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NCES and the Patriot Act: An Early Appraisal of Facts and Issues

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Abstract

In late October 2001 Congress passed and the President signed the Patriot Act of 2001 as part of the nation's response to the attacks of September 11, 2001. Title V of this multifaceted legislation is labeled "Removing Obstacles to Investigating Terrorism" and includes section 508, "Disclosure of Information from NCES Surveys." This section allows the Justice Department to obtain and use for investigation and prosecution reports, records, and information (including individually identifiable information) in the possession of the National Center for Education Statistics (NCES) that had hitherto been protected by the 1994 National Center for Education Statistics Act.

The paper reviews available information about the origins of section 508, its impact on confidentiality protections offered by NCES, and the effectiveness of NCES in communicating to respondents and the public changes in the legal protections available to NCES data providers. It also compares the present situation with some previous efforts to use protected statistical reports for similar purposes and discusses several broader issues relating to the possible misuse of statistical data systems, including the comparative strengths and weaknesses of substantive, technical, organizational, legal, and ethical safeguards.

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Introduction

The attack of September 11, 2001 against the United States elicited prompt, vigorous and diverse responses by our government and people. One of these responses embodied in the omnibus anti-terrorism law, the USA Patriot Act of 2001¹, enacted and signed into law in late October 2001 was to set aside the confidentiality provisions affecting individually identifiable responses provided to the National Center for Education Statistics (NCES) that had hitherto been protected by the National Center for Education Statistics Act of 1994.² Within the Patriot Act the repeal of statistical confidentiality was presented as part of a diverse program of removing obstacles to investigating terrorism.

While the law itself received considerable attention in the media as it was being considered in congress, at its enactment, and subsequently, this coverage as far as we can determine ignored section 508 of the law, Disclosure of Information from NCES Surveys and its implications for statistical confidentiality. What was more notable was that the statistical community was largely unaware of this development and that those who did know, selected members of the federal statistical community, were generally silent about what they knew.³ The first public acknowledgment of the issue by a statistician was a circumspect paragraph by American Statistical Association (ASA) President Miron Straf in the January 2002 issue of the ASA's monthly newsletter [Straf, 2002a].

Even as we write this paper, much remains unknown about these provisions of the Patriot Act: their origins, their actual impact on the confidentiality protections that NCES can offer to past and

present respondents, and their broader implications for statistical confidentiality generally, as well as any unique and constitutional contribution protected information from NCES could actually play in the investigation of terrorism. Accordingly, as the title of this paper states, all we can do at this time is offer an early assessment of the facts and issues involved. It is for this reason, moreover, why the first section of the paper is titled Documented Facts, Presumed Facts, and Related Hypotheses. More complete information may lead to somewhat different conclusions both with respect to the facts and our discussion of the related issues.

We do, however, consider that such an early assessment is important for several reasons: first, the topic is an important one affecting the interface between important ethical and policy norms for our profession and national concerns and priorities; second, as we have noted elsewhere [Seltzer and Anderson, 2001], a policy of silence can, over the longer run, easily lead to greater agency embarrassment and public mistrust; and finally, we hope that by setting down our own appraisal of the facts that we may encourage those more knowledgeable to supplement or correct our facts, conjectures, and interpretations or present a fuller account of their own. In addition, we hope others will join us in an early and continuing discussion of the issues as called for by ASA President Straf.

Part I: Documented Facts, Presumed Facts, and Related Hypotheses

A. Relevant Provisions of the Patriot Act

(1) Text

The full text of section 508 of the Patriot Act, entitled Disclosure of Information from NCES

Surveys, is reproduced in Annex A. Section 508 accomplishes its intended purpose by simply adding a complex, multi-part clause within that part of the National Center for Education Statistics Act of 1994 that provided confidentiality protection for much of the NCES data pertaining to individuals. Section 508 basically permits, notwithstanding the protections afforded by the 1994 law, the Attorney General or an Assistant Attorney General to apply to any competent court for an *ex parte* order to obtain any reports, records, and information (including individually identifiable information) in the possession of NCES that are considered to be relevant to an authorized investigation or prosecution of domestic or international terrorism or terrorism that transcends international boundaries.

Section 508 also specifies that the court shall issue the needed order if it finds that the application includes a certification there are specific and articulable facts giving reason to believe that the information sought is relevant to an authorized terrorism investigation.

Finally, section 508 protects any officer or employee of the Department of Education, who, in good faith, produces information in accordance with an order issued under section 508 against the very substantial penalties provided for the disclosure of protected information under section 408 of the NCES Act of 1994.⁴

Four features of the factual context of Section 508 of the Patriot Act deserve special comment. First, the investigations identified as relevant under the language of section 508 are potentially very extensive, covering not only those suspected of carrying out a broad range of overt terrorist

actions, but also those suspected of engaging in acts that, for example, appear to be intended ... to influence the policy of a government by intimidation or coercion [US Code 18 § 2331] or are related to threats, attempts and conspiracies or are directed at accessories after the fact [US Code 18 § 2332b]. Second, section 508 makes no distinction between data obtained by NCES prior to enactment of the Patriot Act or subsequently, or whether the protected NCES data are the only source of the sought for information. Third, because section 508 specifies that the needed court order is an *ex parte* one (i.e., the target(s) of the investigation or prosecution are not informed about the existence of such an order nor are they able to take part in the proceeding in which the court considers it), even the minimal legal standards provided in section 508 for gaining access to protected NCES data are never subject to challenge. Furthermore, a very wide range of judicial fora are available to the Attorney General to seek the required order since section 508 provides that the application can be made generally to a court of competent jurisdiction. Fourth, while some parts of the Patriot Act have sunset clauses attached to them, section 508 is not one of them. It is thus, as things now stand, part of the permanent legal infrastructure of the federal statistical system.

