

THE MISSING HISTORY OF THE DISCLOSURE OF INDIVIDUAL RESPONSES IN THE AMERICAN CENSUS: WHAT HAPPENED AND WHY IT MATTERS NOW

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TABLE OF CONTENTS

I.	Introduction: The Guarantee	408
I.	Understanding Confidentiality in the Context of Census Processes...	410
II.	What Happened.....	415
A.	The Main Story is not About Privacy; It’s About Stewardship	415
B.	Contesting Data Stewardship: What Are Proper Uses?	422
C.	The State of Data Stewardship at Mid-Century	425
D.	The New Issues of the 1960s and 1970s.....	431
1.	Data Publication Expands, As Does Disclosure Control	431
2.	External Events Change the Narrative: The Privacy Challenge Emerges.....	434
3.	Privacy Replaces the Stewardship Framework.....	442
III.	Implications.....	443

I. INTRODUCTION: THE GUARANTEE

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Currently, the U.S. Census Bureau “Confidentiality Fact Sheet” states:¹

Your responses to the 2020 Census are safe, secure, and protected by federal law. Your answers can only be used to produce statistics—**they cannot be used against you in any way**. By law, all responses to U.S. Census Bureau household and business surveys are kept completely confidential.

Looking at the timeline of statutory, legislative, and technological developments surrounding disclosure of information ever since the first census, the Bureau acknowledges that “[i]t wasn’t always that way.”² However, the Bureau does not adequately explain what that other “way” was, when it changed, or exactly what the practices for releasing of individual-level census responses were at any particular time in the nation’s history.³

This paper aims to address that historical gap. For most of the nation’s history, Census officials, political leaders, and the American public supported seemingly contradictory policies. Census administrative policy and law defined how to release individual-level responses to census inquiries, but they simultaneously banned the publication of tabulations that revealed any particular establishment’s or individual’s identity.

Why review this history now? I do so because, at the current moment, the census laws and practices governing individual-level responses are under strain. The new methods used during the 2020 census collection to “protect” census responses have been controversial, have produced anomalous results in the 2020 data releases to-date, and have delayed the release of further results.⁴

¹ U.S. CENSUS BUREAU, THE 2020 CENSUS AND CONFIDENTIALITY (2020) (emphasis in original).

² U.S. CENSUS BUREAU, A HISTORY OF CENSUS PRIVACY PROTECTIONS (2019).

³ A Note on Method: The emphasis in this article is on the issue of “missing” information and hence analysis. The Census Bureau treatment and evidence presented in its documents is robust and forms a basic source for the historical analysis below, as will be clear from the extensive citation to those sources that follows. My goal is to add additional source material and analysis to reinterpret the history. As a result, the paper cites and quotes substantial material that is not currently reported or analyzed in depth in bureau documents to allow a reader to integrate the “missing” material into the larger historical treatment.

⁴ See, e.g., Gary Menger, *Using 2020 Census Data*, APPLIED GEOGRAPHIC SOLUTIONS (Sept. 16, 2021), <https://appliedgeographic.com/2021/09/using-2020-census-data/> [<https://perma.cc/RDA7-B8B9>]. Wags have come up with names for the anomalies found in the releases so far: e.g., “Lord of the Flies Blocks,” for places with children and not adults, or “Mermaid Blocks,” for “water blocks” with no housing but reported people. See, e.g., Steven Ruggles (@HistDem), TWITTER (JUL. 1, 2021 3:50 PM) Twitter Feed, <https://twitter.com/histdem/status/1410687151784796162> [<https://perma.cc/VHZ7-MXGW>];

This paper examines the origins of the current legal and policy framing. Part 1 locates these policies in the larger issues surrounding census-taking in the American constitutional system. Part 2 traces the development of disclosure avoidance rules and technologies, as well as the logic and practices of individual data release, particularly focusing on twentieth century developments. Given that Congress removed most of the authorizing language for language authorizing individual-level data release through the Mid-Decade Census Act of 1976, Part 3 draws out some of the implications of this complex history with reference to balancing data use and protection of respondent identity.

I. UNDERSTANDING CONFIDENTIALITY IN THE CONTEXT OF CENSUS PROCESSES

see also Christopher T. Kenny et. al., *The Use Of Differential Privacy for Census Data and its Impact on Redistricting: The Case of the 2020 U.S. Census*, 7 SCI. ADVANCES no. 41, Oct. 2021, at 1, <https://imai.fas.harvard.edu/research/files/DAS.pdf> [<https://perma.cc/WAL5-AB4R>]; *Changes to Census Bureau Data Products*, IPUMS, <https://www.ipums.org/changes-to-census-bureau-data-products> (last visited Apr. 20, 2022) [<https://perma.cc/E72E-YTLW>]; *see generally* Steven Ruggles and David Van Riper, *The Role of Chance in the Census Bureau Database Reconstruction Experiment*, POPULATION RSCH. & POL'Y REV. 1 (Aug. 21, 2021), <https://link.springer.com/article/10.1007/s11113-021-09674-3> [<https://perma.cc/WS5W-BY3Z>]. It took six iterations of the disclosure avoidance system to generate the files for redistricting. The first five versions were found to contain odd, anomalous, and discriminatory counts that would make them unsuitable for redistricting use. *See, e.g.*, STEVEN A. OCHOA AND TERRY AO MINNIS, PRELIMINARY REPORT: IMPACT OF DIFFERENTIAL PRIVACY & THE 2020 CENSUS ON LATINOS, ASIAN AMERICANS AND REDISTRICTING (Apr. 2021), <https://www.maldef.org/wp-content/uploads/2021/04/FINAL-MALDEF-AAJC-Differential-Privacy-Preliminary-Report-4.5.2021-1.pdf> [<https://perma.cc/L4XS-KYXC>]. The bureau is releasing “demonstration products” of the next set of releases, the DHC tables, akin to the demonstration products they released before the official redistricting file. Users then can evaluate the quality of the releases. The Committee on National Statistics of the National Academy of Sciences will sponsor a workshop on the work, modeled on the one they sponsored in December 2019 for the redistricting data files. *See generally* DANIEL L. COOK ET. AL., 2020 CENSUS DATA PRODUCTS: DATA NEEDS AND PRIVACY CONSIDERATIONS: PROCEEDINGS OF A WORKSHOP (2020), <https://doi.org/10.17226/25978> [<https://perma.cc/7EDW-7V2N>]; *see also* Letter from JASON, Advisory Grp., The Mitre Corp., to Christa D. Jones, Chief of Staff, Office of the Director, U.S. Census Bureau, and Deborah M. Stempowski, Assistant Dir. For Decennial Census Programs, U.S. Census Bureau (Feb. 8, 2021), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-census-data-quality-processes.pdf> [<https://perma.cc/8MTG-J8S7>]; Mike Schneider, “Boston Joins Other College Towns with Census Challenge,” WBUR (Oct. 25, 2021), <https://www.wbur.org/news/2021/10/25/boston-college-towns-census-challenge> [<https://perma.cc/7WEZ-24DQ>].

The Bureau's historical narrative recognizes that the current ironclad guarantee on confidentiality only dates to 1976, when Congress eliminated most of the statutory authority and parameters for such release. Before then, the census statute in effect did not necessarily limit release. Not only did it include statements like this one:

Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, make any publication whereby the data furnished by any particular establishment or individual under this title can be identified.

But it also included statements such as Section 8 of the 1954 statute:⁵

§ 8. Certified copies of certain returns; other data; restriction on use; disposition of fees received
(a) *The Secretary may, upon a written request, and in his discretion, furnish to Governors individuals, data for genealogical and other proper purposes of States and Territories, courts of record, and, from the population, agriculture, and housing schedules prepared under the authority of subchapter II of chapter 5, upon the payment of the actual, or estimated cost of searching the records and \$1 for supplying a certificate.*

These seemingly contradictory provisions of the statute make sense if one considers their intent within the context of the overall mandate for the census—particularly its origin in the 1787 Constitution as a mechanism to apportion representation (and originally taxation) among the states. That constitutional requirement to apportion political power and tax obligations “according to their respective numbers,” combined with the constitutional grounding of the American state in the sovereignty of “we, the people,” places a heavy burden on the decennial census. It declares the right of people to be counted and explicitly designates the responsibility of organizing the count to the elected representatives in Congress.⁶

The statutory provisions of census law quoted above thus represent the political decision-making of Americans and their consensus on how to go about collecting, tabulating, and using the information the census produces.

⁵ Census, Pub. L. No. 740, § 8, 68 Stat. 1012 (1954) (emphasis added).

⁶ MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* (2d ed. 2015).

As such, one must assume that those decisionmakers understood what they were doing, not seeing what look like contradictory provisions today.

More generally, the overall census statute represents the decisions made over time about what information should be collected in the first place, how much tabulation and publication should be done, and who has the capacity and responsibility to do it. In other words, protection of individual-level census responses in census tabulations or the publication of individual-level responses is only one issue among many to be addressed within general debates about how to take the census and what to do with the results once collected.

Census-taking has always been an astoundingly complex process, requiring administrative procedures that touch every household in the country decennially to capture basic demographic information, and now, intermittently and much more frequently, in sample surveys, economic censuses, estimates and projections of demographic patterns, and research portfolios to figure out how to do it all more efficiently, more cheaply, more accurately, and less obtrusively.

Perhaps remarkably, the U.S. did not create a permanent administrative agency with ongoing authority to conduct the census until the twentieth century. For twelve of the twenty-four decennial censuses collected to date, Congress retained its original constitutional authority to organize the count. Every ten years until 1929, Congress debated, amended, and usually passed a *de novo* census act.

