

## Ethics, Confidentiality, and Data Dissemination

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Statistical agencies, such as the U.S. Census Bureau, have an obligation to disseminate statistical information and to protect the data they collect. In 2004, a *New York Times* article regarding tabulations the U.S. Census Bureau provided to another agency, the U.S. Department of Homeland Security, drew comparisons to actions in the U.S. Census Bureau's past and suggested the U.S. Census Bureau—by providing statistical data, which did not reveal any individual identities—had acted in bad faith, violating the trust under which it collected the census from individuals and households. This concern resulted in a review of our responsibilities, the commitments made to respondents, and U.S. Census Bureau policies. This article reflects the results of that review — and highlights historical aspects, as well as the contemporary provision of data to the Department of Homeland Security. Part I discusses the U.S. Census Bureau's responsibilities and commitments to respondents, the meaning of statistical use, and what the public can expect of the U.S. Census Bureau or indeed any statistical agency. Part II draws a distinction between what can be expected of a statistical agency as an agency within the bureaucratic structure of the government and the responsibilities of individuals, whose moral responsibilities and choices transcend bureaucracies.

*Key words:* Common good; confidentiality; data dissemination; ethical challenges; statistical information.

### 1. Introduction

In 2004, a *New York Times* article regarding tabulations the U.S. Census Bureau provided to another agency, the U.S. Department of Homeland Security, highlighted certain statements and allegations.<sup>2</sup> The article drew comparisons to actions in the U.S. Census Bureau's past, and suggested the U.S. Census Bureau—by providing statistical data, which did not reveal any individual identities—had acted in bad faith, violating the trust under which it collected the census from individuals and households. The article compared the preparation of extracts for the U.S. Department of Homeland Security to the work that the U.S. Census Bureau did in 1942 for the War Department, specifically the Army's Western Defense Command in San Francisco, during World War II, for the purpose of relocating the Japanese community living in the west coast. The comparison between the

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<sup>2</sup>Lynette Clemetson, "Homeland Security Given Data on Arab-Americans," *New York Times*, 30 July 2004.

tabulations the U.S. Census Bureau provided to the Department of Homeland Security and the work it did for the army rekindled long-standing doubts and allegations about the U.S. Census Bureau's commitment to *the confidentiality protections of the Census Law, and the extent to which statistics are used to the detriment of certain populations.*

It is important to recognize these are separate issues or concerns, and to confuse and conflate these allegations unnecessarily undermines public trust. However, that the *New York Times* piece so readily rekindled the doubts about 1942, and conflated the issues of law and the use of statistics, caused concern for the U.S. Census Bureau. This concern resulted in a review of our responsibilities, the commitments we make to respondents, and our policies. This article reflects the results of that review — and highlights historical aspects, as well as the contemporary provision of data to the Department of Homeland Security. Part I, discusses the U.S. Census Bureau's responsibilities and commitments to respondents, the meaning of statistical use, and what the public can expect of the U.S. Census Bureau or indeed any statistical agency.<sup>3</sup> In Part II, we draw a distinction between what can be expected of a statistical agency as an agency within the bureaucratic structure of the government and the responsibilities of individuals — whose moral responsibilities and choices transcend bureaucracies.

## 2. Background: National Crisis and Statistics

In 1942, the U.S. Census Bureau provided aggregate statistical data to the Western Defense Command, the army command located in San Francisco and responsible for the implementation of the War Relocation Program.<sup>4</sup> A review of the historical record conducted by the U.S. 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.<sup>5</sup> The historical record and various accounts support this assertion.

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. In fact, primary sources—in both U.S. Census Bureau and military archives—do not suggest that individual records were ever used or even sought in the course of the evacuation. That the U.S. Census Bureau did take its confidentiality obligations seriously is affirmed by a war history compiled by the U.S. Census Bureau after the war. Duplicate punch cards were prepared in the Census Machine Tabulation Division for the Japanese population, both alien and citizen. The cards were used for special tabulations that were required for the alien control and evacuation program. However, the name and

<sup>3</sup> We draw a distinction here between the possible inadvertent disclosure of individuals in small areas due to improper use of disclosure avoidance rules and the intentional and willful disclosure of identifiable information. The only way to guarantee that no information will ever be disclosed because of the first condition is to not disclose any information.

<sup>4</sup> Terminology note: *relocation* is the proper term for the program undertaken by the military in 1942 that evacuated the Japanese community from the west coast under the authority of Executive Order No. 9066. *Internment*, a term often used erroneously, was a different program. Enemy aliens—including German, Italian, and Japanese—were interned throughout the United States.

<sup>5</sup> Christa D. Jones, "The Role of Population Statistics and the Japanese War Relocation Program" (U.S. Census Bureau, Suitland, MD, 2005).

individual identification data from the 1940 Population Census were not provided to the War Department, nor were these data requested. This was in conformance with Census law, under which the Bureau must keep such data confidential, excepting that it can give these data to the individual who provided the information requests their information.<sup>6</sup> Moreover, the internal review conducted by the U.S. Census Bureau concluded it is unlikely that the possibility of using individual records was ever seriously considered. An important guiding assumption for the planning and implementation of the relocation program was that the exclusion of the Japanese community would be *self-enforcing*.<sup>7</sup> This was based on the belief the Japanese community was an isolated community—and would easily be identified within the majority population.