(2) Legislative history

The legislative history of the Patriot Act can be divided into two phases: first, an informal, gestational period that ran from some point after September 11 to early October, and second, a period of formal legislative action that ran from October 2 to 25. Occasional references to NCES surveys weave in and out of both periods, before becoming legislatively fixed in mid-October. Reflecting the uncertainties and urgencies of those days, important aspects of this

history, particularly the gestational phase, are not clearly documented. (Appendix B presents a consolidated time line of events related to NECS and the Patriot Act, including events related to both phases of the legislative history of the section 508.)

On September 19, just over a week after the attacks of September 11, Attorney General Ashcroft met with the House and Senate leadership to discuss the administration's needs for new anti-terrorism legislation, although it is our understanding that specific legislative proposals were being considered in the administration several days before this. Over the next few days the administration and key members of congress continued to work on developing compromise legislation and on September 24, the House Judiciary Committee held a hearing on the Administration's Draft Anti-Terrorism Act of 2001. That hearing, at which the Attorney General and several other senior Justice Department officials testified, addressed a number of issues in general terms but the hearing also involved questions and issues specifically related to what its report referred to as the Consultation Draft of September 20, 2001, Anti-terrorism Act of 2001 and some Committee member's as the Justice Department draft.

Title 1-B of the draft act was labeled, Intelligence Gathering - Foreign Intelligence Surveillance, and contained section 158, entitled Disclosure of Educational Records. Although section 158 of the administration bill and section 508 of the Patriot Act as finally enacted appeared to have many differences, they were more apparent than substantive. The three major differences were: (1) section 158 dealt with materials that were protected by either the NCES Act of 1994 or the General Education Provisions Act, while the Patriot Act dealt with the former in section 508 and

the latter in section 507; (2) section 158 referred in explicit terms to the kind of investigations or prosecutions for which the protected information was needed, while section 508 of the Patriot Act used a less transparent citation format; and (3) section 508 added several apparent procedural safeguards to the process. One narrowed those who can seek the protected information from any federal employee designated by either the Attorney General or the Secretary of Education to someone at least at the level of an Assistant Attorney General. The other added the need to obtain a court order. However, as described earlier, the added protection provided by this latter safeguard is negligible.

Apparently the text of the full bill was not widely available at the time of the Judiciary Committee's September 24 hearing, although it did appear in the printed, but not the on-line, version of the Committee report. The on-line version of the Committee report did contain a section-by-section analysis of the administration bill, which described section 158 in the following terms:

The government believes that there may be information contained in student education records maintained by educational agencies and institutions and in education surveys reported to the National Center for Education Statistics that could be important in the criminal investigation of the terrorist attack of September 11, 2001, as well as to national security. However, section 408 of the National Statistics Act (sic) clearly prohibits disclosure of such information to appropriate Federal officials for these purposes; and, of equal importance, section 408 criminalizes the disclosure of any such prohibited information. This section will effectively override section 408 for this limited purpose.

While none of the detailed questions put to Attorney General Ashcroft or his colleagues related to section 158, it was not among the 17 sections of the bill that Congressman John Conyers, the ranking Democrat on the Committee, indicated that he was prepared to immediately move

forward on. With respect to the balance of the administration bill, including section 158, he simply observed other provisions, I believe require more study and cannot be considered hastily.

On September 25, the administration bill was dealt with briefly at a hearing of the Senate Judiciary Committee on Homeland Defense, at which the Attorney General testified followed by statements by Senators Patrick Leahy (Dem - VT), Orrin Hatch (Rep - UT), and Jon Kyl (Rep - AZ). There was no mention of education records, statistics, or section 158. However, in a followup hearing held on October 3 by the Judiciary's Subcommittee on the Constitution, Federalism & Property Rights on Protecting Constitutional Freedoms in the Face of Terrorism two of the seven witnesses did specifically refer to section 158 in their comments. (It appears from their testimony that these witnesses did not have access to the administration bill itself, but only to the section-by-section analysis that was included in the on-line version of the report of the September 24 hearing of the House Judiciary Committee.)

First, Jerry Berman Executive Director, Center for Democracy & Technology, noted that section 158, amends the law protecting education records to permit access to them. While this might be justified in terrorism cases, the provision covers all cases involving "national security" and is far too sweeping. Second, Grover Glenn Norquist, President, Americans for Tax Reform, observed that allowing for the compelled disclosure of educational records is substantively unrelated to the effective pursuit and prosecution of terrorists, and would infringe on the privacy rights of all students throughout the nation. The National Statistics Act prohibited the disclosure of this

information for reasons far better than any argument in favor of letting the government break open the seals. On the other hand, the three Senators who also made statements at October 3 hearing, Feingold (Dem - WI), Leahy, and Hatch included no reference to section 158.