Congress' decision-making process is quite clear: They drafted the census schedule on the floors of the House and Senate, decided from the outset that "each and every person more than sixteen years of age, whether heads of family or not," was required to respond on behalf of the family, and set pay scales and reporting times for enumerators.⁷

Over time, incremental changes took place. Congress quickly recognized the potential for piggybacking additional information gathering on the census, so they added queries about economic activity, disability, and basic race, age, and sex distinctions of the population. The inquiries ballooned in number, but the organizational structure to tabulate and report the information did not. By the 1840 census (the sixth decennial), newspaper accounts reported respondent complaints to the intrusiveness of questions, and the census "clerk" or "superintendent" in charge of compiling the results in Washington had to respond to them in print, explaining that Congress called for the collection of the information.⁸

⁷ Act of March 1, 1790, § 6, 2 Stat. 101, 103 (providing for the Enumeration of the Inhabitants of the United States)

⁸ William Weaver, *Superintendent sixth census, Letter to the Editor*, WASHINGTON GLOBE (Aug. 5, 1840), reprinted in RICHMOND [VA] ENQUIRER (Aug. 28, 1840). This also included

In 1850, Congress mandated an individual-level census line of information for each person in the country, except for the constitutionally excluded category of “Indians not taxed.” The temporary officials overseeing the count in Washington found themselves articulating standards of behavior for the enumerators (then assistants to the U.S. marshals). They began to conceptualize what we would now see as the emerging standards of data stewardship. “[Y]ou will approach every family and individual of whom you solicit information, with civil and conciliatory manners,” wrote Joseph C.G. Kennedy, the main census administrator for the 1850 and 1860 enumerations. “The civil and polite prosecution of your duties,” he advised in 1860, “you will find indispensable to the success of your efforts and the pleasure of your occupation.”⁹

By the middle of the nineteenth century, the voices of the “people” shaping and defining the decennial census had expanded substantially beyond debates in Congress to include the voices of respondents, enumerators, a temporary office staff in Washington and, increasingly, census users beyond the politicians concerned with apportionment and redistricting. A public, contentious, and diverse set of voices was mobilized each decade to plan the count, advise Congress on statutory changes, and then praise, complain, and criticize the results as they were released.¹⁰

By the late nineteenth century, the decennial census collected information on multiple questionnaires, published dozens of thick volumes of statistical reports, and had drawn complaints from local officials who claimed that their local area was undercounted. The press reported that local officials, usually in a neighboring city, had “padded” the results in their competition for the fastest rates of growth.¹¹ In initial efforts to guarantee the accuracy of the

the letter from John Pleasants complaining about the questions on the census. The exchanges, both savage and witty, reflected the vigorous partisan jousting in the news at the time. For background on William Weaver’s career and the 1840 census, see PATRICIA CLINE COHEN, *A CALCULATING PEOPLE: THE SPREAD OF NUMERACY IN EARLY AMERICA* (University of Chicago Press, 1982). For the practice of reprinting materials among nineteenth century newspapers, what might be seen as a nineteenth century print version of Twitter, see RICHARD JOHN, *SPREADING THE NEWS* (Harvard University Press, 1998).

⁹ *1860: Instructions to U.S. Marshals*, IPUMS USA, <https://usa.ipums.org/usa/voliii/inst1860.shtml> (last visited Dec. 17, 2021) [<https://perma.cc/7U2W-82ZY>].

¹⁰ For evidence of the emergence of a cartoon literature critiquing census processes, including the boorishness of enumerators and the intrusiveness of questions, see for example, the 1860 *Saturday Evening Post* cartoon, “The Great Tribulation,” reproduced in Anderson, *supra* note 6, at 65.

¹¹ Historians have explored undercounts and padding as both methodological and substantive issues of census history. The methodological issues affect the production of historical estimates of population change, for example, the impact of the Civil War on the American population, or fertility and mortality estimation, to mention just a few issues. See, e.g.,

count, Congress authorized enumerators to prepare duplicate copies of their population schedules for local officials to post publicly so people could check for errors and omissions. Congress also allowed governors and courts to request copies of portions of the population schedules for their local areas.

These provisions were in place before Congress finally decided that the nation required a permanent Census Office and a professional staff that would take over ongoing responsibility for collecting, tabulating, and publishing information from the decennial census. When Congress finally did so in 1902, the economic census enumerations were no longer collected in the same year as the population census. Congress authorized more frequent and specialized data collections and, for a brief period, considered consolidating the statistical offices that had grown up in the operating departments into a central statistical office. However, centralization did not occur. The Census Office became a “bureau” in the Department of Commerce and Labor in 1903, and later the Department of Commerce. A new and influential “voice” of permanent census officials was added to the somewhat crowded conversation about census policy and planning.

As census officials in the new permanent agency took office, however, they recognized they were not the only voice in the Census policy room. The officials inherited the policies and practices developed over the previous century. They recognized that Congress would not likely cede its authority to review and rewrite the census statute each decade, as they had done since 1790. And the Census officials came to realize that as a permanent “bureau” in a cabinet department, they were subject to the policy agendas of the presidential administration. Or, as one wag put it at the time, the “strong, lusty census office” faced the “Departmental Bureau curse.”¹²

Nevertheless, Census officials strove for control over their working environment, seeking to address the nagging problems of census administration that had plagued the census processes during the temporary agency era. In particular, they focused on the glut of work surrounding the decennial count, the difficulty in controlling field work, and the need for sufficient funding. Census officials began to codify best practices more systematically, to articulate “statistical standards,” to maintain political support in Congress and the administration, and to build relationships with media and the public to support their work. On its face, such an approach

Ronald Goeken & Diana Magnuson, ‘I Hate to See the Evening Sun Go Down’: Recounts and Padding in the 19th Century U.S. Decennial Census of Population, Address at 44th Annual Meeting of Social Science History Association (Nov. 23, 2019); David J. Hacker, *New Estimates of Census Coverage in the United States, 1850-1930*, 37 SOCIAL SCIENCE HISTORY 71 (2013); David J. Hacker, *A Census-Based Count of the Civil War Dead*, 57 CIVIL WAR HISTORY 307 (2011).

¹² See Anderson, *supra* note 6, at 121.

uncontroversial, but it did take on a different cast when a “successful” census also meant professional success for the officials themselves.

The twentieth-century struggle to take a “successful census” therefore became a complicated conversation among a variety of authorized voices: Congress, the administration, respondents, census users, and the Bureau. Amidst these voices, the Bureau aspired to serve as “ringmaster,” claiming to represent administrative continuity, the scientific viewpoint and innovation, and the authoritative record of what we used to do versus what we should be doing now. And it is that framework that provides the context to understand the development of policy both on disclosure control, and on the release of information about individuals.

II. WHAT HAPPENED

A. The Main Story is not About Privacy; It’s About Stewardship

The word “privacy” appears nowhere in Title 13; thus, proposing that “privacy” policy drives census confidentiality policy is ahistorical and misleading. The language in the current and predecessor statutes is about the responsibilities of the data collectors (stewardship) and the uses to which data can be put. In Kenneth Prewitt’s pithy phraseology,¹³ “privacy” is about a respondent’s objection to answering a question: “Don’t ask me that. I won’t tell you. It’s private.” Congress decided how to deal with that when they made responses to the census mandatory in 1790. “Yes, you do have to answer,” they said. Over the years, officials have added additional justifications: “It’s your representation”; “It’s your civic duty, like jury duty or military service”; or “It’s to your benefit.” Ever since, there have been negotiations within Congress—and among the public, Congress, and the Census Bureau—on what questions are appropriate for the census. Privacy challenges to particular census inquiries primarily concern the legitimacy of the collection of information in the first place, not the publication of information once collected.

Continuing with Prewitt’s phraseology, the respondent says, “OK, but if I answer you, don’t tell anyone else what I said.” That’s the stewardship piece. Census officials have done quite a good job for 230 years on that front. As Steven Ruggles and Diana Magnuson repeatedly point out, there have not been any identifiable outside data breaches from the census.¹⁴ The United

¹³ Kenneth Prewitt, *Why It Matters to Distinguish Between Privacy & Confidentiality*, 3 J. OF PRIV. AND CONFIDENTIALITY 41 (Nov. 2, 2011).

¹⁴ Steven Ruggles & Diana L. Magnuson, *‘It’s None of Their Damn Business’: Privacy and Disclosure Control in the U.S. Census, 1790-2020*, U. OF MINN., MINN. POPULATION CTR.

States has not had to destroy its raw census schedules as other countries have, even as they moldered away in government warehouses before the creation of the National Archives in the 1930s.¹⁵

So, what's the problem? The problem is on the use side: what the agency and its employees can and should do with the information that comes into their possession to ensure that it is complete, accurate, and useable for the public. And that is what generates the over two-hundred-year debate on data stewardship.

Let's return to 1860 Census Superintendent Joseph C.G. Kennedy's formulation of these issues in his instructions to his enumerators.¹⁶ Kennedy was the first census official in the temporary census office era to return to his position a second time. Prior to his service as Superintendent, Kennedy had been appointed clerk to the Census Board—which Congress had set up to design the 1850 Census (the seventh census). The 1850 census statute created a superintendent position to run the enumeration; Kennedy was appointed in the spring of 1850 and oversaw the planning, field enumeration, tabulation, and publication phases of the 1850 census. Because he was a Whig and the incoming President was a Democrat, Kennedy was fired with the change in the presidential administration in 1852. However, he managed to regain his position as Superintendent in the late 1850s. He wrote the 1860 instructions to the enumerators with the 1850 experience in mind.¹⁷

“Cause for offense was given by one or two indiscreet assistants engaged in taking the Seventh Census,” he warned, “by the liberty exercised in the unnecessary exposure of facts relating to the business and pursuits of individuals, the communication of intelligence obtained in the discharge of duty to persons who desired it for private advantage or pecuniary profit, or to newspapers.” He continued:

The officers engaged in this service should understand that they have no right to use or promulgate the information obtained for any purposes whatever. Although designed ultimately for the use of the people, the department reserves to itself the privilege of examining into and determining the

(Apr. 20, 2020), <https://users.pop.umn.edu/~ruggles/Articles/DamnBusiness.pdf> [https://perma.cc/BX4A-355R].

¹⁵ Australia provides an example of a different historical tradition. *See generally* Terence Hull, *The Strange History and Problematic Future of the Australian Census*, 24 J. OF POPULATION RSCH. 1, 1–22 (2007); Austl. Bureau of Stat., *Privacy, Confidentiality and Security*,

<https://www.abs.gov.au/websitedbs/censushome.nsf/home/privacy> (last updated Jul. 20, 2017) [https://perma.cc/L8DH-429C].