According to the documentary evidence, the U.S. Census Bureau did not violate the confidentiality provisions of the Census law. The U.S. Census Bureau's contributions to the Japanese War Relocation Program were statistical data and the assistance of an expert from the U.S. Census Bureau, Mr. Calvin Dedrick. Even so, the rumors and speculations do persist, and the Japanese War Relocation Program is often cited in criticisms of the U.S. Census Bureau.

The U.S. Census Bureau recently found itself reviewing the provision of data to the U.S. Department of Homeland Security in the context of the law, public trust, and national crisis. September 11th changed the priorities of U.S. government, bringing a new focus on issues of "homeland security." A new department, Homeland Security, was created in 2002 to address the needs of coordination, surveillance, and public safety in the context of the war on terrorism. On 14 May 2004, the Electronic Privacy Information Center (EPIC) filed a Freedom of Information Act (FOIA) request, requesting the U.S. Census Bureau to provide a range of documents pertaining to the decennial census and requests for data. The range of the request included any "correspondence or communications" with law enforcement or intelligence agencies; materials pertaining to any policy determinations about the storage and access to census questionnaires; and any materials pertaining to the U.S. Census Bureau's plans with regard to the 2010 Census. In the course of fulfilling the FOIA request, the U.S. Census Bureau discovered that it had provided extracts from the public files—those data available on the U.S. Census Bureau's website in the American FactFinder.

In July 2004, the U.S. Census Bureau released correspondence and other materials indicating that the Office of Customs and Border Protection, which is part of the Department of Homeland Security, had made two requests for data about the Arab community in 2002 and 2003. The U.S. Census Bureau provided two extracts, which are data extracted from the public files—and data which are available on the U.S. Census Bureau's website in the American FactFinder. These extracts indicated the number of persons of Arab ancestry living in places of 10,000 people or more and

<sup>6</sup> J.V. Dobbin, "How the Census Bureau Helped the Program to Evacuate the Japanese from West Coast Cities," National Archives, Washington DC, Records of the Bureau of the Census, RG 29, Records Relating to the War History Project, File: Material on Census Bureau Aid in Japanese West Coast Evacuation, 4.

<sup>7</sup> Jones, "Population Statistics," 5.

A thorough description of the Census Bureau activities regarding the Japanese War Relocation Program can be found in this article.

by ZIP-code tabulation area (geographic areas closely associated with Postal Zip Codes).<sup>8</sup>

These data did not identify individuals, and did not violate the confidentiality provisions of the Title 13, the census law. Each of these tabulations could have been retrieved by the Department of Homeland using the public data website, American FactFinder. However, as a courtesy the U.S. Census Bureau extracted the data and provided it to Customs and Border Protection. This was not a case of unique courtesy for another federal agency; the U.S. Census Bureau, in the past, frequently assisted researchers—both public and private—by extracting data.

The revelation that the U.S. Census Bureau had provided these data to the Department of Homeland Security did not go unnoticed by the media. The *New York Times* broke the story on Friday, 30 July 2004, pointing out “the assistance is legal, but civil liberties groups and Arab American advocacy organizations say it is a dangerous breach of public trust and liken it to the U.S. Census Bureau’s compilation of similar information about Japanese-Americans during World War II.”<sup>9</sup> Once again, the issue of assistance in 1942 was used to raise doubts about the U.S. Census Bureau’s actions, and there were protests in the press against the U.S. Census Bureau’s actions. In fact, the initial article spurred a range of reactions, from outrage to bemusement. According to another *New York Times* article, “Wade Henderson, executive director of the Leadership Conference on Civil Rights said, ‘The Census Bureau has unwittingly played into the worst fears of all minority communities that they are being watched, catalogued, and tracked for improper purposes.’”<sup>10</sup> Offering a different perspective, a marketing company executive, Brian Teasley, likened the data provided on Arabs to data on German Americans.

“Most marketers do not understand the best way to use data to identify and target their markets. That is what we help them do. The U.S. Census helps identify which areas are most appropriate for products that are geared towards ethnic tastes. In the case mentioned by the New York Times, the Department of Homeland Security’s Customs and Border Protection Division is using the data to target areas in which to distribute information regarding U.S. traveling laws and restrictions.”<sup>11</sup>

Teasley concluded, “it is important for American citizens to understand this is publicly available data, provided by the U.S. Census Bureau.”<sup>12</sup>

### 3. Part I — Responsibilities, Commitments and Expectations

In fact, the U.S. Census Bureau’s provision of publicly available data to the Department of Homeland Security was picked up by media throughout the United States, and in other parts of the world. These articles presented many questions and concerns about the U.S. Census

<sup>8</sup> The source of these data was the 2000 Census of Population and Housing, the decennial census, which does not collect information on Arab nationalities or ethnicity as part of the 100 percent data collection, known as the short form. The census does collect information on ancestry as part of the 1-in-6 sample known as the long form.

<sup>9</sup> Clemetson, “Data on Arab Americans.”

<sup>10</sup> Lynette Clemetson, “Coalition Seeks Action on Shared Data on Arab Americans,” *New York Times on the Web*, 13 August 2004 [cited: 13 August 2004].

<sup>11</sup> “Top Twenty U.S. Areas to Find Arabs and German Americans,” *PRWeb*, 10 August 2004.