The formal legislative history of the Patriot Act was short 24 days from its introduction in the House of Representatives on October 2, 2001 to its final passage on October 25. The original text of the proposed legislation as it was introduced in the House on October 2, by Congressman James Sensenbrenner, Chairman of the House Judiciary Committee, contained no reference to the NCES. Such a reference reappeared on October 4 in the Senate version of the bill as it was introduced by the bipartisan Senate leadership. On the afternoon of October 12 the House of Representatives, without discussion, accepted this language into its version of the legislation that became the Patriot act. Based on searches of the Lexis-Nexis and Library of Congress Thomas websites, we were unable to identify any further discussion in either the House or Senate or the few related hearings that referred to NCES, NCES data files, or section 508 (or 158). Indeed, reflecting the lack of detailed legislative consideration of this aspect of the Patriot Act, the language of section dealing with NCES remained unchanged after its introduction in the Senate on October 4 (although its numbering changed from section 509 to 508). After its final passage by congress on October 25, the bill was signed into law by President Bush on October 26.

(3) Evidence on the origins of and the rationale for section 508

Why does the Patriot Act contain section 508? In other words, what have NCES data files to do with the investigation of terrorism and how did the authors of section 508 (and predecessor

section 158) become aware of the presumed investigative worth of these files and the existing legal barriers to their use? Pending the availability of more authoritative accounts,⁵ our answers at this point are necessarily provisional, based on scattered hearsay reports of information provided by NCES staff and others at several professional meetings in the Washington, D.C. area over the past several months and in the course of private conversations with colleagues.

According to one story related at the December 2001 meeting of the Council of Professional Associations on Federal Statistics (COPAFS), NCES data became of particular interest because of the role of flight schools in the 9/11 attacks [COPAFS Meeting, December 2001]. This assessment is the same as many of the other reports we have heard. Banks has indicated that the interest was somewhat broader, covering students from specific foreign countries who are enrolled in flight school, nuclear energy programs, and so forth [Banks, 2002: 10]. More recently we heard, again through hearsay sources, that the focus was not the flight training schools, but the source of financial support of foreign students in the United States generally.

However, we have not as yet been able to identify which specific NCES data collection programs or data sets were considered of such investigative worth. Indeed, NCES data files seem particularly ill-suited for investigative purposes of the kind envisioned by the Patriot Act. First, the primary focus of NCES attention, as for the entire the Department of Education, is primary and secondary schooling, including nursery schools and other pre-school programs, and related policy issues. Thus, it appears that half or more of NCES data sets have no information on persons old enough to be potential suspects. Second, even those collection activities that pertain

to post-secondary education and training seem largely irrelevant. NCES has two major types of regular data gathering operations: (a) the annual collection of aggregated data (on students, faculty, finances, etc.) from all education and training institutions in the country; and (b) the periodic collection of individual micro-level data on students, teachers, and supervisory and management personnel on a sample basis, sometimes as part of longitudinal studies. Neither of these two types of activities generates detailed identifiable micro-level data collected on a 100 percent basis, which presumably is the sort of information that section 508 of the Patriot Act was designed to make available.

The lists of all students, faculty, or administrators that NCES (or its subcontractors) obtain from selected educational and training institutions may seem somewhat more promising from an investigative viewpoint. NCES uses these lists to select its samples for its detailed sample surveys. They therefore contain, for everyone on the list, identification information and information on all variables used in stratification. However, the selection of the PSUs (the educational and training institutions themselves) in these designs is roughly in terms of probability proportionate to size, with large, degree-granting universities selected with certainty in some designs, with non-degree granting training institutions having a very low probability of selection, and with other educational institutions having intermediate probabilities. If our understanding of the NCES data-gathering program is correct, it would thus appear that even this promising lead would provide useful information only about the population of students and faculty at large universities while leaving those attending flight schools and similar training programs virtually untouched in terms such lists.

Equally there is no full answer yet to the questions of how the administration and Congress became aware of the possible relevance of NCES data to the investigation of terrorism or of the legal barriers to the use of such data for investigative purposes. All the accounts that we have heard link the answers to both questions to the Department of Education, and most likely to those within NCES itself. Based on these accounts, we hypothesize that sometime between September 11 and 16, one or more NCES staff members raised within the agency the proposition that information gathered by NCES might be of substantial investigative relevance.

According to one account it was a data analyst concerned with tuition and other financial support received by foreign students, possibly associated with the National Post-secondary Student Aid Study, that sounded the first alarm. According to another story, what apparently happened was that higher-ups in the Dept. of Education became aware that one of the NCES surveys, concerning funding for higher education, included the Florida Aviation School as a respondent. This meant that the names of the terrorists who attended that school were likely buried somewhere in NCES files. It quickly moved out of NCES' hands [Becker, 2002]. Of course, this account begs the question of how someone senior in the Department of Education became aware that a particular institution was selected as a penultimate unit in a non-self-representing stratum. It also ignores the fact that the FBI and other investigators were able to identify and obtain needed information from flight training schools in Florida and elsewhere without any assistance from NCES and long before the Patriot Act was passed.