¹⁶ *See* INSTRUCTIONS TO MARSHALS AND ASSISTANT MARSHALS, *supra* note 9.

¹⁷ MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 2–3 (2d ed. 2015).

correctness of the returns and their proper arrangement for publication by Congress, and you are to consider the facts communicated as obtained exclusively for the use of the government, and not in any way to be used for the gratification of curiosity or your private advantage or emolument. You are employed in this service as the agents of the government in a confidential capacity, and you should never betray insensibility to this relation.

The manuscript copies filed with the county and State officers are the property of the government and while it will doubtless be permitted every citizen to have access to them for the purpose of examining into any details of personal application, or for the purpose of suggesting any errors which may have occurred, no other use of them will be sanctioned. The returns deposited with the county records are thus disposed of to be reclaimed in case of the loss of the copies transmitted to this office, and to enable persons interested to make correction of errors, but for no other purpose, and they continue the property of the government.

Although these enumerator instructions can be read as evidence of an emerging recognition of issues of privacy and confidentiality in census data collections,¹⁸ I read Kennedy's exhortations somewhat differently. Kennedy was acknowledging the various participants who shape census policy and administration. The enumerators were his main concern, but he was also concerned with the respondents, Congress, and, by way of exclusion, the agents that did not have a legitimate claim to the information the enumerators collect (namely those "persons who desired it for private advantage or pecuniary profit, or ... newspapers"). Kennedy's immediate concern was to advise the enumerators that the "facts communicated" while conducting the census should "not in any way to be used for the gratification of curiosity or your private advantage or emolument."

Kennedy also made affirmative statements to establish that the forms were the "property of the government," and "ultimately for the use of the people," and accordingly "it will doubtless be permitted every citizen to have access to them for the purpose of examining into any details of personal application, or for the purpose of suggesting any errors which may have occurred."

¹⁸ U.S. CENSUS BUREAU, A MONOGRAPH ON CONFIDENTIALITY AND PRIVACY IN THE U.S. CENSUS (2001), <https://www.census.gov/history/pdf/ConfidentialityMonograph.pdf> [<https://perma.cc/MT68-TYGP>].

In other words, the collection of census information is a legitimate function of government which is democratically and statutorily determined. Kennedy took pains to explain the responsibilities of the enumerators to prevent improper use by persons or organizations that could not claim the right to access the information and participate publicly in the world of democratic governance.

Census practice “in the field” at the time aimed to ensure that everyone was counted. Congress mandated that the schedules collected by the assistant marshals (the enumerators until 1880) be posted in public places or deposited with local officials so people could verify the responses for accuracy and omissions before they were finalized and sent on to the Washington. That seemed sensible for almost the entire nineteenth century, and the statutory language either authorized or required enumerators to make a copy of their forms for local scrutiny.¹⁹

A related question was whether state and local officials should get copies of their schedules. Yes, that would make sense too, but only if they pay for the work involved in copying them out. As noted at the outset, provisions to provide copies to state and local officials were in the census statute until 1976.²⁰

A third question concerned the proper behavior of enumerators. Should enumerators be permitted to provide their listings to almanac publishers to make a bit of extra money? No, say the instructions to the enumerators; that is unethical and a violation of your oath of office. Enumerators were paid for the work by the government and their work was a public service.

Parallel census policy in the nineteenth century also addressed what happened when the forms got to Washington. Could the clerks in the Census Office cut side deals with almanac publishers or newspaper editors looking to dig up dirt on a celebrity, such as those deals the local enumerators were enjoined from making? No, that is again unethical and a violation of your oath of office. The clerical staff worked for the government; the work was public service.

What about what gets tabulated and published—are there rules there? Kennedy’s exhortations are silent on that point as of 1860, but the issue did emerge in the late nineteenth century as each census got more elaborate given the increased complexity surrounding schedules, manufacturing, agriculture, mortality, publishing, and other factors. The immediate flash point was the

¹⁹ *See id.*

²⁰ The legislation page of the Census Bureau History Reference tab contains links to most census statutes. *See* U.S. CENSUS BUREAU, HISTORY: LEGISLATION, <https://www.census.gov/history/www/reference/legislation/> (last updated Dec. 8, 2021) [<https://perma.cc/NQU6-76NZ>].

issue of economic regulation of monopolies, trusts, national railroads, or big corporations; of labor unrest; and of immigration policy. What were the rules for processing and publishing information from the census? And did the access to information on individuals in the manuscript schedules that had been granted to governors and courts also extend to government officials in other agencies of the federal government?

Nineteenth century census law implied that copies of the raw census data supplied to state and local officials had to be requested and prepared at the time of the enumeration, since the national census office itself was simply a temporary agency that closed shop once its tabulation and publication responsibilities were complete. The establishment of the permanent Census Office in 1902, however, changed the calculus. Once the Census Office was permanent, could state and local officials ask at any time for their local information? Could the Secretary ask for copies of the manufacturing census schedules to be made available to the officials in the Bureau of Corporations (another bureau in the Department of Commerce and Labor)?²¹

Within the context of this changed administrative environment, the emerging profession of official statisticians articulated a new standard to define and control data use, which is now called “statistical purposes.” Statistical purposes refer to what all this information is for, and therefore what should and should not be tabulated and published.

Congress first used the term “statistical purposes” in Section 25 of the 1909 census statute:²²

[T]he information furnished under the provisions of the next preceding section shall be used only for the *statistical purposes* for which it is supplied. No publication shall be made by the Census Office whereby the data furnished by any particular establishment 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.

Section 25 followed Section 24’s mandatory requirement for response for economic inquiries, and should be read in conjunction with its predecessor:

And it shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any manufacturing establishment, mine, quarry, or other

²¹ See Anderson, *supra* note 6, at 122 (describing the conflicts over departmental access to bureau schedules in the first decade of the permanent Bureau).

²² Act Making Appropriations for Expenses of the Thirteenth Decennial Census, and for Other Purposes, Pub. L. No. 61-1, 36 Stat. 1, 1 (1909) (emphasis added).

establishment of productive industry, whether conducted as a corporation, firm, limited liability company, or by private individuals, when requested by the Director of the Census or by any supervisor, enumerator, special agent, or other employee of the Census Office acting under the instructions of the said Director, to answer completely and correctly to the best of his knowledge all questions on any census schedule applying to such establishment.

Section 24 continued with provisions for prosecution for noncompliance, including fines and imprisonment.

What was Congress doing here? Far from being concerned about privacy, these provisions of the Census Act jointly encapsulated and even extended the understandings articulated in Prewitt's formulation. Congress directed the business owner or agent to "answer completely and correctly." Congress also set requirements for Census officials to assure the business owner or agent that the Census Office would use responses appropriately. Census officials were required to articulate the statistical purposes of tabulations, guarantee that the data are used for statistical purposes only, and ensure that there was no intentional or inadvertent publication of the information from "any particular establishment." To that end, Congress banned the Census Office from participating in a tabulation process that identified any particular establishment, which thereby could be used for regulatory purposes, litigation, or reputational damage.

This is important because in the 1909 statute, Congress did not apply the statistical purposes use standard to population responses. For the population census schedules, older notions of the rights of the public and state and local officials continued to prevail. Congress affirmed that legitimate uses for population data continued to include provisions for delivering lists of responses to individuals, courts, or state and local officials. Section 32 of the 1909 census statute maintained the provisions for access to individual-level records permitted by prior statutes but added new language conditioning that access on the discretion of the Census Director. Section 32 of the 1909 Census Act includes:

That the Director of the Census is hereby authorized, at his discretion, upon the written request of the governor of any State or Territory, or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies, and one dollar additional for certification. . . .

While Congress enjoined the Director from publishing “data furnished by any particular establishment” from the economic censuses, it authorized the Director’s discretion in providing “certified copies” from the population responses. The Director exercised discretion to assure the data were provided for “proper purposes.” This was a service for which the Bureau charged, and the annual reports from the Bureau through the 1920s document the use of this provision.

Bureau officials recognized that overly-free access to the information in the population schedules could be problematic. The 1910 Census Presidential Proclamation stated that the “sole purpose of the census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only in order to permit the compilation of such general statistics.” “Certified copies” of individual census responses supplied to states and courts were not “general statistics.”²³

The proclamation stated that the “census has nothing to do with taxation, with army or jury service, with the compulsion of school attendance, with the regulation of immigration, or with the enforcement of any national, state, or local law or ordinance, nor can any person be harmed in any way by furnishing the information required.”

The language in the proclamation was drafted by the Census Bureau and reflected its efforts to assure public cooperation with the data collection endeavor. It was aspirational of the standards that the officials in the newly permanent Census Office wanted to institutionalize. In other words, as officials in the permanent Bureau prepared to take the thirteenth decennial census in 1910, they implemented several steps to codify additional standards of data stewardship, beyond the earlier exhortations to enumerators and staff to not reveal individual information that came into their possession. For the economic censuses, publication which would reveal the identity of an individual establishment was barred. In technical terms, in the preparation of table shells, cases were grouped (classified into bins, particularly top coded) so that the information published in a particular cell would not reveal the identity of an individual case. Tables were suppressed if they could not meet the disclosure avoidance standard. The Director could use his discretion to deny requests for release of copies of individual records. Additionally, the Presidential Census Proclamation stood as a pledge to assure respondents that their responses would not be used to harm them.

²³ U.S. CENSUS BUREAU, 1910 CENSUS PROCLAMATION, https://www.census.gov/history/www/reference/artifacts/1910_census_proclamation.html (last visited Dec. 17, 2021), [<https://perma.cc/KW7X-9M37>].