<sup>12</sup> *Ibid.*

Bureau's responsibilities and commitments. The articles also highlighted diverse expectations — illustrating a potential gap between the U.S. Census Bureau's understanding of its promises and protections, and the expectations of many stakeholder communities and special interest groups. The numerous comments and criticisms from the Congress, media, and special interest groups can be summarized as one question and two assertions:

- *The Law that Protects Confidentiality*: Did the U.S. Census Bureau violate the law that protects confidentiality?
- *Statistics and Harm*: Even if the U.S. Census Bureau did not release individually identifiable information individuals were still harmed because groups were harmed.
- *Sensitive Information and Public Trust*: By releasing such sensitive information to a law enforcement agency the U.S. Census Bureau broke faith with or violated the trust of minority groups that are already suspicious and difficult to enumerate.

### 3.1. *The Law that Protects Confidentiality*

A pledge of confidentiality of individual information is the bedrock on which the U.S. Census Bureau, as well as other national statistical offices, builds public trust. For example, Principle 6 of the Fundamental Principles of Official Statistics states: "Individual data collected by statistical agencies for statistical compilation, whether they refer to natural or legal persons, are to be strictly confidential and used exclusively for statistical purposes."<sup>13</sup> This pledge encourages respondents to provide accurate and truthful information; and is, therefore, the foundation for accurate and relevant statistics. It originates from the recognition that the information we wish to collect is of a fundamentally private nature. By its nature, individual information belongs to the person, not the government. Statistical agencies collect information, because the government, either through legislative, executive, or regulatory decision, has determined that the statistical data for which the individual information is required are needed for the common good.<sup>14</sup> The information is used to inform and direct policies, measure outcomes, and determine societal needs. Statistical agencies should be prepared to explain why the information is needed and collected, and then pledge — if it is an accurate statement — that the information will not be published except in an aggregate form. The U.S. Census Bureau, in fact, under Section 9 of Title 13 of the United States Code is able to provide such a pledge for all of its data collection activities except for the collection of export data. It is unlawful, to "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified."<sup>15</sup>

Title 13 provides comprehensive protection of individual data. It limits the availability of individual data and protects the individual from the possibility of having the data used against the individual by a court, or other administrative proceeding. The U.S. Census Bureau uses the authority of Title 13 to make a promise — a pledge — to the individual to protect the confidentiality of his or her individual information. The author is aware of an instance of a

<sup>13</sup> United Nations Statistical Commission, Economic and Social Council Supplement 9, "Fundamental Principles of Official Statistics," 1994.

<sup>14</sup> We discuss the notion of the common good in more detail in Part II.

<sup>15</sup> *Title 13—Census*, U.S. Code, Sec. 9 (a).

census enumerator who violated this pledge and was sent to jail. The past is not a guarantor of the future, and the U.S. Census Bureau has always pursued statistical and technological safeguards, as well as better employee awareness, to reinforce the validity of its pledge.

Title 13 provides strong protection for confidentiality. More than the legal pledge, however, it is the culture and ethos of the agency – from the director on down – that is the ultimate guarantor of the pledge. The affirming development in 1942 was that, despite the times, the U.S. Census Bureau did not release individual identifiable information. Reading the transcripts one can see the strong influence of a culture not to participate in any such release. *It is worth noting that in the case of our dissemination of data about Arab Americans, almost all of our critics accepted that we had not violated our pledge of confidentiality.* However true, it did not answer the concern and assertion that groups were *harmed* by the data the U.S. Census Bureau released, even though the data did not contain any individually identifiable information.

### 3.2. Statistics and Harm

The promise of confidentiality however, is not intended to imply that statistical data could not be used in any way that could be construed as harmful. The National Academy of Sciences has stated:

“[the purpose of statistics] is to generate an aggregate description of a group of persons or businesses. No direct action is taken for or against a specific individual or business, although as a result of the information, policy changes based on such information could result in benefits or costs to persons or businesses”<sup>16</sup>

In fact one purpose of collecting census data is to paint a portrait of the people in the nation and their living conditions. These data provide policy makers with a tool for bettering the lives of people.

The confidentiality provisions of the U.S. Census Bureau’s law, however, are not intended to prohibit the use of aggregate statistical information — uses that may result in harm to particular groups within society. Nevertheless, there was concern and assertions that groups were harmed by the data the U.S. Census Bureau release — even though the data did not contain any individually identifiable information — and that the U.S. Census Bureau should have acted to prevent this harm.

One example of this point of view was expressed in a letter to an official of the U.S. Census Bureau concerning the release of statistical information about Japanese Americans. The letter stated:

“Even if actual names were not released, the information given to the War Department was not for the purpose for which it was supplied, and was clearly to the detriment of the persons to whom such information related (people were imprisoned as a result). But as

<sup>16</sup> Committee on Confidentiality and Accessibility of Government Statistics, National Research Council, *Private Lives and Public Policies: Confidentiality and Accessibility of Government Statistics*, Edited by George T. Duncan, Thomas B. Jabine, and Virginia A. de Wolf (Washington, DC: National Academy Press, 1993), 24.

far as I know, no one was ever charged with this crime – certainly not the Director of the Census, nor the Secretary of Commerce.”<sup>17</sup>

This assertion was not uncommon, and was perhaps the most important one to many of the critics of the dissemination of Arab American statistics. The assertion brings into question the very nature of “statistical use,” and whether there is a common understanding of that term. This assertion also begs a secondary question of whether the U.S. Census Bureau can exercise any authority to prevent harm to any group.

