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THE MYTH OF CENSUS CONFIDENTIALITY

Statement By

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One of the most enduring and widely believed myths perpetrated by the federal government in modern history has been the supposed confidentiality of census records.<sup>1</sup> During the promotional campaign for each decennial census, the Bureau of the Census has assured the public that individual records are absolutely confidential and will not be shared with any other agency of the government. And since the 1960 census, the Bureau has used the example of an alleged refusal to turn over names and addresses of Japanese Americans to the War Department in 1942 as their major selling point. Media spokespersons for the Bureau have appeared on television broadcasts throughout the country to make the following or similar public service announcement:<sup>2</sup>

The first example of Bureau steadfastness involves one of the most shameful episodes in American history. During World War II, emotions ran high. Many Americans were concerned about the security of our Pacific Coast against Japanese invasion. These anxieties got so far out of hand that several hundreds (sic) of loyal Japanese Americans were interned in concentration camps. At the height of this hysteria, the Secretary of War requested that the Bureau of the Census supply the names, addresses and ages of all Japanese Americans living on the coast. In spite of the national emergency--and hysteria--the Bureau's decision to not supply this information was upheld.

The spokesperson would then go on to state that no census official or employee has ever been charged with a violation of the confidentiality law.

Such statements strongly implied that the Bureau protected the interests of census respondents, and that no census records were used to incarcerate Japanese Americans. A number of documents,

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however, contradicted such a conclusion; and the Director of the Census Bureau, Vincent Barabba, finally admitted several months ago that "based on our recent review of the events, it is apparent that a different account would be appropriate in the future."<sup>3</sup> While it was technically correct to state that names and addresses were not revealed, such a statement was extremely misleading because sufficient other census information was provided to the War Department for the purpose of locating and imprisoning Japanese Americans. Instead of being uncooperative as their claims insinuated, the Census Bureau worked in close association with the War Department, and thereby betrayed the trust placed in them by the census respondents.

Shortly after the issuance of Executive Order 9066, a high ranking official of the Census Bureau was assigned to help the War Department, and was promptly dispatched to the headquarters of the Western Defense Command in San Francisco.<sup>4</sup> It was at this headquarters that the detailed planning for the mass incarceration of Japanese Americans took place. The War Department's own report on the episode stated:<sup>5</sup>

The most important single source of information prior to the evacuation was the 1940 Census of Population. Fortunately, the Bureau of the Census had reproduced a duplicate set of punched cards for all Japanese in the United States shortly after the outbreak of war and had prepared certain general tabulations for the use of war agencies. By arrangement with the Bureau of the Census, through the Office of the Provost Marshal General in Washington, the Wartime Civil Control Administration had the Bureau prepare several special tabulations of these Japanese census cards. These special tabulations, when analyzed, became the basis for the general evacuation and relocation plan.

Another civilian official assigned to the Western Defense

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Command was Tom C. Clark, then special assistant to the Attorney General and coordinator of Alien Enemy Control for the Justice Department (later Attorney General and Supreme Court Justice).<sup>6</sup>

In an interview after his retirement, Clark remembered that a Census Bureau official pulled out raw files and showed him exactly how many Japanese Americans lived in each city block.<sup>7</sup>

There is no doubt that the Census Bureau was intimately involved in the planning for the mass incarceration of Japanese Americans. The only question is whether their actions violated the law. The pertinent sections of the United States Code require that:<sup>8</sup>

The information furnished under provisions of this chapter shall be used only for the statistical purposes for which it is supplied...and in no case shall information furnished under authority of this chapter be used to the detriment of the person or persons to whom such information relates.

Since incarceration could not have been one of the "statistical purposes" for which census respondents supplied information regarding their race or ancestry, and since imprisonment was clearly a "detriment to the person or persons to whom such information relates," it would appear that the law was broken on a massive scale involving over 120,000 individuals. But no one was ever charged with this crime. The Attorney General certainly did not prosecute the Director of the Census Bureau or the Secretary of Commerce. Indeed, the Bureau's boast about no official or employee being charged with a violation is undoubtedly true; but it is also meaningless. The Attorney General was part of the same conspiracy to lock up Japanese Americans.