B. Contesting Data Stewardship: What Are Proper Uses?

Nevertheless, Census officials soon discovered that their standards could be overruled by more politically-powerful voices, and their capacity to control the uses of data from the 1910 Census buckled under the pressure of war. It turned out that the claim that the “census has nothing to do with. . . army. . . service,” was not true. During World War I, under Section 32 of the Census Act, the Bureau provided draft authorities with individual-level information about the names and ages of particular men from the 1910 Census. Draft authorities used census information to identify and prosecute some individuals for draft evasion. Selective Service Officials argued that a draft dodger violated the law; there was no ‘harm’ caused by answering the census.²⁴

The 1919 census statute recognized the ambiguities of the 1910 Presidential Census Proclamation’s language. The statute attempted to address this by assigning control for determining harm to the discretionary authority of the Director to release individual information. Congress added a proviso to the effect that any copies “furnished” could not be used to the “detriment” of the person or persons to whom the information related. The exact language of Section 33 of the 1919 statute authorizing release of individual-level information from the population schedules contained the restriction: “*Provided however, [t]hat 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.*”²⁵

By the late 1920s, despite the fact that state and local governments continued to access their local data (sometimes even sending their own officials to Washington to do the clerical work), most Bureau officials had come to see the statutory language authorizing the Director to release individual-level information as a potential public relations problem.²⁶ With the 1929 Census Act, Congress fixed what was becoming an embarrassing

²⁴ *A Monograph on Confidentiality and Privacy in the U.S. Census*, *supra* note 17, at 11; Margo J. Anderson & William Seltzer, *Challenges to the Confidentiality of U.S. Federal Statistics, 1910-1965*, 23 J. OF OFFICIAL STAT. 1-34 (2007).

²⁵ The Act Providing for the Fourteenth Census, Pub. L. No. 65-325, 40 Stat. 3, 3-15 (1919).

²⁶ Census Director William Mott Steuart expressed concern in 1922, in his response to a request for access to individual level data from former bureau official Walter Willcox, writing: “I always feel considerable hesitancy about giving out names and addresses, even in a case such as yours where I have every confidence that the information is wanted for legitimate purposes and will be safeguarded as far as possible against any improper use.” *See* Anderson Seltzer, *supra* note 24 at 9.

loophole in the Bureau's authority by extending the release rules for economic data to population data.²⁷ Section 11 of the 1929 Census Act read:

That the information furnished under the provisions of this Act shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Census Office 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. (emphasis added)

However, that solution did not resolve the issue. Congress did not simultaneously repeal Section 18, which enacted the same provisions for individual-level data release at the discretion of the Director, subject to the detriment clause in earlier census acts. As a result, when world war once again loomed in the late 1930s, the Roosevelt administration proposed clarifying language in the Census Act repealing the restrictions on releasing individual-level information from census surveys, both economic and demographic, for national defense purposes.

The first salvo in this White House effort occurred in 1939. The Justice Department proposed bill language authorizing the release of individual-level information to the FBI, Naval Intelligence, and Army Intelligence (G2). They sent the draft bill to the Census Bureau. Coming so close to the 1940 enumeration, fear of depressed public cooperation generated strenuous opposition inside the bureau. By March of 1940, after months of behind-the-scenes lobbying, Bureau director William Lane Austin convinced the White House not to introduce the bill in Congress. The 1940 census went forward as planned with the same public statements guaranteeing against harm from supplying information that had been made in previous decades. The Presidential Proclamation clearly stated: "There need be no fear that any disclosure will be made regarding any individual person or his affairs."²⁸

²⁷ The Act Providing for the Fifteenth Census and for the Apportionment of Representatives in Congress, Pub. L. No. 75-13, 46 Stat. 21, 21-27 (1929). In 1930 the Women's Bureau requested access to schedules for residents of Rochester, New York. The bureau requested and received an opinion from the Attorney General that they used to deny the request. A MONOGRAPH ON CONFIDENTIALITY AND PRIVACY IN THE U.S. CENSUS, *supra* note 18, at 14.

²⁸ See ANDERSON, *supra* note 6, at 185-208; Anderson & Seltzer, *supra* note 24; FRANKLIN D. ROOSEVELT, SIXTEENTH DECENNIAL CENSUS: A PROCLAMATION (1940), https://www2.census.gov/programs-surveys/decennial/2010/program-management/4-release/press-kit/president-obama-message/1940_census.pdf [<https://perma.cc/A4ZZ-DGVH>] for a detailed recount of the events that shaped the 1940 census.

Once the census field enumeration was complete, and FDR was reelected for a third term, the administration revived their effort to open census records for national defense planning and national security surveillance. In May of 1941, the White House replaced William Lane Austin with a new director, J.C. Capt, who introduced bills to repeal the restrictions on the publication of individual-level information.²⁹ The 77th Congress attached the bill language to the Second War Powers Act, Section 1402. The repeal took effect in March 1942 and remained in effect until the War Powers Act itself expired in March 1947. The provision read in part:³⁰

That notwithstanding any other provision of law, any record, schedule, report, or return, or any information or data contained therein, now or hereafter in the possession of the Department of Commerce, or any bureau or division thereof, may be made available by the Secretary of Commerce to any branch or agency of the Government, the head of which shall have made written request therefor for use in connection with the conduct of the war....

The provision was widely used for national security and economic planning during the war.³¹ In May 1942, the administration issued Executive Order No. 9157 to manage the implementation of the provision.³² In practice, agencies sent information requests to the Secretary of Commerce. The department's chief clerk then routed the requests to the Census Bureau, the Bureau prepared the information, and it was finally routed back through the Commerce Department to the requesting agency. Much of the information provided was routine, such as information on prospective defense contractors. However, Seltzer and Anderson, previously cited, provide administrative detail, including a 1943 Secret Service request for a list of Japanese Americans residing in the Washington, D.C. area from the 1940 census. The Secret Service was part of the Treasury Department, so that request and transmittal were between the Secretary of the Treasury and the Secretary of Commerce. The Bureau produced the list of individuals, with name, address, age, occupation, and nativity detail in about a week.³³

²⁹ William Seltzer, *Replacing Austin: A Study in Leadership Change at the US Census Bureau* (2011) (Paper presented the 2011 Joint Statistical Meetings, Miami Beach, Florida, Jul. 30–Aug. 4, 2011); see also William Seltzer, *Replacing Austin: A Study in Leadership Change at the US Census Bureau*, 157 PROC. JOINT STAT. MEETINGS 11 (2011) (A shortened version of the paper).

³⁰ Second War Powers Act, 1942, ch. 199, § 1402, 56 Stat. 186, *repealed by* First Decontrol Act of 1947, ch. 29, 61 Stat. 34.

³¹ WILLIAM SELTZER & MARGO J. ANDERSON, *CENSUS CONFIDENTIALITY UNDER THE SECOND WAR POWERS ACT (1942-1947)* (2007), <https://margoanderson.org/govstat/integrity.htm> [<https://perma.cc/ZDS7-NDSQ>].

³² 50 U.S.C. APP. § 644a (1942).

³³ The materials were then archived in the Secretary of the Treasury's papers in the Franklin Delano Roosevelt Presidential Library.

C. The State of Data Stewardship at Mid-Century

Looking back at the permanent Census Bureau's half-century of experience with standards of data stewardship presents a complicated picture. For example, Congress enjoined publication of economic data "furnished by any particular establishment" in 1909 but authorized it from 1942 to 1947 as a war measure. Furthermore, the provision of certified copies of individual-level demographic information remained legal under the discretionary authority of the Director in all the census acts during the period, as well as in section 1402 of the Second War Powers Act. Yet section 11 of the 1929 act also stated that "[n]o publication shall be made by the Census Office whereby the data furnished by any particular establishment or individual can be identified." Not surprisingly, users were confused. Throughout this time, the Bureau fielded requests for individual-level economic and demographic data from other agencies of the federal government, from state and local officials, and from academics. Some of the requests were granted, while others were not.³⁴

The problem was that while the statistical profession was increasingly committed to principles of data stewardship to protect individuals' privacy, that commitment was not necessarily shared by government officials in the regulatory and enforcement agencies, state and local officials, or even among census officials. Nor was there consensus that officials in the Census Bureau itself, rather than decisionmakers elsewhere in government, such as Congress or the upper administration, should have sole authority to decide these matters.

Parties that sought access to the individual-level returns viewed information collected through the census as akin to other information collected by the government—in that both types of information were collected and used for legitimate government functions. Draft authorities relied on this belief to request information from the 1910 census to prosecute draft dodgers. Census Director William Mott Steuart described how this conception was used to

³⁴ Ed Goldfield, for example, recounted a Secret Service request around 1950 for access to lists of individuals from the census for a neighborhood in Washington, DC. The White House was being renovated and the Secret Service wanted information of possible locations for the President to live. The bureau denied the request. *See* Letter from Vernon Curry, Freedom of Information Act Officer, U.S. Census Bureau, to Governmentattic.org (Mar. 5, 2021), https://www.governmentattic.org/40docs/CensusBureauProtCensusData_1980_2005.pdf [<https://perma.cc/6HCP-5RTQ>]. *See generally* Interview by Frederick G. Bohme with Edwin D. Goldfield (Oct. 8, 1991), https://www.census.gov/history/pdf/Goldfield_Oral_History.pdf (general discussion of Edwin D. Goldfield's experience with census confidentiality policy) [<https://perma.cc/H52U-AVLY>].

justify the use of individual literacy information gathered in the 1920 census in the Secretary of Commerce's 1923 Annual Report.³⁵

"State superintendents of public instruction," he wrote, "departments of education, and other State bureaus, as well as organizations, such as State universities and the Federation of Women's Clubs, and individuals have during the past two years instituted a campaign of education. The publication of statistics concerning the number of illiterates reported for the Fourteenth Census . . . directed attention to the fact that the records of the Bureau of the Census contained the names and addresses of all persons reported as illiterate." While a list was not readily available, "several States appropriated money . . . and employed a considerable force of clerks in the bureau copying the names and addresses from the census reports" to create such a list. Steuart was proud of this initiative and believed that the lists were of "material assistance" in the campaign of education.

