census Bureau has to date found no clear evidence of such disclosures from the 1940 Census involving Japanese Americans. However, we do question how informed and thorough their search for such disclosures has been, particularly in light of the Bureau's sweeping dismissal of suggestive evidence concerning targeted disclosures contained in our earlier work. Indeed, we have also been careful to present evidence that suggests that micro data were not so used (see for example, Seltzer and Anderson 2003, Table 2). Based on our research to date, we would suggest that a more prudent response at this point is to say that the jury is still out.

Second, the U.S. Census Bureau leadership has a responsibility to foster and be open to informed historical research, if one is ever to truly grapple with the complex historical record (cf. Neustadt and May 1986). This was the stance of the official military history of World War II which performed a careful critical analysis of the Japanese evacuation decision (Conn et al. 1964). The Army, in other words, did not feel the need to defend the actions of Colonel Karl Bendetsen in later years. More critical was a clear-eyed analysis of the program and its consequences for the decision making of the military. It was also the response of the federal courts that reopened the internment cases in the 1980s and reversed the wartime decisions (Irons 1983; 1989). Only the U.S. Census Bureau, to our knowledge, as a key participant in the evacuation, has yet to fully come to terms with its role in these events. And only the U.S. Census Bureau is therefore still dogged by distrust and controversy when potential current analogous events reopen the controversy again. One consequence of a failure to address long-standing past issues is that they can distort thinking about current problems both by the responding public and by statistical agency staff and leadership.

Third, we would stress we are in full agreement with Habermann's emphasis on the need for statistical agencies to engage in ethics training for its staff and leadership and that to be effective such training needs to take place well before new threats emerge.

6. References

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