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In response to challenges made on the basis of the forgoing information, Director Barabba defended the actions of his predecessors as follows:<sup>9</sup>

The applicable law in 1942 was the census act of 1929 which provided that 'in no case shall information furnished under the authority of this Act be used to the detriment of the person or persons to whom such information relates.' This provision of law was contained in the same section that provided authority to the Census Bureau Director to furnish to governors and courts of record certified copies of population returns. This provision was carried forward for many decades from the census statutes enacted during the 19th century, which did not provide fully for census confidentiality...

The 'detriment clause' is therefore believed to have originated as a pejorative caution by the Congress that those who received identifiable information in accordance with the Director's authority to furnish such information should not use the information to anyone's detriment. There is no real basis for assuming that aggregate statistics released by the Bureau were prohibited by law from being used to the possible detriment of groups of individuals whose characteristics were described in census tabulations, whether published or unpublished, so long as the identity of any individual was not disclosed in such tabulations...

In legal terms, census confidentiality was suspended by the War Powers Act for a period of nearly 3 years. We have no evidence, however, that identifiable census information was ever released during this period because of the act... Although many provisions of the War Powers Act of 1942 were controversial, the suspension of census confidentiality was enacted with little debate in Congress...

Once released, statistics can be used in opposite ways that may be perceived as helpful or harmful to individuals. Whether statistics are used to enhance or abridge individual rights depends, not on the statistics themselves, but on the public policies created through statistical and other kinds of knowledge, and the people elected and appointed to establish and implement those policies... The larger question of how information is used, and whether specific uses are reprehensible, goes far beyond our responsibility to determine.

Mr. Barabba is correct in stating that the detriment provision originated in the Census Act of June 18, 1929.<sup>10</sup> But it is not

enough to argue that the law is very old and that other practices existed at the time of enactment. The same detriment provision was carried over at each subsequent revision of the census laws when confidentiality became better established. Moreover, there has been no court decision substantiating Mr. Barabba's interpretation; and without such a judicial ruling, the Census Bureau cannot unilaterally exempt itself from the letter of the law. Also, the differentiation between "identifiable" and "aggregate" data begs the issue with respect to detrimental use. The "aggregate statistics" alone provided sufficient information to implement a plan thoroughly detrimental to Japanese Americans.

The time frame is important when considering justifications based on the Second War Powers Act of 1942. The bill for this act was first introduced in Congress on January 22, 1942; was passed by Congress on March 19, 1942; and was signed into law by the President on March 27, 1942.<sup>11</sup> But nearly all of the planning for the incarceration of Japanese Americans took place in late February and early March 1942; and the Census Bureau's active participation can be traced to the arrival of the Bureau representative at the headquarters of the Western Defense Command on February 27, 1942.<sup>12</sup> Furthermore, a December 17, 1941 transmittal to the State Department indicates that unpublished data on Japanese Americans was being released to other federal agencies even before the introduction of the bill in Congress.<sup>13</sup> The Bureau's actions must be judged on the basis of the law in existence at the time such actions were taken--not some law which became effective at a later date.

Eventually, some of the statistical data in question became public information through the publication of the 1940 census results in 1943. But at the time of surreptitious release to the War Department and other federal agencies, the data was still in raw form, and no one outside of the Census Bureau was supposed to have access. Certainly, census officials cannot control the use of data after it has been published; but they can and must prevent premature release, especially when it is obvious that the intended use will be detrimental to certain census respondents.

No concrete evidence has been uncovered to disprove Mr. Barabba's assertion that the identity of individuals was withheld. But there are some interesting documents which at least leave the question open for further investigation. For example, the Census Bureau official assigned to the Western Defense Command was ordered on July 3, 1942 to:<sup>14</sup>

Confer with Colonel Boekel and Major Beasley with a view to obtaining a list of certain persons of Japanese ancestry furnished by Commander A. D. Ringole of the Navy. It is desired to determine where these persons are at present.

In July 1942, the incarceration of West Coast Japanese Americans was approximately 80% completed, and it is possible that some of the individuals named in Naval Intelligence reports had not been rounded up yet. In any case, it is difficult to imagine how a census bureau official can help to locate specific persons without the use of names and addresses. Thus far, no documents have been found to show what transpired as a result of that meeting.