Secretary of Commerce Jesse Jones made similar arguments when discussing the use of census information in wartime, claiming that "the Bureau of the Census provided much of the basic factual data needed for nearly every phase of planning for total war." In his memorandum to the president in early 1945 recounting his department's war work, Jones noted that the Census Bureau "has been drawn upon for such statistical material by nearly every other agency of the Government . . . from its population records, the Bureau of the Census was able to establish the citizenship of hundreds of thousands of workers who needed this proof in order to be employed in our plants; and, immediately after Pearl Harbor, was in a position to give the military services the name and residence of all Japanese nationals residing in prescribed West Coast areas."³⁶

In this passage, Jones conflated several of the Bureau's wartime activities. Jones described supplying "age search" information to people without birth certificates, which allowed them to prove birthright citizenship and thus qualify for war work. Simultaneously, he incorrectly claimed that the Bureau provided names and addresses of "Japanese nationals" to the military "immediately after Pearl Harbor." In fact, the Bureau provided small area tabulations, technical advisors, and mapping facilities, not lists of individual

³⁵ U.S. DEPARTMENT OF COMMERCE, ELEVENTH ANNUAL REPORT OF THE SECRETARY OF COMMERCE (Sep. 15, 1923), https://fraser.stlouisfed.org/files/docs/publications/commerce/ar_commerce_1923.pdf [<https://perma.cc/5MZ9-9SY9>].

³⁶ Letter from Jesse Jones, U.S. Sec. of Commerce, to Franklin D. Roosevelt, U.S. President (Jan. 19, 1945) (record kept at the Library of Congress with Jesse H. Jones Collection, Box 174, Commerce Dept. Reading File, Dec. 22, 1944 – Jan. 27, 1945) (I am indebted to Steven Fenberg for alerting me to this letter in the collection of Jones' correspondence at the Library of Congress).

responses, to the military from 1942-1945. The overall message, however, remained true: Census information, whether tabulated or provided on an individual level, advanced the war effort.³⁷

Not surprisingly, arguments about proper data stewardship continued into the post-war period. Government officials in administrative agencies outside the Bureau sought to expand their access to and uses of census data, both aggregated and at the individual level. Once the Second War Powers Act expired, Census officials relied on the restrictive language of the 1929 Census Act as the dominant policy framework for requests for access. Census officials resisted requests for individual-level information under the authority of Section 18 of the 1929 Census Act and mounted concerted campaigns to assure the public that individual responses were protected.

However, the Bureau did not propose repealing the state and local government access provisions from the Census Act. The 1954 revision and codification of Title 13 as positive law retained these access provisions. The Bureau also did not publish its war history report, which might have drawn attention to its activities under the provisions of the Second War Powers Act.³⁸

The codification of Title 13 in 1954 exemplifies the continued ambiguities in the statute, and Congress' intent to retain both the provisions for individual level data access and the strictures against publication of individual level data. Senate Report 2497 reviewed the committee's work and reported that "there were very few, if any, changes made in substantive law and that the proposed legislation embodied only a codification of existing law." Editorial changes were "of a technical or clerical nature."³⁹ The older provisions of the 1929 statute were rewritten as Sections 8 and 9 of the new Title 13:⁴⁰

³⁷ See STEVEN FENBERG, *UNPRECEDENTED POWER: JESSE JONES, CAPITALISM, AND THE COMMON GOOD* (2013).

³⁸ Roger Daniels, *The Bureau of the Census and the Relocation of the Japanese Americans: A Note and a Document*, 9 *AMERASIA J.* 101 (1982), <https://www.tandfonline.com/doi/abs/10.17953/amer.9.1.h4p7lk32q1k441p3?journalCode=ramj20> [https://perma.cc/H4RS-9PVB] (The records of the War History Project, including draft reports, are available in the National Archives Census Bureau Collection in Record Group 29).

³⁹ STAFF OF S. COMM. ON THE JUDICIARY, 83D CONG., *REVISION OF TITLE 13 OF THE UNITED STATES CODE, ENTITLED "CENSUS" 3* (Comm. Print Aug. 18, 1954) [To accompany H. R. 9729]: "As noted above, the purpose of this bill is to revise and enact into law, title 13 of the United States Code entitled "Census." It is not the primary purpose to make substantive changes, but rather to put the law in a form more useful and understandable. This required the substitution of simple language for awkward terms, reconciliation of conflicting laws, omission of superseded, obsolete, or executed sections, and consolidation of similar or related provisions."

⁴⁰ 13 U.S.C. §§ 8–9 (1954).

§ 8. Certified copies of certain returns; other data; restriction on use; disposition of fees received

(a) The Secretary may, upon a written request, and in his discretion, furnish to Governors of States and Territories, courts of record, and individuals, data for genealogical and other proper purposes, from the population, agriculture, and housing schedules prepared under the authority of subchapter II of chapter 5, upon the payment of the actual, or estimated cost of searching the records and \$1 for supplying a certificate.

(b) The Secretary may furnish transcripts or copies of tables and other census records and make special statistical compilations and surveys for State or local officials, private concerns, or individuals upon the payment of the actual, or estimated cost of such work.

(c) In no case shall information furnished under the authority of this section be used to the detriment of the persons to whom such information relates.

(d) All moneys received by the Department of Commerce or any bureau or agency thereof in payment for furnishing transcripts of census records or making special statistical compilations and surveys shall be deposited to the credit of an appropriation for collecting statistics.

§ 9. Information as confidential; exception (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, *except as provided in section 8 of this title*—[emphasis added] (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

The individual access provisions in Section 8 preceded and qualified the Section 9 provision banning “publication whereby the data furnished by any particular establishment or individual under this title can be identified.” Congress implemented this structure after recognizing the confusion that could result from a statute offering general authorization to release coupled with a ban on publication, and specifically privileged releases “from the

population, agriculture, and housing schedules” to governors, courts, and individuals for “proper purposes.”⁴¹

Through the 1950s, these use debates continued in the context of information from the economic censuses, often concerning access to address lists or information on a particular violation of antitrust law. The Watkins Commission wrestled with these issues.⁴² Federal courts finally took on the question in a series of antitrust cases, culminating in the Supreme Court ruling that the file copies of the census forms submitted by the St. Regis Paper Company were not immune from subpoena by the federal government.⁴³ That 1962 decision prompted the Bureau to urge Congress to protect the file copies from subpoena. Hearings aired the positions on both sides about another government agency’s access to individual-level census information. The Bureau reiterated its longstanding position that access to information from ‘any particular establishment’ was restricted by law.⁴⁴

There were also powerful defenders of relaxing statistical confidentiality standards. Among them was Congressman Emmanuel Celler (D-NY), Chair of the House Judiciary Committee, who testified in favor of the Supreme Court’s majority position before the House Post Office and Civil Service Committee. Having also served as a member of the House Judiciary Committee in the 77th Congress, Celler participated in the debates about Section 1402 of the Second War Powers Act and contended that the St. Regis decision should be taken further:⁴⁵

As a general rule, information in the files of one agency should be available to other agencies of the executive branch in the enforcement of the laws. The administration of justice should not be reduced to the level of blind man’s bluff, played by different departments of the same government. If the Bureau of the Census has in its files information relevant to a violation of the antitrust laws, it seems to me as a general proposition that such information should be available to the Department of Justice and the Federal Trade Commission –the agencies

⁴¹ *See id.*

⁴² *See generally*, U.S. CENSUS BUREAU, THE WATKINS COMMISSION (last visited Dec. 17, 2021) [<https://perma.cc/TR63-HZ3F>].

⁴³ *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961).

⁴⁴ For an analysis of the issues in the case, *see* Margo J. Anderson & William Seltzer, *Federal Statistical Confidentiality and Business Data: Twentieth Century Challenges and Continuing Issues*, 1 J. PRIV. AND CONF. 7-52 (Spring 2009), Comment on Article by Anderson and Seltzer, by C. L. Kincannon, 53-54; Rejoinder, by M. Anderson and W. Seltzer, 55-58.

⁴⁵ *Hearings Before the H. Comm. on Post Office and Civil Service*, 87th Congress, 2d Sess. 34, 38, 39.

charged with antitrust enforcement. It would be more appropriate, therefore, to repeal the secrecy presently accorded the original census returns in the possession of the Bureau of the Census than to extend the shroud of secrecy to file copies of census returns retained by reporting companies.

Celler saw regulatory issues like antitrust enforcement as the more important standard for evaluating what information a statistical agency could provide. The St. Regis Paper Company was trying to hide its bad behavior, and he felt that the census information that the Justice Department subpoenaed provided proof. He derided the statistical agencies' claims for the need for confidentiality and perceived the Bureau's protection of confidentiality as a smokescreen for bureaucratic self-protection: "These bills are symptomatic of a dangerous climate of secrecy among Government agencies. Among the worst offenders, I am told, are the Bureau of the Census, the Bureau of Mines and the Bureau of the Budget." He argued that statistical data should not be covered with a pledge of confidentiality: "The right of the people to know what their Government knows is indispensable to that informed public opinion which alone can make our democracy work." "These bills promote an abuse of secrecy," he continued. "Secrecy so abused in this instance is a threat to our free enterprise system—a system whose freedom depends upon the ability of our Government to enforce the antitrust laws."⁴⁶

In other words, both advocates for keeping the individual-level questionnaires confidential and advocates for release of that information found support for their positions in the basic principles of democracy, open government, and the integrity of the free enterprise system. Congress ultimately supported the Bureau, adding a provision to Section 9 of Title 13 making file copies of census forms immune from subpoena. At that time, Congress did not investigate the other provisions of Title 13 that authorized the release of individual-level census responses from the population census to governors, courts, or individuals.

Significantly, none of these controversies between the Census Bureau and the other administrative agencies of the federal government in the immediate post war period concerned what one might call issues of privacy. Moreover, from the turn of the century through the 1960s, there were no legal or political challenges to the Census Bureau from respondents whose information was provided to governors, courts, or persons under the authority of Section 8 of Title 13, or its predecessor statutes.

⁴⁶ *Id.*

D. The New Issues of the 1960s and 1970s

Two developments in the 1960s brought the issue of data stewardship back onto the technical and administrative agenda of the Census Bureau and into the public eye. The first was the dramatic expansion of the volume of census data released worldwide, the expansion of the bureau's capacity to tabulate and release information from the decennial and other surveys, and the decision to release public use microdata files (PUMS files), starting in 1960. This expansion prompted census authorities and government statisticians worldwide to revisit their disclosure control protocols and assess whether existing procedures were sufficient to protect individual level responses from identification. The second development was external—namely, the emergence of a larger political debate on governments' privacy protection responsibilities and individuals' rights to access information collected by third parties, including government, about them.