This point of view was also expounded by one of the members of the *Commission on Wartime Relocation and Internment of Citizens* during the hearings of 1981 regarding the Japanese War Relocation Program. According to Judge William Marutani’s view, who questioned Calvert L. Dedrick, a former Census Bureau employee who was detailed to the military to assist in the planning and implementation of the relocation program, the U.S. Census Bureau had violated the public trust, even if had not, in fact, violated the law. By assisting the military the U.S. Census Bureau had violated public trust, because allowing the data to be used to the detriment of the Japanese community, was a violation of the U.S. Census Bureau promise that the report could not be used against the individual. Yet, the U.S. Census Bureau had never extended its promise or the protections beyond individual records and information. Marutani challenged Dedrick, and the prevailing interpretation of the Census Law, in an effort to extend the protections of the law and imply that the U.S. Census Bureau had violated the trust of the Japanese community. Marutani was unsatisfied with Dedrick’s answers.<sup>18</sup> Marutani’s concerns remained unresolved, and reflect an ongoing debate about public trust and the use of statistical data, especially as they affect small, minority or sensitive populations. In a way, the Marutani exchange foreshadowed the recent discussion about the use of the census data to identify locations of Arabs after September 11th.

National statistical offices pledge not to release individually identifiable data and only to use the individual data for statistical purposes. What then is a *statistical purpose*? Is the release of such data a benign, neutral act if no group suffers any detrimental effect? At first view, this would not seem to be unreasonable. Who among us would want to use statistics to harm, injure or have a detrimental effect on a group? If, in fact this were what statistical use meant then we have taken the importance out of statistics. Statistical products must be used to inform public policy and *they must be relevant to the policy issues of the time*. The first of the United Nations Fundamental Principles of Official Statistics states:

<sup>17</sup> Raymond Okamura to Meyer Zitter, 7 June 1980, U.S. Census Bureau papers, Washington, DC.

<sup>18</sup> Commission on Wartime Relocation and Internment of Citizens (CWRIC), 3 November 1981, Transcripts of Public Hearings (Calvert L. Dedrick), National Archives, College Park, Records of Temporary Committees, Commissions, and Boards, RG 220, Commissions and Boards, Microfile 1293: 1, (document pagination 157–158). Judge Marutani in challenging Dedrick referred loosely to the data the U.S. Census Bureau provided. Dedrick had already, in exchanges with MacBeth and Marutani, testified that the U.S. Census Bureau had not violated the law or provided any data with individual records. In addition, Marutani uses the terms *incarcerated* and *incarceration*. These terms inaccurately reflect the relocation program, and were not the terms commonly used either by the military or the commissioners in the course of the hearings.

Official statistics provide an indispensable element in the information system of a democratic society, serving the Government, the economy and the public with data about the economic, demographic, social and environmental situation. To this end, official statistics that meet the test of practical utility are to be compiled and made available on an impartial basis by official statistical agencies to honor citizens' entitlement to public information.<sup>19</sup>

Clearly statistics will *affect* groups, and therefore the individuals within groups. If there were no effect, then the statistics are irrelevant. There would be no reason to spend any money on the collection, processing and dissemination of these data. One of the principal reasons for collecting official statistics is the allocation of funds and public policy decisions at all levels of society. Most often these allocations and decisions are a zero-sum game. The amount of money, for example, available for highway construction or for new hospitals is usually fixed. A statistical agency cannot promise a highway will be built to provide relief of traffic congestion in a particular neighborhood or that a hospital will not be built in some other neighborhood. Depending on the results of poverty surveys, income taxes may rise for a segment of the population. The effects can be for small geographic groups and/or for subgroups at the national level. The promise of confidentiality is not intended to imply that *statistical data* could not be used in any way that could be construed as harmful.

With respect to the decennial census itself the promise to protect the confidentiality of information is restricted to cover only individual census reports. They are used every day in ways that affect communities and individuals—and not always to the benefit of every individual or community. As Morris Hansen, a former Associate Director of the U.S. Census Bureau, pointed out, when addressing the question of the data used in 1942 to relocate the Japanese, “*a primary function of the census is to provide statistics for small areas to be applied in whatever ways users desire to use them for or against various programs. The use of census statistics to guide the evacuation was not in any sense an ethical violation by the U.S. Census Bureau.*” (emphasis added)<sup>20</sup>

Statistical information answers many questions about society, and it is used to address a range of needs and desires throughout a diverse society. The U.S. Census Bureau, in fact, does not exercise control over the use of the statistical information it disseminates. Its duties, responsibilities, and obligations are outlined in Title 13 of the U.S. Code—and the law does not provide any authority to consider the uses of statistical data. Moreover, like other statistical agencies, the U.S. Census Bureau subscribes to professional standards and ethics. A key question for the U.S. Census Bureau, as well as other statistical agencies, is whether society and the statistical community understand the law and the agencies' responsibilities, as well as professional standards and ethics, in the same context and whether the statistical community has any responsibility or obligation *to anticipate harm*.