While denying that individual identities were revealed in World War II, Mr. Barabba himself pointed out a thought provoking

precedent from a previous war. Evidently, a similar war powers act was in force during World War I; and in 1918, the Census Bureau released individual information regarding several hundred young men to the Justice Department and Selective Service System for the purpose of prosecutions for draft evasion.<sup>15</sup>

The primary significance of the Second War Powers Act, however, should not be sidetracked by this discussion about whether the Bureau did or did not reveal individual identities: after the Second War Powers Act was signed into law, it would have been perfectly legal to release any information. The importance of the Act lies in the fact that it completely destroyed census confidentiality for a number of years. The Act, therefore, is a powerful reminder of the very tenuous nature of the confidentiality law. The Second War Powers Act provided:<sup>16</sup>

The Secretary of Commerce shall, at the direction of the President...make such special investigations and reports of census or statistical matters as may be needed in connection with the conduct of the war, and, in carrying out the purpose of this section, dispense with or curtail any regular census or statistical work...

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 authority granted by these sections of the Second War Powers Act expired on December 31, 1944; but since there was no court challenge to the Act, Congress may easily suspend confidentiality again during any situation deemed an emergency.

Thus, there is an everpresent danger that census information may be used against the best interests of the respondents due to unforeseen and unpredictable circumstances in the future.

Under the existing laws, and the precedents of past laws and practices, there is no practical protection for the census respondents against the abuse or misuse of personal records held by the Census Bureau. Respondents may naively answer questions regarding their race or ancestry without fully realizing that such information may be used against them. The law prohibiting the release of confidential data is worthless when the Attorney General declines to prosecute violators. At best, the law may intimidate low-level employees; but the World War II example proves it does not restrain high-ranking officials, especially if they are operating under a mandate from the Secretary of Commerce, or the President. The confidentiality law simply does not provide the safeguard that most people assumed. Instead, the experience of Japanese Americans demonstrates the devious ways in which the law can be interpreted to harm people.

In 1942, it would have been unthinkable for the Attorney General to prosecute the Secretary of Commerce or the Director of the Census Bureau. Furthermore, government officials then were immune from private lawsuits by aggrieved individuals. But the Watergate episode and recent Supreme Court decisions may have opened the way for remedies. At least for the present, Watergate has made it possible for even the highest officials to be charged with crimes; there is no guarantee, however, that this posture

will prevail in the long run. The public mood--consequently official policy--may very well revert to the previous attitudes as the memories of Watergate fade into history.

Last year, the U. S. Supreme Court upheld the right of individuals to sue government officials for violation of civil or constitutional rights if Congress had not provided an equally effective alternative for remedy.<sup>17</sup> In another case a few months later, the Court extended the right to sue government officials to damages resulting from the violation of any federal law.<sup>18</sup> These recent decisions have been based on the Civil Rights Act of 1871 which states:<sup>19</sup>

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subject, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the parties injured in an action at law, suit in equity, or other proper proceedings for redress.

The present law governing the use of census data does not provide an effective avenue for remedy in the event an individual or group of individuals is harmed by improper disclosure. For isolated violations involving a small number of victims, perhaps a private lawsuit will provide relief. But when a massive violation takes place, like the incarceration of 120,000 individuals, damage suits against a few government officials will not result in adequate compensation to each and every person wronged. Many billions of dollars would be needed for proper settlement, and there is no possibility that such a large sum can be collected from the government officials responsible for the damages.

Although the detriment provision in the United States Code appears to be unequivocal, it was open to different interpretations. Perhaps it should be clarified to explicitly prohibit the Census Bureau itself from releasing any information whatsoever--including aggregate statistics--to any other government agency prior to regular publication of the results, particularly when it is known in advance that the information will be used to the detriment of the persons concerned. Under the constitutional protection against self-incrimination, the law cannot require a person to fill out a census form, and at the same time permit the government to use that information to imprison or otherwise harm the person.

Since another war powers act cannot be prevented, one practical method of securing confidential census information against the exigencies of the moment might be to require by law the physical transfer of all identifiable records to the custody of the federal courts. The courts can then seal the records and prevent any disclosure for a prescribed period. Under the present system, the records are in the custody of the Census Bureau and the National Archives--both part of the executive branch and subject to the orders of the President. If another branch of government has physical custody of the records, it becomes less likely for improper disclosures to occur.

The "Commission on Wartime Relocation and Internment of Civilians" is urged to further investigate the role of the Census Bureau in the mass incarceration of Japanese Americans, and to make appropriate recommendations for legislation to strengthen

the census confidentiality law. The World War II example must become the impetus for initiating amendments to the law to assure that no American in the future will be victimized by what he or she puts on the census forms. If the American people are to trust their own government, the promise of census confidentiality must become an actual fact.