However it happened, it is said that once the issue was raised within NCES, there was an internal

debate, perhaps also involving Department of Education lawyers, about whether the Department of Justice should be informed about this potential investigative lead. Apparently, some within NCES opposed using protected NCES data files in this manner, citing among other things the legal protections promised to respondents under the 1994 NCES Act and other relevant laws. In fact, it is said that one NCES staff member observed, it would take a law to allow us to provide these files to the Justice Department. At some point it is alleged that this debate turned into a legal one, with the deciding argument based on a reference to a law requiring that anyone having in their possession knowledge that could help to identify suspected felons must disclose that fact.⁶

In any case, NCES or more likely the Department of Education, at some point prior to September 17, informed the Justice Department about the existence of NCES data sets that it was thought might help in the investigation of terrorism. Presumably at that point, these officials also raised the issue of the existence of the 1994 NCES Act that both barred the use of these data for investigative purposes and subjected NCES staff to very severe penalties if they disclosed these protected data.

We do not know if NCES staff or leadership ever tried to make the point that their files contained little or nothing of investigative worth or which could better be obtained by normal investigative means. It appears that neither NCES staff nor leadership informed others in the federal statistical system or those in the user community the about the issue when it first emerged.⁷ Finally, it may be noted that no member of the NCES staff or leadership has gone on record publicly protesting the roll back of NCES confidentiality protections.

B. Impact on NCES Confidentiality

NCES staff have consistently maintained that NCES has, to date, received no requests from the Justice Department for data under the provisions of section 508 of the Patriot Act, most publicly at a conference on data confidentiality organized by a number of federal statistical agencies, the Committee on National Statistics, the Washington Statistical Society, and others in Washington, D.C., January 7-9 2002 and again, as recently as June 25, 2002. However, it is not clear whether the NCES staff who have made such statements would necessarily be aware of or in a position to reveal that such requests had been made, since some of the provisions of the Patriot Act and related legislation as amended and referenced by the Patriot Act (for example, the Classified Information Procedures Act, the Criminal Procedures Act, the Foreign Intelligence Surveillance Act of 1978, and the National Security Act of 1947) clothe many investigative and prosecutorial acts in great secrecy.

NCES staff have also consistently maintained that the potential future impact of section 508 on the agency's ability to protect the confidentiality of responses is minimal. For example, when at a COPAFS meeting in mid-December 2001, a concern was expressed that the Patriot Act might impair the ability of NCES to ensure confidentiality, an NCES staff member present played down the concerns, noting that NCES standards on sharing would still be stricter than those of other agencies, with data covered under the generic Privacy Act [COPAFS Meeting, December 2001].

Similarly, at the January 2002 data confidentiality conference referred to previously, another NCES staff member emphasized that the Justice Department would have to get a court order showing specific cause for any release of data under the Patriot Act and that, even then, the

Attorney would still be bound by the NCES confidentiality provisions.

Part of the confusion may be based on the interpretation that NCES and its staff have placed on the concept confidentiality since the passage of the Patriot Act. In the words used by NCES on its own website [<http://nces.ed.gov/statprog/confid3.asp>], accessed on 5/29/02]

It is important to note that the confidentiality of data collected by NCES is protected in all instances, since even in the case of a judge's order for matters relevant to an offense concerning national or international terrorism, the Attorney General must protect the confidentiality of the data.

Such an interpretation of confidentiality runs counter to the concept as it has been used and understood in discussions of statistical policy and practice over the past 50 to 60 years, at least. For example, the Committee on National Statistics in its publication, *Principles and Practices for a Federal Statistical Agency* [National Research Council, 2001:5], is clear about this, stating, maintaining confidentiality, in particular, precludes the use of individually identifiable information for any administrative, regulatory, or enforcement purpose. The American Statistical Association's *Ethical Guidelines for Statistical Practice* [ASA, 1999: II.D.5] also makes the point be aware of limitations of privacy and confidentiality assurances. Do not, for example, imply protection of privacy or confidentiality from legal processes of discovery unless explicitly authorised to do so. The United Nations Statistical Commission's *Fundamental Principles of Official Statistics*, is equally clear on the subject, Individual data collected by statistical agencies for statistical compilation ... are to be strictly confidential and used exclusively for statistical purposes [United Nations Economic and Social Council, 1994: Principle 6]. Finally, the NCES position with respect to the meaning of the term confidentiality seems at variance with established

federal statistical policy in these matters [Office of Management and Budget, 1997: 35047]

The integrity and credibility of confidentiality pledges provides assurance to the public that information about persons or provided by persons for exclusively statistical purposes will be held in confidence and will not be used against them in any government action. Public confidence and willingness to cooperate in statistical programs substantially affects both the accuracy and completeness of statistical information and the efficiency of statistical programs. Fair information practices and functional separation of purely statistical activities from other government activities are both essential to continued public cooperation in statistical programs.