<sup>19</sup>United Nations Statistical Commission, “Fundamental Principles.”

<sup>20</sup>Morris H. Hansen, “Discussion” (presentation response at the annual meeting of the American Statistical Association, Washington, DC. 1989 [cited: 21 March 2005]). Available from World Wide Web: < <http://www.amstat.org/sections/srms/proceedings>>, 162.



### 3.3. Sensitive Information and Public Trust

In an interview given shortly after the release of small area data about Arab Americans the author gave an interview to the *New York Times*, and was quoted as saying, “We do worry about how information will be used. However, we have not been given the authority to determine which organization gets which information.”<sup>21</sup> This response was not persuasive with many special interest groups. The typical response to our release of information about Arab Americans is illustrated by the following:

“Technically, the U.S. Census Bureau did not break any laws or regulations in providing this sensitive information on Arab Americans to Homeland Security. In fact, that data was already readily available to everyone on the U.S. Census Bureau website and in other forms. Homeland Security could have generated these tabulations on its (*sic*) own. The problem is that the U.S. Census Bureau went the extra mile for that agency, when it did not have to, to generate special tabulations of that data realizing how sensitive this was. Given what is at stake that was an irresponsible action.

If the U.S. Census Bureau is conducting these types of analysis for Homeland Security, they are in essence acting as a branch of that office. What will stop them from cooperating with the U.S. Immigration and Naturalization Service in the collection of information on undocumented immigrants who play such a crucial role in the economy of the United States? The information could now easily be collected using a new technology recently implemented by the U.S. Census Bureau for collecting information.”<sup>22</sup>

Most, if not all, of these critics understood that the U.S. Census Bureau had no mandate to decide who did and who did not get information. Some even understood that the U.S. Census Bureau’s law provides the authority to prepare special tabulations, and that as agency of the government, the U.S. Census Bureau is expected to furnish information to other government agencies.<sup>23</sup> Despite this, they thought the U.S. Census Bureau should protect them from what they saw as *harm* — or bad decisions by society.

Clearly the U.S. Census Bureau has no mandate or authority to decide which users should receive or not receive aggregate data.<sup>24</sup> In fact, if such a mandate were proposed, we would argue against it. It would not be suitable for the U.S. Census Bureau to exercise

<sup>21</sup> Clemetson, “Data on Arab Americans.”

<sup>22</sup> Angelo Falcón and José García, “Op-ed: Census Bureau Needs to Restore its Credibility,” *civilrights.org*, 20 August 2004 [cited: 20 August 2004]. Available from World Wide Web: < [http://www.civilrights.org/tools/printer\\_friendly.cfm?id=24820&print=true](http://www.civilrights.org/tools/printer_friendly.cfm?id=24820&print=true) >

<sup>23</sup> *Title 13—Census*, US Code, Sec. 8 (b).

“Subject to the limitations contained in Sections 6(c) and 9 of this title, the Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys, for departments, agencies, and establishments of the Federal Government, the government of the District of Columbia, the government of any possession or area (including political subdivisions thereof) referred to in Section 191 (a) of this title, State or local agencies, or other public and private persons and agencies, upon payment of the actual or estimated cost of such work. In the case of nonprofit agencies or organizations, . . .”

<sup>24</sup> This problem is further complicated in the United States by the lack of copyright on any government statistical information.

such authority and become a gatekeeper, determining who and what organizations could access statistical data.

What then of the possible *misuse* of survey and census data that has been collected? It is important to recognize the limited authority of the U.S. Census Bureau, as an agency of the government. The U.S. Census Bureau is bound by law, and, as such, does not and cannot exercise free will or make value judgments on whether to release data (subject to protection of individual information). The only legal pledge the Bureau can make to respondents is to keep their individual records confidential. The law itself, while critically important, may not be sufficient. For example, the U.S. Census Bureau has an excellent law protecting the confidentiality of respondents' information that has stood the Bureau in good stead for many years. However, the Congress could decide to change that law and remove all the protections that now exist. Second, it is important for society to establish standards of conduct concerning information and statistical data. The ultimate protection of any individual is an open and informed society. If there were a proposal to change the Census Law, we would hope for a spirited public examination, and that society would reinforce existing protections and recognize the value of individual confidentiality as integral to the mission of the U.S. Census Bureau. Of course, for a debate to take place, society must be informed. In that spirit, we believe that the U.S. Census Bureau should be open and transparent about the requests for data that it fills and that data requesters are informed in advance that their request may be public information.

What criteria would the U.S. Census Bureau use in its role as gatekeeper? Should the U.S. Census Bureau decide, for example, that an organization sponsored by one religion is to get information while a different one is not? How would the Bureau decide if one group was of sufficient sensitivity?