#### NOTES

1. The author is indebted to David Burnham, William Hohri, and Michi Weglyn for providing much of the documentation used in this statement.
2. Television script courtesy Michi Weglyn. Also see "Census Bureau Refused to Let War Dept. Have Nikkei Names," Pacific Citizen, January 25, 1980; Robin Herman, "As Census Nears, the Fears of Some Are Unrelieved," New York Times, March 31, 1980; Jill Smolowe, "East Bronx Leads City in Rate of Return of Census Forms," New York Times, April 27, 1980.
3. Letter, Vincent P. Barabba, Director, Bureau of the Census, to Raymond Okamura, December 16, 1980, p. 1. Also see Raymond Okamura, "Census Showed-and-Told on Japanese," New York Nichibei, January 22, 1981; Spencer Rich, "Census Bureau Aided '42 Roundup of Nisei," Washington Post, February 15, 1981; Dexter Waugh, "Census Bureau Vow of Privacy Tainted by WWII Revelations," San Francisco Sunday Examiner and Chronicle, February 1, 1981; Guy Wright, "Census Taker Tattled," San Francisco Examiner, January 28, 1981.
4. U. S. War Department, Final Report: Japanese Evacuation from the West Coast 1942 (Washington: U. S. Government Printing

Office, 1943), p. 31; Wartime Civil Control Administration, Western Defense Command and Fourth Army, Press release No. 1, March 14, 1942. The official was Dr. Calvert L. Dedrick, Chief of the Statistical Research Division.

5. Final Report: Japanese Evacuation, op. cit., p. 352.
6. Ibid., pp. 6, 67; Wartime Civil Control Administration Press Release, op. cit.
7. Report from William Hohri, National Council for Japanese American Redress Newsletter, September 30, 1980. The statement by Tom Clark may be found in "Japanese-American Relocation Reviewed," Earl Warren Oral History Project, Bancroft Library, University of California, Berkeley.
8. 13 USC 211, 218 (1940); 13 USC 8c, 9a (1976). The wording is from the applicable 1940 edition; the current wording is nearly identical.
9. Barabba to Okamura letter, op. cit., pp. 2, 3, 4, 6.
10. Public Law 71-13, Chapter 28, Sections 11, 18 (46 Stat 21, at 25, 26), June 18, 1929.
11. Public Law 77-507 (56 Stat 176), March 27, 1942. Introduced as S. 2208; passed Congress under H. Res. 444, S. Con. Res. 27.
12. See note 4.
13. Letter with attached data, J. C. Capt, Director, Bureau of the Census, to Harold B. Hoskins, Executive Assistant, Department of State, December 17, 1941. National Archives, Diplomatic Branch, 740.00115 Pacific War/419 PS/MNP. Document courtesy Michi Weglyn.
14. Memorandum, Karl R. Bendetsen, Colonel, GSC, Assistant Chief of Staff, Civil Affairs Division, to Dr. Dedrick, July 3, 1942. National Archives, Record Group 338, Entry 1, Box 6,

Japanese 291.2. Document courtesy Michi Weglyn. In the same memorandum, Colonel Bendetsen asked for "recommendations as to the most practicable method of compiling a list of Kibei." The interest in the Kibei (American citizens partly educated in Japan) seems to be explained in a subsequent memorandum from General John L. DeWitt (Bendetsen's superior and head of the Western Defense Command) to General George C. Marshall, Chief of Staff, U. S. Army, August 23, 1942, wherein it was proposed that Kibei "not presently under federal supervision" (i.e. those living outside of the West Coast) be interned, stripped of citizenship, and deported after the war. As American citizens, Kibei were not required to register their whereabouts, so the Census Bureau may have been looked upon as a source for locating such persons. See Michi Weglyn, Years of Infamy (New York: William Morrow, 1976), p. 307, fn. 21.

15. Vincent P. Barabba, "The Right of Privacy and the Need to Know," The Census Bureau: A Numerator and Denominator for Measuring Change (Washington: U. S. Department of Commerce, 1975), Technical Paper 37, p. 27.
16. Public Law 77-507, Title XIV, Sections 1401, 1402 (56 Stat 176, at 186), "Utilization of Vital War Information."
17. Norman A. Carlson v. Marie Green, Supreme Court of the United States, No. 78-1261, April 22, 1980.
18. State of Maine v. Joline Thiboutot, Supreme Court of the United States, No. 79-838, June 25, 1980.
19. 42 USC 1983.