In sum, whether or not section 508 was sound legislation, it can not be said that it protects the confidentiality of statistical data.

C. Responses to the Patriot Act

(1) NCES

In recent years the National Center for Education Statistics (NCES) has been among those federal statistical agencies with strong legal and other protections in place designed to safeguard the confidentiality of information provided in its data-gathering operations. These protections included the 1994 National Center for Education Statistics Act and other more general legislation, arrangements for decoupling respondent identifiers from some statistical records, and well-elaborated procedures to licence researchers who want access to data files containing microrecords. Indeed, the NCES arrangements placed the agency, along with the Census Bureau, the National Center for Health Statistics and one or two other agencies, at the forefront of the federal statistical system in terms of respondent protection provided. Even a brief examination of the NCES website (<www.nces.gov>) provides a clear indication of the range of legal and other protections provided. Indeed, all during the period November 2001 through March 2002, a

search of the site using the term confidentiality identified well over 300 hits.⁸

Among these hits were summaries and the full text of the appropriate section from the 1994 NCES Act, that protected confidentiality including one

[<http://nces.ed.gov/statprog/Stand1V_01.asp> accessed 11/27/01] that stressed the heavy penalties that violators faced:

Employees, including temporary employees, or other persons who have sworn to observe the limitations imposed by this law, who knowingly publish or communicate any individually identifiable information will be subject to fines of up to \$250,000, or up to 5 years in prison, or both (Class E felony).

It was thus surprising to find that for months after the Patriot Act became law, NCES did nothing to indicate, either in the confidentiality assurances it provided to individual respondents or major data providers or in related information posted on its website, that its hitherto strong confidentiality standards had been significantly modified by new legislation. When the matter was first raised with NCES in late November and early December 2001 by email we were informed by NCES that

We are still working on language--to be cleared by OMB, and working on the required confidentiality guidelines to be agreed to by both the Attorney General and the Secretary of Education. We will modify our Web site when these issues are resolved. Actually, there is nothing incorrect in the language [on our website]. We are still providing protection of the confidentiality of the data. In fact, even with the amendment to our law, we are still in compliance with the Privacy Act that covers all statistical agencies--please see Title 5 of the US Code, section 552a part b, 7.

Whatever the merit of this response from NCES, it did not address what, if any, changes had been introduced by NCES into the confidentiality assurances given to major data providers or

individual respondents in new or ongoing surveys. A detailed letter sent to NCES in January again asking about this matter, among others, went unanswered for four months.

Subsequently, by examining Department of Education and OMB websites we were able to identify two NCES surveys which were in the process of obtaining needed OMB clearances in early 2002.⁹ In both cases, the language in the documents and survey protocols first submitted by NCES and/or the concerned contractors for clearance and all subsequent documents and memorandums, many written after the Patriot Act became law, placed all discussions of confidentiality protections and assurances in the context of the 1994 NCES Act, unamended by section 508 of the Patriot Act. In particular, the confidentiality assurances as specified in the survey questionnaires and telephone interview scripts were those appropriate only for a survey carried out exclusively for statistical purposes.¹⁰ Moreover, by the time we had identified the situation, one of these two surveys had already received its clearance from OMB.

At this point, we thought it essential to inform all those involved of the discrepancies between the confidentiality assurances apparently still in use and the language of the Patriot Act. Accordingly, in early March 2002, we contacted OMB and the two contractors (RTI and Westat), in addition to NCES about our findings so that they might take corrective action. Toward this end, we sent email messages to all four agencies sharing our findings about these specific surveys. We also again asked the more general question, what adjustments, if any, have been introduced into the confidentiality assurances provided by ... NCES contractors to respondents in connection with any [other] ongoing surveys they are carrying out on behalf of NCES? Finally, we noted that

while we understand that there may be legitimate differences of views about the efficacy of section 508 of the Patriot Act, we believe that there is little dispute that the ethical principle of informed consent, requires candor with respondents about confidentiality and confidentiality laws. If we have misunderstood the matter, we welcome your corrections.

The two contractors promptly responded, at first positively, saying they would look into the matter. However, first one and then the other contractor, avoided providing a substantive answer to our questions. Eventually, one of the contractors informed us they had been instructed by NCES not to reply themselves, but were told to refer us back to NCES. Within a week, OMB initiated a response, which thanked us for bringing the matter to their attention, and expressed the hope that they or NCES would be back to us in another week with a written statement about the confidentiality statement being used in new and continuing NCES surveys. OMB also pointed out that some of the surveys that were in the field in the first quarter of 2002 had entered the clearance process well before the events of 9-11 and the Patriot Act, but indicated that future reviews of NCES surveys would include a more careful scrutiny of the confidentiality issue.