We understand those who wanted and/or expected the U.S. Census Bureau to prevent any possible misuse of data and to ensure that the "bad guys" did not get information that could be used to harm groups. Yet, the U.S. Census Bureau does not have a mandate to accomplish this, nor the ability to anticipate misuse. Groups are affected by the release of statistical data, and it is not possible for the U.S. Census Bureau to prevent such effects. In fact, the same statistics are often cited for and against the "interests" of certain groups. For instance, the data requested by Customs and Border Protection could also be used for civil rights enforcement or by companies seeking potential marketing opportunities. It is worth noting again Hansen's comment: *a primary function of the census is to provide statistics for small groups to be applied in whatever ways users desire to use them for or against various programs.*

What, then, is reasonable to expect from the U.S. Census Bureau? Society can expect that the U.S. Census Bureau will not release his or her individually identifiable data, and the U.S. Census Bureau will only use individual information to prepare aggregate data products. A respondent can also expect that these products will cause actions at the national and subnational level. The U.S. Census Bureau is a statistical agency and its mission is to release data, *provided those data do not violate the fundamental mandate to protect an individual's information.* The U.S. Census Bureau devotes considerable resources through its disclosure avoidance program to ensure that individual information is not released. Of course, *the only way to guarantee — in the absolute sense — that no individual information is ever released is to provide no statistical aggregates.*

To go a little further, there is one other possibility that should be considered: an agency cannot release data it does not possess. Suppose society decides that data on a particular characteristic should not be collected. There can be no concern then about releasing small area data about this characteristic. This situation already exists. For example, in the United States, questions on religious affiliation are not permitted on the decennial census, and in other countries, racial characteristics are not collected. While these decisions can eliminate the potential harm to particular groups, they also clearly deprive society of potential benefits. Who then should make this decision on content and how should the decision be made? In some countries the Chief Statistician has the authority to decide what data to collect and in others the content of major data collections is decided by the legislature – as in the decennial census in the United States. Even if the authority is vested in the Chief Statistician legitimacy is assured if decisions on the collection of particularly sensitive data elements undergo a broad societal examination. This is not a decision, then, that a statistical agency should make on its own. A statistical agency should attempt to ensure society has the chance to understand the consequences of particularly sensitive data collections. Again, openness and transparency in the proposed content of surveys and the decennial census allows affected segments of society to participate in the process and make their views known.

These efforts, however, do not resolve the inherent tension between the obligation of statistical agencies to protect respondent information and their mission to disseminate statistical data and information. In a broader sense, there is also a tension between statistical agencies and the use of statistical data — especially in the context of law enforcement, and other defense or intelligence activities — and the related tension that exists with respect to the autonomy of a statistical agency and the context of the agency within the *government*.<sup>25</sup>

## 4. Part II

### 4.1. *The Common Good, the Particular Good, and Individual Ethics*

It is important to recognize that these tensions may remain unresolved. Government agencies, as smaller organizations within a larger governmental structure, are not well equipped to exercise moral authority. Yet, we want to believe a government is more than just bureaucracy, and a statistical agency is more than a cog within a wheel. And most of us would want human association to be more than Brownian Motion on a macro level. It is more than random interactions that we seek as members of society. We seek to understand the society of which we are members and to participate in the goals of that society. We participate in complex societies and engage in human associations. The reason or end of human association is what ethicists call the “common good of society” — and the government is expected to promote and maintain the common good of society.<sup>26</sup>

<sup>25</sup> *Government* should not only be considered in the abstract, but also considered as the ruling party in a parliamentary system or the administration in a presidential system.

<sup>26</sup> V. Bradley Lewis, “The Common Good and the Functions of Government,” (unpublished paper, U.S. Census Bureau, 2004).

To better understand the issues of data dissemination and confidentiality in a broader ethical context the U.S. Census Bureau engaged the services of Professor Brad Lewis, The Catholic University of America. We would like to acknowledge his assistance in helping us to better understand and frame the ethical considerations discussed here. However, any shortcomings in this area are not attributable to him.

Statistical agencies derive their authority from being within the government. They are part of the government in general and as such are subject to all the laws and bureaucratic procedures that bind government agencies. Directors of statistical organizations are responsible for carrying forth the mission of statistical agencies, which is to provide statistical information to inform the public, and to protect the confidentiality of individual information. Yet, directors of statistical agencies are responsible, in the larger sense, for ensuring that the agencies they direct do, in fact, act in the interests of the common good. “The common good names 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.”<sup>27</sup>

It is not sufficient that they merely will the *common good* – which is to be expected of all good citizens. It is, for example, a *common good* of society to further national defense or to provide for equal protection under the law and equal opportunity for all citizens. It is a *particular good* for the U.S. Census Bureau to protect respondents’ information and to adhere, for example, to the other principles of the Fundamental Principles of Official Statistics. This does not mean that the *particular good* of the U.S. Census Bureau is not part of the *common good*. In fact, ethicist Bradley Lewis points out that *particular goods constitute the common good*. “Indeed, that particular goods are maintained by particular persons is itself constitutive of the common good.”<sup>28</sup>

Lewis also points out, however, that precisely because there are particular goods associated with particular functions within the agency of government; it is possible for conflicts to occur between different functional parts of the government, as well as between functional parts and those responsible for overall direction of the common good. “Agencies regularly make decisions about what would most serve their missions that conflict with the missions of other agencies or with policies favored by higher elements of government.”<sup>29</sup> These kinds of conflicts cannot be eliminated. According to Lewis, “at the limit there are cases of conflict that are more difficult. These cases may involve matters of conscience. An official might conclude that implementing some policy would fatally compromise the mission of his or her position or be a violation of some fundamental principle of morality.”<sup>30</sup> An agency director may be called upon to make ethical decisions — decisions that may transcend bureaucracy. Lewis reviewed such a conflict and cited the following example.