1. Data Publication Expands, As Does Disclosure Control

The Bureau faced several data stewardship issues in the 1960s and developed new techniques to address them. The new PUMS files, the demand for and expansion of tabulated census releases, and the demand from researchers for access to unpublished census information were on the Bureau's agenda simultaneously, prompting technical innovation and arguably cross-fertilizing across one another and the overall approach the agency took.

The most interesting technical challenge was the new "public use micro data sample files," which the bureau began to release after the 1960 census. These files are made up of actual individual cases. What information would such a file would contain? The practices of table suppression did not address the problem of producing a file that was made up of untabulated cases but that did not identify anyone in it. Census officials and users accepted the need to extend the principles of disclosure control to cover the issues presented by a PUMS file. The question was how to do it. The Bureau could rely on some of longstanding tabulation protocols derived from the technical capacities of the tabulation process itself. For example, names and addresses had never been entered on the punch cards used for tabulation. That constraint dated to 1890. As the raw data for tabulation shifted to from punch cards to computer tape in 1960, the practice of removing this identifying information continued.⁴⁷

This method of protection was a first step. The second step was the sampling process itself. Officials recognized that the rich array of variables in

⁴⁷ LEON TRUESDELL, *THE DEVELOPMENT OF PUNCH CARD TABULATION IN THE BUREAU OF THE CENSUS* 206-07 (GPO 1965).

census long form responses might allow a user to piece together enough information to make a very good guess on the identity of the individual case. In response, officials emphasized that these were sample files, and thus a PUMS file case was only one case out of 1,000 possible cases. The file contained no information on the 999 other individuals in the population that might display the same combination of variable characteristics. Thus, it would be impossible to identify an individual in the file. Finally, the Bureau borrowed a technique used for limiting report categories in tabulated releases and restricted variable coding in the files. For example, the classified the geographic areas reported in the PUMS file into very large groupings—250,000 people or above for the 1970 files.⁴⁸

The proliferation of and increasing detail in tabulated files presented slightly different issues of disclosure control. The capacity of users to cross classify and combine multiple tabulated files to produce single case cells in a combined tabulation of complete count data became the new issue. Mathematical statisticians identified this problem and proposed new techniques of ‘complementary cell suppression’ to address it. Census officials added this new tool to their growing toolbox of disclosure control techniques.⁴⁹

The Bureau also addressed protocols in their special tabulation programs, the practices of their own internal research agenda, and the Bureau’s growing collaborations with university researchers. As discussed above, previous directors allowed an external researcher to access internal data files. But after the whipsawing officials had taken through the world wars and the public challenges to their protection of economic data in court litigation, they were eager to find ways to facilitate research with census information without getting tangled up in challenges to improper data release. They did so by articulating standards encompassing special tabulations, allowing for confidential access to raw-internal census files, and defining administrative procedures to facilitate access beyond published releases.

In February 1966, Morris Hansen, Assistant Director for Research and Development, reported on these matters in an article aimed at the professional data-user community. Hansen noted that published results from census

⁴⁸ The Census Bureau procedural histories provide an entrée into the technical literature on the control protocols for the new PUMS files. U.S. CENSUS BUREAU, 1970 CENSUS OF POPULATION AND HOUSING: PROCEDURAL HISTORY 13-15, 106-07 (1976).

⁴⁹ See, e.g., Ivan P. Fellegi, *On the Question of Statistical Confidentiality*, 67 J. OF THE AMERICAN STATISTICAL ASS’N 7-18 (1972). For background on the emerging issues and the activities of the American Statistical Association, see generally, Margo J. Anderson, *The ASA Committee on Privacy and Confidentiality: Pre History of the Committee* (paper prepared for the American Statistical Association Committee on Privacy and Confidentiality Dec. 2017), <https://zenodo.org/record/4118712#.YmCz3 fPMLow> [<https://perma.cc/8X63-AK56>].

surveys “are not the only ones that can be derived from the data collected. Indeed, they have been likened to the exposed part of the iceberg; the larger part of the iceberg consists of the many additional special-purpose tabulations that can be produced from the same data. Although many groups have gone beneath the surface to bring out these statistical treasures, research workers, in particular, have explored the depths to get fresh statistics to test their hypotheses and to add to their store of knowledge.” Hansen then described how to access such “statistical treasures,” including how to purchase “low cost” tables prepared by the bureau “in the process of preparing the published results” or a copy of a “special tabulation” ordered by another user.⁵⁰

But that did not exhaust the possibilities. He continued: “Not so easy to reach, as a general rule, are the individual records (such as the returns for particular households or business establishments), because these records are by law confidential and cannot be seen in identifiable form by anyone except sworn Census Bureau employees. Even here, however, there are at least four methods of developing statistics from individual records without violating confidentiality.”

“The most widely used method,” he continued, “is to have the Census Bureau make special tabulations from the data.” The second method was a public use micro data sample (PUMS) file which the bureau offered for sale on punch cards or tape for users to self-tabulate data.

The “third, less frequently used method,” Hansen explained, “is to move the data (on tape or punch cards, which do not carry names and addresses but are nonetheless in such complete detail as to require confidential treatment) to the quarters of a research or operating group, under the continuing custody of a qualified Census Bureau employee. This method permits the use of equipment at the location of the user and allows considerable flexibility in tabulating the data--perhaps including matching to other results--and in reviewing the results step by step.” The final method “is used when the Bureau acts as sponsor or cosponsor, supporting the proposed research as an element of one of its authorized programs; and it can apply only to projects or research in which there is a clear public interest.” In such a case, “an expert who is employed to carry on research involving individual records takes the usual employee's oath not to reveal the contents of those records, and he is thereafter subject to the legal requirements on nondisclosure of individual information.”

Hansen noted that the second and third methods were generally not appropriate for economic data because of the highly-skewed nature of distributions of business establishments. In his conclusion, Hansen directed

⁵⁰ Morris Hansen, *Unpublished Census Data as a Basis for Research*, STAT. REP. 17-18 (Feb. 1966).

his audience to the Bureau of the Census catalog for information on available “unpublished materials.”

2. External Events Change the Narrative: The Privacy Challenge Emerges

The data stewardship innovations prompted by the increasing volume of released data were fundamentally professional discussions within the Census Bureau and the larger community of census users across government, academia, and increasingly, the private sector. A political debate on privacy rights throughout society catalyzed a new challenge concerning an individual’s claim to control what information governmental or private entities could collect and maintain, or control how information was used, stored, sold, or destroyed.

Returning to Prewitt’s formulation, privacy, in the census context, encompasses data collected at the source, and whether the government has the authority to demand that information. The companies objecting to investigation by the Federal Trade Commission or prosecution by the Justice Department did not challenge the underlying statutory authority of the economic census to collect information on a firm’s activities. Instead, these corporate objectors focused on use, who could access the information, and to what ends.

On the population census side, the issues of what is collected and how it can be used can be conflated, particularly as Congress considers the questions to be asked on the upcoming census. The income question introduced in 1940 generated a challenge on privacy grounds by Republican Senator Charles Tobey [R-NH]. Tobey’s early 1940 challenge was also implicitly a critique of the New Deal social and economic policy, as well as a response to rumors that Roosevelt was proposing access for FBI, Naval Intelligence, and G2 (army intelligence) to the individual census responses. In truth, Roosevelt was.⁵¹ In the nineteenth century, there were similar criticisms surrounding asking for women’s age or asking about a householder’s personal wealth. Solutions to those challenges had included a guarantee of confidentiality (a pledge of data stewardship against improper use) or a decision not to collect the information (wealth questions).⁵²

⁵¹ See A. ROSS ECKLER, *THE BUREAU OF THE CENSUS 192-95* (Praeger Publishers 1972); see also Anderson & Seltzer, *supra* note 24 at 15-16 (evidence that Tobey was aware of rumors on the draft legislation to open up census files to the surveillance agencies) [<https://perma.cc/QHP4-DM9F>].

⁵² See CARROLL WRIGHT & WILLIAM C. HUNT, *HISTORY AND GROWTH OF THE UNITED STATES CENSUS 147, 154, 939* (GPO 1899) (Information on the value of real estate [1850-

The privacy debates of the second half of the 1960s, however, were much wider-ranging conversations, not only about the collection of information, but also about the issues of stewardship and use of information once recorded. They generated ambitious Congressional investigations and initiatives to write statutory law framing the public's right to control governmental collection and disposition of information about an individual on the one hand, and the public's right to know about what its government was up to—"freedom of information"—on the other. These larger concerns culminated in the Privacy Act of 1974 and the Freedom of Information Acts.⁵³

The publication of books like Vance Packard's *The Naked Society* in 1964 and Alan Westin's *Privacy and Freedom* in 1967 signaled public concern with the uses of information collected on individuals. The ensuing debates focused on information collected by private sector entities, as well as on government information collection, spurring a variety of investigations and legislative initiatives in the coming years. Once the public was alerted, Congress began to investigate a host of processes—from schools' and employers' uses of psychological testing to practices of wiretapping, credit ratings, and the availability of criminal records. Not surprisingly, given the comprehensive nature of the collection of information in the decennial census, the practices of the Census Bureau soon came to legislators' attention.

In 1965, the House Government Operations Committee opened a "Special Inquiry on Invasion of Privacy" and held wide-ranging hearings over several months.⁵⁴ As part of those hearings, the committee reviewed census policy and practice, initially focusing on a constituent's challenge to a particular sub-question on income in the agriculture census. As Cornelius Gallagher [D-NJ] reported, "Last year, . . . [the committee] received a complaint from a Pennsylvania farmer who objected to a new section of the farm census questionnaire because it sought information on the outside income of everyone living in the same house as the farm operator. The farmer who wrote the subcommittee said he thought questions about farm income were proper, but details about his outside income constituted an invasion of privacy in his view." Gallagher further related that there were questions about whether

1870] and personal estate [1860-1870] for each individual was authorized in the 1850 census statute. The 1880 census statute specified that these questions were to be "stricken out").