Learning of our concern about the NCES confidentiality assurances currently in use, a member of the staff of the National Center for Health Statistics (NCHS) informed us that

In the case of an NCES study in which NCHS is collaborating, the Early Childhood Longitudinal Study Birth Cohort (ECLS-B), a modification to the consent form ... went into effect in January 2002.... Soon after the provisions of the amendment to NCES' statute became known to NCHS, NCHS contacted NCES staff and arranged for the development of a revised consent form as required by the NCHS confidentiality statute. This change was agreed upon and then approved by the NCHS Institutional Review Board. [Zarate, 2002]

The confidentiality assurance used in this joint NCES-NCHS survey beginning in January 2002, while admittedly long and complex, concluded with a clear statement that

These laws limit the use of the data to the purposes for which it was collected in this case, for research and statistical reports, unless the information is acquired by the Attorney General of the United States under court order to be used to investigate and prosecute acts of terrorism.¹¹

NCES itself did not respond until mid-April 2002. At that time they indicated that in response to our messages of early March, the NCES Chief Statistician, Marilyn McMillen Seastrom, met the project directors of all surveys fielded since the passage of the Patriot Act in an effort to ensure that NCES surveys were in compliance with the law. In Dr. McMillen Seastrom's words

Studies that were preparing to go into the field were instructed to change the confidentiality language on all data collection instruments to incorporate wording that was reviewed and approved by OMB. Other studies that were in the field were instructed to change the confidentiality language on any data collection instruments that were still in the collection phase. The two studies that were in the field when the corrections were made during the data collection process are both longitudinal studies. As was the case with ECLS-B, a decision was made to provide all respondents with the new confidentiality language during the next round of data collection. [McMillen Seastrom, 2002a]

We were also informed that NCES has addressed the need for revised confidentiality assurances in its newly developed draft statistical standards.¹² These new draft standards were posted on the NCES website on May 1 2002 for public comment between May 1 and May 30, which was extended to June 17. These standards cover a wide range of statistical control and quality issues with respect to NCES programs. Only one section under part 4 on processing and editing of data, NCES STANDARD: 4-2-02, Maintaining Confidentiality, deals with confidentiality. Within

that section, standard 4, deals with the assurances to provided to respondents. It reads,

Respondents must be told in a cover letter or in instructions that all responses that relate to or describe identifiable characteristics of individuals will be kept confidential, and will be protected to the fullest extent allowable under law. (In the case of NAEP, the legislation extends this protection to the identification of individual schools.) Furthermore, the routine statistical purposes for which the data may be used must be explained [US Dept. of Education - NCES, 2002: 58].

At the end of May, Acting Commissioner Phillips, in his response to our January letter and subsequent communications, elaborated on the new standards and how they were being implemented in these terms

We have revised our confidentiality pledge to conform to the new law. The new language is as follows: The information you provide will be kept confidential, and will be protected to the fullest extent allowable under law (20 USC 9003a-9007, as amended). This language will be used in all future NCES data collections. In the case of data collections underway at the time of passage of the USA Patriot Act, NCES informed respondents who had not yet been contacted of the amendment to the law. Those respondents already interviewed in ongoing longitudinal studies will be informed of the amendment to the law at the time of the next round of data collection. [Phillips, 2002]

After several careful readings of these three statements from NCES relating to the new confidentiality assurances provided to respondents, we are still uncertain about when exactly the changes were introduced, in which surveys, and what language was actually used in each. We do know that the cover page of survey questionnaires in the field in the Spring of 2002, at least as shown on the NCES website, still used an unmodified assurance.¹³

Of even greater importance is that confidentiality assurances quoted by Phillips, and referred to in more general terms in standard 4, seem inconsistent with our understanding of the spirit of the

OMB Federal Statistical Confidentiality Order. Appendix B of that order [OMB, 1997: 35049] dealing with Confidentiality Pledges makes a distinction between programs that are exclusively statistical in nature, on the one hand, and those where the purposes of the collection are not exclusively statistical or where the data may be disclosed in a form or manner that may permit use of the data in identifiable form by other agencies or persons for purposes other than statistical purposes, on the other hand. Appendix B further provides an unqualified confidentiality assurance to be used by those programs that are exclusively statistical. The same appendix, however, cautions that when a confidentiality pledge is made by any other statistical program such pledge may not include any language that might reasonably be confused with the language that the exclusively statistical programs are permitted to use.

In the past NCES was properly counted as an agency whose programs were wholly statistical in nature. However, as modified by section 508 of the Patriot Act, NCES survey programs now clearly fall into the category of statistical programs where the data may be disclosed in a form or manner that may permit use of the data in identifiable form by other agencies or persons for purposes other than statistical purposes. Thus NCES programs may no longer use the unqualified confidentiality pledge specified in appendix B. Unfortunately, the new confidentiality assurances quoted by Acting Commissioner Phillips and provided for by NCES in Standard 4 seem highly likely to be confused with such an unqualified confidentiality pledge by many. (Clarity seems particularly important in cases such as the present one where respondent cooperation could lead to substantial harm.). We would also emphasize that the OMB order is

not expressing a unique position, but is completely in line with the position taken in a range of normative documents, whether policy or ethical that refer to the responsibilities of data collectors to data providers (for example, ASA [1999], National Research Council [2001], United Nations Economic and Social Council [1994]).