In October 1973, President Richard Nixon ordered his Attorney General, Elliot Richardson to fire Archibald Cox, the special prosecutor investigating the Watergate cover-up. Richardson resigned his office rather than fire Cox. Nixon reportedly said to Richardson, “I’m sorry that you insist on putting your personal commitments ahead of the public interest,” to which Richardson replied, “Mr. President, I can only say that I believe my resignation is in the public interest.” Richardson’s deputy, William Ruckelshaus, did the same and it fell to then Solicitor General Robert Bork to execute

<sup>27</sup> Lewis, “The Common Good and the Functions of Government,” 2.

<sup>28</sup> *Ibid.*, 8.

<sup>29</sup> *Ibid.*, 12.

<sup>30</sup> *Ibid.*, 13.

the president's order. Legally, it seems clear that the president did have the right to fire the special prosecutor, but doing so destroyed his remaining moral credibility and, in Richardson's opinion, would have gravely damaged the credibility of the Justice Department. Richardson resigned to defend that integrity.<sup>31</sup>

These kinds of situations are not necessarily rare events. The director of a statistical agency is likely to face situations where the particular good of the agency is at variance with the common good as supported by a superior or the legislature. If laws are broken or there is an attempt to break the laws, it is an easy case. Sometimes, however, it is not an easy case. It is often not a question of legality — and, therefore, the law does not provide sufficient guidance. If it is a question of conscience, the decision may not be so clear. One has to decide, if the conflict rises to what Richardson identified as a crisis of conscience and integrity for the Justice Department, how to act in an ethical sense. These decisions cannot be made in a fit of pique, nor should they be made to garner public attention — although public attention can be an effective tool if the conflict rises to a matter of conscience.

Matters of conscience, however, may not be recognized as such by those involved unless they have prepared themselves for these kinds of issues. It is useful, once again, to return to the issues of World War II. In 1981, during the hearings of the *Commission on Wartime Relocation and Internment of Citizens*, matters of conscience were clearly on the minds of the commissioners, who wanted to understand why the relocation was supported and promoted by the U.S. government, including the military, and the U.S. Census Bureau. During an exchange between Justice Arthur J. Goldberg and a former colonel of the army, Karl R. Bendetsen, the Justice questioned the rationale and the decision. Bendetsen, who held the operational responsibility for much of the relocation program, believed then, as he had in 1942, that the decision was consistent with the protection of the nation during wartime.

JUSTICE GOLDBERG: Yes. Do you really believe in light of the fact than no act of sabotage was communicated, no proven case of disloyalty, they didn't do in Hawaii [and given the bravery of Japanese-American troops]. . . What restrains you from coming in sir, and saying we were mistaken?

MR. BENDETSSEN: But my answer to you is that those who made the decision at the time were in good faith and could not know the outcome of events; and therefore under those considerations, I don't think we can say here today that they made a mistake.<sup>32</sup>

Bendetsen was not moved by Goldberg's argument, nor was he moved by another argument urging him to modify his answer based on retrospection.

<sup>31</sup> Ibid., 13.

<sup>32</sup> Commission on Wartime Relocation and Internment of Citizens (CWRIC), 2 November 1981, Transcripts of Public Hearings (Karl R. Bendetsen), National Archives, College Park, Records of Temporary Committees, Commissions, and Boards, RG 220, Commissions and Boards, Microfilm 1293: 1, (document pagination 97–98).

JUSTICE GOLDBERG: I'll ask you again. Would you have regarded, in light of what we know today, from our present vantage point, because that's important for us in our report, would you today say, in light of what we know, that the evacuation was necessary?

MR. BENDETSSEN: In the circumstances of the day and time it was.

JUSTICE GOLDBERG: I didn't ask you that.

MR. BENDETSSEN: But there are no such circumstances today.<sup>33</sup>

Bendetsen's answers illustrate two points. The first, the decision was made in good faith, and he was actively and materially supporting the common good as understood in 1942 by the government. Bendetsen believed the Japanese war relocation program supported the common good. It is difficult to equate any modern mobilization with the World War II national defense mobilization—and the degree to which the World War II redirected priorities and activities throughout the government. His second point was that it makes no sense in hindsight to ask if the decision was a mistake based on what is known in the future. He points out that the future is unknowable (e.g., sabotage was unlikely), and judgments must be made based on the circumstances and in the context of the time.

In contrast, Dedrick, in answering Marutani's queries did not offer the same consistent commitment to the decisions of the past. Yet, Dedrick's answers offer an important insight into the conflict between particular goods, as well as the common good.

JUDGE MARUTANI: What was your understanding as to the purpose to which, or the use to which this data would be placed?

MR. DEDRICK: I find that difficult to define, because I was like a specialist, let's say, in orthopedics or something – some medical specialty – who is called into an emergency operating room to perform a particular function. It was not up to me to define who would do what but I was assigned a particular function to do – which was to get statistics from outside the census and any place I could get them.

JUDGE MARUTANI: But I take, sir, you would not have supplied the information if in the course of doing so you would have been violating some law?

MR. DEDRICK: No, we would not; and that is a law that we're very proud of.<sup>34</sup>

Later, Marutani questioned Dedrick as to whether he understood how the statistical data were to be used.