⁵³ See generally Privacy Act of 1974, 5 U.S.C. § 552a [<https://perma.cc/P3MK-4U4R>]; see also U.S. DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION POLICY, THE LEGISLATIVE EVOLUTION OF THE FOIA (Apr. 12, 2012) [<https://perma.cc/ZS5R-VYZ9>].

⁵⁴ See generally, Special Inquiry on Invasion of Privacy, Jun. 2-4, 7, 23, Sep. 23, 1965: *Hearing Before H. Comm. on Gov. Operations, H. Special Subcomm. on Invasion of Privacy*, 89th Cong. 1 (1962).

the farmer should be required to inquire about and report on individuals who resided on the farm (e.g., farm hands).⁵⁵

A. Ross Eckler, then Acting Director of the Census Bureau, accompanied by Assistant Director Conrad Taeuber, responded to Gallagher's questions. He explained why the questions were phrased as they were and the statistical purposes they served; he also conceded that it would be possible, as Gallagher suggested, to develop procedures so that a non-family member of the farm proprietor could file responses separately from the operator.

Eckler conceded that the bureau had confronted such questions before and had policy processes to deal with them. In other words, in this line of questioning, there were elements of older objections about asking inappropriate questions and how to collect responses that did not generate respondent resistance.

Gallagher then went on to another line of questioning about the confidentiality of responses once collected and how census data were released. He asked Eckler to report the legal language for the record to reassure the public that their data were secure once collected. "Could you advise," Gallagher asked, "whether or not, and for the record would you state the law under which the confidentiality of census information is protected?" Eckler responded, "Basically it is title 13 of the United States Code; section 9 of that title gives the provisions regarding confidentiality. Would you like to have that submitted for the record, Mr. Chairman?" Gallagher agreed, and Section 9 was entered into the hearing record. Gallagher then asked if there were any exceptions to the provisions in Section 9. Eckler responded there were, citing Section 8. In response to Gallagher's questions, Eckler explained:⁵⁶

Mr. ECKLER: Yes. There is a provision that at the discretion of the director, certain information can be furnished. ... It is a very narrowly defined kind of exception, and I think we ought to supply that to you.

Mr. GALLAGHER: We would like to have that. Has this discretion ever been exercised?

Mr. ECKLER: Yes, age search information.

Mr. GALLAGHER: What would be the justification for the exercise of this discretion?

⁵⁵ *Id.* at 271. (Gallagher described his concern; he "expressed the hope that the Federal Government would take the lead in helping to protect the right of each individual to decide himself what he wants to keep private. Ordinarily, he should not be put in a position of being forced to give information which may be no one's business other than himself.... It is usually possible to ask the person directly involved, instead of someone else. Procedures could presumably be worked out to insure and facilitate this").

⁵⁶ *Id.* at 284.

Mr. ECKLER: That this is information which is needed, as it says here for genealogical and other proper purposes. This is at the discretion of the Secretary which in turn is delegated to the Director.

***may upon a written request, and in his discretion furnish to Governors of States and territories, courts of record and individuals' data for genealogical and other proper purposes-upon the payment of actual or estimated cost of searching through records and \$1 for supplying a certificate. This is given to the person who supplied the information or his legal representative.

Mr. GALLAGHER: Is that the only exception?

Mr. ECKLER: This is the only exception that exists. An individual may want this for age, proof of age for purpose of passport or employment certificate, social security, or something of that sort. We do about 200,000 of those jobs each year.

Mr. TAEUBER: But if I might add? Mr. Chairman, this information is supplied to the individual who initially supplied it to the Bureau, or on his order it may be supplied to someone else. But it cannot be supplied to a third party without the authorization of the person who initially provided it to us.

Mr. GALLAGHER: I see. That is an excellent safeguard.

Mr. ECKLER: And there is one other safeguard I should note. "In no case shall information furnished under the authority of this section be used to the detriment of the persons to whom such information relates."

Mr. GALLAGHER: That would include any investigation being made about the individual, or any matter relating to taxation?

Mr. ECKLER: Right.

Mr. GALLAGHER: Has there ever been an exception made in this?

Mr. ECKLER: Not to the best of my knowledge.

Mr. GALLAGHER: How about to the best of anyone else's knowledge?

Mr. ECKLER: I know of no one who knows of an exception, and I believe that this has been protected in an inviolate fashion.

Mr. GALLAGHER: What would you do if a court order was presented to you for the obtaining of information, say, on family x on a farm?

Mr. ECKLER: In this case there has been an example x in which-. [sic] I do not think the treatment of court orders has been uniform.

Mr. GALLAGHER: They are not?

Mr. ECKLER: Sometimes court orders have been disregarded.

Mr. GALLAGHER: That is one of the things we worry about.

Mr. ECKLER: In at least one case, I believe under a court order, the information on the individual was furnished to the court with a separate statement regarding the statutes and calling attention of the judge as to the conditions under which this was furnished, and I think the transcript was returned unopened.

Mr. CORNISH:⁵⁷ You mean the court realized it was asking for information it had no proper authority to get?

Mr. ECKLER: Yes; I believe the only case I know of was turned back to us.

Mr. GALLAGHER: Can any investigative agency of the Federal Government have access to this information?

Mr. ECKLER: No, sir.

Mr. GALLAGHER. Without the express consent of the individual?

Mr. ECKLER: That is correct, sir.

Mr. GALLAGHER. There has never been an exception to this?

Mr. ECKLER: Again, not to the best of my knowledge, and I believe there never has been.

Eckler's statement that "to the best of my knowledge" there had never been release of individual level information from the population census was clearly not true at the time. Eckler came very close to lying to Congress on the public record. Recognizing that his statement had overreached, without further comment, the bureau later submitted the "following information... for inclusion in the record" in the published hearing transcript:⁵⁸

It might be noted that in time of war special provisions may be set up to provide for the transfer of Information among Federal agencies. For example, section 1402 War Powers Act passed March 27, 1942, citation 56 Stat. 170 provided that during this war time Director could turn over or release any records from one agency to another. Under that order-Executive Order 9157

⁵⁷ *Id.* at 286.

⁵⁸ *Id.*

of May 9, 1942, citation 7 F.R. 3505 directed Secretary of Commerce to turn over any of his records under certain conditions. The War Powers Act itself expired May 3, 1947, as to that section.

The Bureau did not attempt to explain how the “special provisions” were used, nor did it detail the “conditions” that governed the release of individual level information during World War II. There is no indication that the Special Inquiry Committee took the matter of the individual level release any further or that census officials revised their other public statements on their past practices.

Congressional concern with issues of privacy continued in the second half of the 1960s and fed into a confusing debate about the impact of computer technologies, data banks, and government information processes. Rebecca Kraus has described this “data bank” controversy in great detail, including how the aspirations of government officials and social science researchers to organize and build a national data infrastructure were frustrated by threats of “invasion of privacy.”⁵⁹ Bills to limit the questions on the census or to make the census responses voluntary made census officials wary of trying to say too much about their technical innovations in disclosure control, PUMS files, or processes of complementary cell suppression. Census officials saw the looming challenge to collect, tabulate, and publish the 1970 census as their main task ahead. The emerging issues of privacy and freedom of information distracted from what they saw as the main event—the new mail census, the challenges for information to address the court mandates of “one person, one vote,” and data to address the information needs of the civil rights revolution.⁶⁰

Out of this confused situation, however, did come legislative proposals to revamp Section 8 of Title 13, to limit it to the kind of age search requests that Eckler described in his 1965 testimony. In the first session of the 91st Congress dated July 20, 1969, the Committee on Post Office and Civil Service’s report, titled “Confidentiality of Census Information,” proposed amending Section 8 of Title 13 to remove the access of state governments and courts to individual level census information.⁶¹

Section 4 of H.R. 12884 amends section 8 of title 13, United States Code, to provide two of the several new protections for

⁵⁹ See generally Rebecca Kraus, *Statistical Déjà Vu: The National Data Center Proposal of 1965 and Its Descendants*, 5 J. OF PRIVACY AND CONFIDENTIALITY 1-37 (Aug. 1, 2013) [<https://perma.cc/TGN8-CBK4>].

⁶⁰ See 1970 CENSUS OF POPULATION AND HOUSING, *supra* note 48.

⁶¹ COMM. ON POST OFFICE AND CIVIL SERV., 91ST CONG., REP. ON CONFIDENTIALITY OF CENSUS INFORMATION, H.R. REP. NO. 91-407 (1st Sess. 1969).

individual privacy which are afforded by the bill. The first such new protection consists of the elimination in its entirety of the present subsection (a) of section 8 of title 13, which now authorizes the furnishing of individual data, upon request, to Governors of States and territories and courts of record for genealogical purposes. That authorization is rescinded and is replaced by a new subsection (a) specifically authorizing the furnishing to respondents or their heirs or authorized agents, upon request, authenticated transcripts of reports filed by or for the respondents.

The bill proposed a variety of other changes to census law. The committee had heard testimony to make the census voluntary and rejected changing that provision of the statute. The committee bill proposed that the Census Bureau submit subject areas and questions to Congress three years and two years before the count respectively, and contained language requiring Congressional approval of the proposed questionnaire. The Administration recommended “against the enactment” of the bill. It did not become law, but the report explaining that the intentions of the changes provided a version of the history of access to individual-level census information. In a sweeping statement, the committee stated:

There has never been a single claim substantiated that the Bureau of the Census has made individual information available outside the Bureau or that the Bureau has ever used any information received other than for authorized purposes. The Bureau never even releases statistics which could, through analysis, be used to divulge information relating to a specific person or family. Nevertheless, given today's concerns with the potential for invasion of privacy through modern electronic computer technology and the concomitant [sic] development of data banks, the committee bill removes even the threat of that possibility.

The statement was a remarkable piece of evidence given the “information . . . for inclusion in the record” supplied by the Bureau to the 1965 House Government Operations “Invasion of Privacy” Hearing. It became the new mantra of past census practice and was a profoundly misleading statement on several levels.