In fact NCES does know better and has been explicit in informing responding institutions about limitations, other than those imposed by the Patriot Act, to its confidentiality assurances. For example, in the Graduation Rate Survey Screens for 4-year Institutions carried out as part of the Integrated Postsecondary Education Data System (IPEDS) [accessed at <http://nces.ed.gov/ipeds/pdf/spring2002screens/gr-4yr.pdf>] on 6/11/02] after the legal basis for the confidentiality assurances are stated in the section on Confidentiality of Data of the general instructions, the limitations to these assurances coming from the Freedom of Information Act are described in full detail:

The Freedom of Information Act requires that data retained by the Federal Government must be made available to the public so long as the rights to privacy of individuals are not violated. When requested, data collected in this survey will be made available to the public in the form of diskettes or via Internet. Data cells containing fewer than three individuals will be removed. The database will contain all of the data items on the report (except those which might identify individuals), as well as the names of institutions submitting the reports. [p. 21]

In still another context, NCES released a working paper in early 2002, even as it was using outdated confidentiality assurances in ongoing surveys and on its website, that recognized and discussed the legal and ethical responsibilities in research and data gathering [Arafeh and McLaughlin, 2002]. As Arafeh and McLaughlin observed

The impetus for regulations and guidelines regarding the ethical treatment of human subjects was misconceived and misguided research such as that which took place during World War II or the Tuskegee experiment on syphilis, for example. In cases such as these, a number of researcher activities resulted in subjects being emotionally and/or physically abused or endangered. In part, this was because subjects were not informed of the research's potential effects on them, were not given the opportunity to consent to their participation in such studies, were exposed to dangerous or atrocious conditions as part of the study's design, were not allowed to withdraw from a study, and the like. In contrast, and to ensure such atrocities would not occur again, human subjects regulations and guidelines were predicated on the belief that human beings have certain unalienable rights such as the right to the property of one's body for which one can and should make rational, informed decisions as regards conduct and conditions. Autonomy, privacy, safety from harm, and fairness also underpin human subject guidelines. In the broadest sense, these guidelines translate into researcher concern for risk/benefit assessment, informed consent, and confidentiality. [2002: 8-9]

We would only add to this excellent summary, the documented misuses of population data systems in the United States and elsewhere that have led to human rights abuses [Seltzer and Anderson, 2001].

Finally, NCES has indicated that its new draft statistical standards, including the confidentiality assurances it contains, are being reviewed in light of comments received. It has described the review process in the following terms,

The schedule we are on will have us submitting our draft standards to OMB by August 1 for their review and consideration. In late July or early August we will also meet with an independent panel of experts that we have commissioned NISS [the National Institute for Statistical Science] to convene for the purpose of reviewing and commenting on our draft standards. Our plan is to have the NISS panel receive the draft that we submit to OMB by August 1. Following the input from OMB and NISS we will prepare a final version for adoption by NCES Senior Staff. This final version will be submitted to OMB for the September deadline and will be posted on our Website [McMillen Seastrom, 2002c].

We are hopeful that NCES, with the support of OMB, will use the occasion of this review to

introduce greater candor in the confidentiality assurances it will be using in its data collection activities in the future.

(2) The federal statistical community

The over-all impact on the federal statistical community of the changed confidentiality environment occasioned by section 508 of the Patriot Act and the various responses of NCES have been very mixed. We were surprised by the number of federal statisticians, at least among those attending the Population Association meetings in early May 2002, who were unaware of section 508, although we understand that the Office of Statistical Policy briefed the statistical agency heads about the then forthcoming legislation at their meeting of October 10, 2001.¹⁴

Others we have heard from down played the significance of section 508, citing various assurances made by NCES staff over the months that there was minimal concern because section 508 would sunset, required a court order, or preserved confidentiality. (As we have shown, section 508 does not sunset, requires only a secret and perfunctory court order, and does not preserve confidentiality, at least not as the term is customarily used.).

On the other hand, some federal statistical agencies and selected personnel in these agencies seemed to be alert from the start to the danger that section 508 posed to the concept of statistical confidentiality. For example, even as the Patriot Act was being signed into law, the U. S. Census Bureau [2002] issued a very strong statement reaffirming its commitment to maintaining confidentiality. Also, as already described, the National Center for Health Statistics quickly took

steps to ensure that the confidentiality assurances used in the NCES Early Childhood Longitudinal Study Birth Cohort (ECLS-B), carried out in cooperation with NCHS, were modified with effect from January 2002 to explicitly take into account the impact of Section 508 of the Patriot Act [Zarate, 2002].

With regard to the Office of Statistical Policy, it is our understanding that that Office first became aware around September 17 of the attempt to include language to amend NCES confidentiality protections in what was to become the Patriot Act. In response, attempts appear to have been made by OMB to have these provisions eliminated or at least make them less objectionable from a statistical policy perspective. In this connection an effort was also made to have these provisions sunset, that is, automatically end after a fixed number of years. However, the Administration's Statement of Administration Policy, dated October 12, 2001, did not raise any statistical policy concerns or express any reservations about section 508 [OMB, 2001b] and, as already indicated, the section did not sunset and the procedural safeguards added to section 508 during the legislative process were of questionable effectiveness.