JUDGE MARUTANI: Well, what was your understanding as to what purpose the information would be used? I take it that you just did have some idea, in fact a pretty good idea, in fact, what it was going to be used for.

MR. DEDRICK: Sir, I was 41 then; I'm 40 years older now, and at 41 I was fairly, I thought, I was aware of what was going on in the country. I knew that the relocation was going on. I knew that. I sat in confidential staff

<sup>33</sup> *Ibid.*, Microfilm 1293: 1 (document pagination 98–99).

<sup>34</sup> CWRIC, "Transcripts, (Dedrick), Microfilm 1293:1 (document pagination 153–154).

meetings with General Bendtsen and his staff. I knew of the decision to evacuate the Japanese racial group from the west coast, certain west coast areas, and I knew that the President of the United States had signed an Executive Order. My sociology friends over across the Bay at Berkeley were very upset at me, but I must say that I reached up to the University of Washington and got a professor of sociology and his principal graduate student as my right-hand and left-hand man in this thing, and I would assure you that sociological considerations were in the background, but never in control.

JUDGE MARUTANI: So what I understand you are saying is you did know this information was going to be used by the WCCA to round up persons of Japanese ancestry so that they could be sent to the camps?

MR. DEDRICK: Yes.

JUDGE MARUTANI: What about provision in the law, sir, that was existing at that time, reading as follows: “That in case shall information . . .” and it does not say names or addresses. . . “in no case shall information furnished under authority of this chapter be used to the detriment of the person or persons to whom such information relates.”

MR. DEDRICK: That, sir, has special reference. Our attorneys at the Bureau of Census have since informed me that relates to age search and other special tabulations which are purchased of the Bureau of Census by, let’s say J. Walter Thompson Company, or an attorney. Many attorneys seek to get information for a client about that client’s brother, when the client is suing a brother. And that provision of the law that you are now quoting says that we may not furnish that information which would be detrimental to that person.<sup>35</sup>

#### 4.2. Personal Ethics

Marutani’s questions demonstrate the inherent tension between statistical agencies and the use of the information they produce. Statistics are used for a multitude of purposes by many different groups in society to fulfill many particular functions. Therefore, it is important, as well as consistent with the first fundamental principle, to provide statistical data on an *impartial basis*. The U.S. Census Bureau — acting as an agency of the government — not only did nothing illegal in 1942 and in 2002 and 2003. It did what should be expected of a statistical agency. First, it preserved the pledge of confidentiality that it made to respondents. Second, it provided statistical information that was critical to a major policy decision and it provided that information in a timely manner.

The story does not end here, but rather suggests a new direction to understanding roles and responsibilities. In the examples we provided above we see three types of decisions that individuals can make when their agency is faced with a controversial decision and in

<sup>35</sup> CWRIC, “Transcripts, (Dedrick),” Microfilm 1293:1 (document pagination 155–156).

particular situations where the particular good of the agency may conflict with the common good. The first case is illustrated by Attorney General Elliott Richardson's position. Richardson took the position that his resignation was not only consistent with the mission and credibility of the Justice Department (a particular good), but also consistent with the common good of the nation. He rejected the authority of the President of the United States to define the common good. Karl Bendetsen accepted the notion of the common good as defined in the context of the war, and by the Administration and Congress. He actively pursued the common good, to exclusion of the particular good of the Japanese community, which was harmed by the relocation program. Calvert Dedrick, according to his testimony in 1981, appeared to believe that he was only a functionary, and that the lawyers had assured him that he was operating within the law. His position seems to have been a narrow legalistic one and limiting, perhaps self-limiting, the scope of his actions. Yet, his position does demonstrate the tension between statistical agencies and the use of statistical data beyond their authority.

There is no easy answer to resolve the tensions affecting statistical agencies. Mr. Dedrick's answers, however, may cause discomfiture with us as individuals who realize that we are moral creatures within the context of a larger society — and that we are seeking an *intelligible* end for human association. As individuals, we are conscious of that *regulative principle of social and political life*. . . *the common good*. When faced with conflict then, one choice is what, on the surface, is the easiest — simply go along with the common good as defined by superiors. In many ways, bureaucracy trains people to do this. The bureaucracy values order and rewards team players.

Yet, government is more than bureaucracy, and individuals do exercise moral authority and must make moral judgments. Adherence to bureaucratic procedures may, in fact, be a denial of the basic responsibility of those who work in statistical agencies. The common good at any particular time may negate the particular good of the statistical agency and/or of particular groups.

Despite this, the decision to oppose the expected and widely-perceived common good cannot be taken lightly. It is important to recognize the gravity of the situation — disagreement can be both difficult and hazardous. The validity of the common good as contrasted to the particular good of a subset of the population (e.g., Japanese Americans) or the perceived particular good of the statistical agency is often unclear. Care must be taken, in substituting one's own definition of the common good. Nevertheless, these are exactly the kinds of decisions that leaders of statistical agencies will encounter and will be required to make. When these situations occur they are likely to come upon the agency very quickly. It is critical for leaders of statistical agencies to understand their role and contribution within the context of the common good, in other words, their particular good or function. Those who direct statistical agencies must consider and prepare for how they will react to different situations, including ethical challenges, before they happen.

It will be too late for careful consideration and reflection when the situation presents itself.