First, it was misleading about what the Bureau did, as noted from the analysis above. By couching its statements in the absence of evidence, “there has never been a single claim substantiated” that the Bureau “used any

information received other than for authorized purposes,” the report implied that the Bureau did not release individual-level information. The qualifier, “authorized purposes,” was elided in the larger claim to proper use. In fact, though, it was precisely the “authorized purposes” that were at the heart of the legislative history of data release and Bureau practice.

Second, it misleadingly implied that the rationale for past statutory language and practice was based in concerns about “privacy.” The governing rationale for determining the legitimacy of individual-level data release was the “detriment” clause or issues of “harm” to the respondent. But that only became relevant if there was no other overriding “proper purpose,” primarily a prosecution or national security claim.

For example, a young man’s age was not “private” information; information on the schedule functioned to demonstrate the individual violated federal law by not registering for the draft at the appropriate age. The Justice Department and the Supreme Court argued that a company violating federal law could not escape trial and prosecution by claiming relevant information did not exist or was not subject to subpoena. During World War II, Congress authorized the use by all federal agencies of individual-level information “in connection with the conduct of the war” despite the pledge of confidentiality when the data was collected.⁶²

Absent such overriding claims, it was the responsibility of the Director to assess whether a requested release could “harm” the individual, and if so, to deny the request. The Bureau’s procedures for providing research access for analyses beyond what was in the published reports were designed to enable user access to the “statistical treasures” in the data, while protecting individual level information from inadvertent or intentional release. These were not issues of “privacy.”

However, the committee report did signal the changing technical environment for census data release, as well as emerging concerns about “the potential for invasion of privacy,” “modern electronic computer technology,” and “data banks.” Nonetheless, the report admitted that repeal of Section 8a was about the “threat of that possibility” rather than any specific solution to the emerging “potential.”

⁶² The New York Times reporting on the committee deliberations on the Section 1402 provisions of the Second War Powers Act provides a particularly clear example of the way that claims of “proper use” of individual level census information overrode prior claims to confidentiality. On February 7, 1942, the *Times* headlined, “Spy Data Sought from 1940 Census.” The article subhead continued, “House Committee Votes to Let Confidential Reports Be Released to Federal Bureaus. Would Retract Promise. Group Believes Japanese and Others Evading Evacuations Might Thus Be Traced.”

3. Privacy Replaces the Stewardship Framework

It took almost seven more years for Congress to repeal Section 8a. At the time, there were many other changes proposed to Title 13, including confirming public access to old census schedules after seventy-two years, as well as requiring the Bureau to inform Congress formally of questionnaire content three years and two years before the next enumeration. All these issues were considered in Congress from 1970 to 1976, and they were finally consolidated into a larger bill authorizing a mid-decade census to provide more timely information pursuant to the Mid Decade Census Act of 1976, PL 94-521.⁶³

By that time, the repeal of Section 8a seemed like a minor statutory change, a clean-up of language about practices in the distant past when census schedules were posted in public places or duplicate copies filed with the states. The individual-level releases of census information authorized by the Second War Powers Act were once again forgotten. The Bureau reframed issues of data stewardship and use as issues of privacy.

For example, in 1975, while the repeal of Section 8a was still on the congressional legislative agenda, the Bureau published a technical volume reporting papers and transcripts from an August 1974 seminar at the University of Southern California's School of Public Administration.⁶⁴ The volume explored a wide range of contemporary topics, including the measurement of wealth, health, social indicators, commercial data uses, and notably, "privacy" and "confidentiality."

Director Vincent Barabba's paper, "The Right of Privacy and the Need to Know," captured the discussions of the time and put the issues within context of long-term census policy and practice. He reviewed the "logic of information" and then turned to the history and "track record" of bureau practice as he called it. Much of his narrative recounted the material discussed in this paper, including the statutory provisions, the presidential proclamations, and the "discretion" of the Director to release information for "genealogical and other proper purposes." "In current Bureau practice," he asserted, "the term 'confidentiality' represents nothing less than a clear extension of an individual's right to privacy." This statement was a fine rhetorical device, but on closer inspection, a vague and ahistorical reading of

⁶³ Mid-Decade Census Act of 1976, Pub. L. No. 94-521 (1976) [<https://perma.cc/7J3G-C7F9>]; *see also* "Legislation 1974-1983", U.S. CENSUS BUREAU [<https://perma.cc/M8P7-SRCN>]. The revision of Section 8 retained the authority of an individual to access their own census response; *see* the discussion of the "age search" provisions above.

⁶⁴ Vincent P. Barabba, *A Discussion of Privacy*, in *A NUMERATOR AND DENOMINATOR FOR MEASURING CHANGE* (Technical Paper No. 37), 17, 17-30 (U.S. Bureau of the Census, 1975).

the distinction between the strictures governing data collection and data use. As noted at the outset above, the mandatory requirement for responses to the Census, dating to 1790, effectively nullified the principle that an individual had a “right of privacy” and could refuse to respond. Particular questions were inappropriate for the Census, but not the obligation to provide congressionally mandated information.

Barabba seemed to sense as much at the time, namely that the real issue for the Bureau was not the “individual’s right to privacy,” but was the data stewardship procedures governing the release of information once collected. “Until recently,” he noted, “most of the Bureau staff assumed that individual-level information collected had always been held in strictest confidence. I must report that this has not always been the case.” In general, terms he recounted the World War I release of “information about individuals” given to the Department of Justice for use as evidence in prosecuting young men who claimed they were “too young to register for the draft.” He assured the students that those types of releases had stopped years before, and he went on to describe the technical and administrative procedures used to protect confidentiality.

The message was clear. There had been some minor hiccups in past practice of data stewardship, but now, all was in hand. Respondents should trust the census information would not be used to their detriment. The Census Bureau should be a model for other institutions, public and private, in how to collect, release, and use information in modern society.

III. IMPLICATIONS

The statutory framework for the release of individual-level responses and the obligations to protect those responses from publication have not changed since 1976, but the data world has. There is substantially more published census data today. The data is more easily accessible on the web and reported with finer levels of tabulation and geography. The big change, however, is that the rest of the data world has finally caught up with the power and reach of the census, with what we call today the rise of Big Data, social media, and the Digital Revolution. The personal computer was still being invented in the 1970s. There was no Wi-Fi, no smart phones, and no 24-hour connectivity.⁶⁵ The understandings that informed Congress and the census officials of the 1970s encompassed main frame computing, printed publications, and the assumption that census officials could control the data they collected, physically, technically, and administratively—so they should also be the sole arbiters of the form in which it was released. The 1970s

⁶⁵ See generally Anderson, *supra* note 6.

provisions were revisions of earlier policies, which themselves had changed repeatedly over the previous century. And they had changed because the technical, political, and administrative framework and decision makers had also changed over the century.

Administrative arrangements matter. The addition of the original 1909 language to ban the publication of information on an individual establishment was a result of the debate about whether information collected for statistical purposes should not be used to administer a regulation—in particular, antitrust regulation. Once both the Census Bureau and the regulatory agencies were housed inside the Department of Commerce and Labor, the question arose about whether information collected in the economic censuses could be accessed by regulatory agencies within the Department. Census officials resisted such access, and Congress agreed in the 1909 statutory language. Congress removed the ban, temporarily, during World War II, and the issue was not finally resolved until the statutory change in 1962, after the Supreme Court's decision in *St. Regis*.

Further, the power of various political actors matters. While Bureau officials articulated the statistical purposes standard early in the life of the permanent Census Bureau to define their data stewardship policies, they were not powerful enough to resist weakening those standards in the face of national security claims in both World War I and World War II. Presidents and Congress thought otherwise and prevailed.

The legacy of the past also matters. The nineteenth-century statutory provisions allowing governors and courts access to individual level responses remained in census law long after Bureau officials discouraged their use. State and local officials were legitimate users, and Bureau officials, even as they discouraged provision of identifiable information from censuses, did not attempt to remove these authorizations for access until Congress addressed the privacy issues of the 1960s and 1970s.

Finally, technical capacity matters. Through the 1970s, access to the resources and technical skills needed to reverse-engineer a census tabulation to identify a particular respondent was limited. The Bureau tabulation techniques practically prevented disclosure, even as statisticians and computer scientists began to raise concerns about the theoretical possibilities.

Now, the data environment has changed dramatically, and as the Georgetown Law Technology Review (GTLR) symposium demonstrated, the issues of data stewardship for public data are once again before policymakers. Again, the conversation is a complicated one among technical experts, users, respondents, and the public.⁶⁶ For issues surrounding the census, I have

⁶⁶ There are already voluminous and complicated legal debates about whether an individual has a property right to their information who sets data stewardship rules for the public, and

emphasized the need to anchor whatever decisions are made in the democratic understandings that originally framed the institutionalization of the census in the United States.⁶⁷ It is an ongoing conversation, and an experiment, as historians are wont to remind us. But for now, this reminder will do: the current technical, administrative, and legal framework is not absolute, and past history suggests that it can and should change if it is not serving the users of the census.

private stewards of individual level information. Salome Viljoen, another presenter at the GLTR symposium, has reviewed and challenged these frameworks. *E.g.*, Salome Viljoen, *A Relational Theory of Data Governance*, 131 *YALE L.J.* 370 (2021) [<https://perma.cc/RX6C-4THH>].

⁶⁷ Not addressed in this paper, but very important to recent political debates about data stewardship in the census have been the post-1980 challenges to Census Bureau tabulated practices on the basis of “detriment” or “group harm.” Title 13 bans the release of information about an individual person or respondent but does not address the question whether individuals or groups can claim to be ‘harmed’ by tabulations, i.e., tabulations used for ‘group harm,’ for example racial profiling. For some of my work in this area, see William Seltzer & Margo Anderson, *The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses*, 68 *SOC. RES.* 481, 481-513 (summer 2001); Margo J. Anderson, *Public Management of Big Data: Historical Lessons from the 1940s*, 7 *FED. HIST.* 17, 17-34 (2015); and Margo J. Anderson, *The Census and the Japanese ‘Internment’*: *Apology and Policy in Statistical Practice*, 87 *SOC. RES.* 789, 789-812 (winter 2020).