After the Patriot Act was enacted, OMB seemed to allow NCES to proceed very slowly to bring itself in compliance with the provisions of the 1997 federal statistical confidentiality order [OMB, 1997]. Moreover, the particular wording of the confidentiality assurances agreed to by NCES and OMB, quoted above in section I.C.1 [Phillips, 2002; McMillen Seastrom, 2002a], seemed inappropriately vague, given our understanding of the intent of the 1997 OMB order and the ethical principles on which it is based.¹⁵ On the other hand, during this period, with the active

support of the major federal statistical agencies and many in the user community, the Office of Statistical Policy was trying to mobilize support for comprehensive new legislation to designed to providing legal protection for the confidentiality of all individually-identifiable data (whether they pertain to a person, household, or institution) collected for statistical purposes under a pledge of confidentiality. This initiative also apparently accounts for an otherwise opaque OMB statement in a February 2002 analytic report pertaining to the budget for fiscal year 2003:

In addition, the statistical system is poised to play a significant role in the Nation s response to terrorism and demands to strengthen homeland security. Thus, the 2003 budget includes, for example: ... initiatives to address the implications of the war on terrorism with respect to confidentiality of individual data reports...[OMB, 2002a: 262].

In any case, after mid-March, the Office of Statistical Policy appears to have been able to take a more public role, and, in this connection, we very much welcome the fact that Katherine Wallman from OMB, the U.S. Chief Statistician and a former ASA President, has agreed to participate in a panel discussion on the subject at these meetings. Perhaps even more important, in recent months, the Office of Statistical Policy seems to have been successful in gaining more support within the Administration and the Congress for the cause of statistical confidentiality.

(3) Others in government

If NCES and OMB were relatively inactive in responding to section 508, almost appearing to act for some time after it became law as if it did not exist, Congress did not hesitate to move forward on the matter. In late February 2002, after a period of consultations,¹⁶ Congressman Michael N. Castle, Chair of the Education Reform Subcommittee of the House Committee on Education and

the Workforce, introduced the Education Sciences Reform Act of 2002 to provide for improvement of Federal education research, statistics, evaluation, information, and dissemination, and for other purposes (HR 3801). The bill was approved by the House on a voice vote with bipartisan support at the end of April 2002 and sent to the Senate. This legislation is now with the Senate Committee on Health, Education, Labor, and Pensions. Section 401 of this legislation simply recodifies section 508 of the Patriot Act, now divorced from the language and concerns of that Act. Since the language of section 401 is indirect, its intent may not be apparent. In any case, no discussion of section 401 was recorded either in the Committee or on the House floor, prior to its approval by that body.

(4) The statistics profession

The American Statistical Association's Committee on Privacy and Confidentiality was active in monitoring developments and in advising the ASA President on an appropriate response.

Individual ASA members, including individual members of the ASA's Committee on Professional Ethics, were also active in this process. As already indicated, ASA President Straf [2002a] addressed the issue of section 508 in his first Presidential Corner article in the January 2002 issue of *Amstat News* and it was also referred to in David Banks [2002] article in the winter issue of *Chance*

In mid March 2002 after receiving the necessary approvals,¹⁷ ASA President Straf, wrote to Congressman Castles and the ranking minority member on the Education Reform Sub-committee, to which HR 3801 had been referred, to express the ASA's concern about how this legislation

dealt with the issue of statistical confidentiality.

The Congress has enacted strong measures to protect confidentiality, in particular for the National Center for Education Statistics. Confidential data may not be subject to subpoena or used for any purpose that is not statistical. Felony penalties are provided for violations. We believe the intent of H.R. 3801 was to preserve and even extend this protection of confidentiality.

A problem occurs, however, because The USA Patriot Act provides for an unprecedented exception to the confidentiality principle. The Act allows individually identifiable data collected under a pledge of confidentiality in surveys of the National Center for Education Statistics to be made available to law enforcement officials, upon court order, in order to investigate crimes of terrorism. H.R. 3801 could continue this practice.

The American Statistical Association does not want to deter doing all we can to combat terrorism. Indeed, we have galvanized our membership to contribute to that effort. Our concern is that the benefits of making confidential data available for law enforcement purposes appear to be far outweighed by the risks to our federal statistical system and the potential damage to the credibility of our nation's information. The information in question may not be necessary; to date, no law enforcement agency has sought it. But the specter of an exception to the confidentiality principle persists. [Straf, 2002b]

Unfortunately, the letter was sent after the Sub-committee approved the bill and sent it onto the full Committee on March 13 and a day before the full Committee held its only mark-up session on the legislation. (In view of the lateness of the hour, the letter was sent by fax to Congressman Castle and several other key representatives.) Fortunately, President Straf received more timely approval to send essentially the same letter to Senator Kennedy (Chair of the Senate Committee on Health, Education, Labor, and Pensions and Senator Judd Gregg, the ranking minority member, before any hearings or Committee meetings on the measure were scheduled [Straf, 2002c].

In addition, JSM 2002 is providing two formal opportunities for discussion of the subject to take place. The first is the contributed paper session, Quality and Responsibility in Government Surveys, in which this paper is being presented. Second, a special panel discussion, Breaking the Promise after 9-11: Confidentiality in the Age of Terrorism, to be held on August 13, featuring Marilyn McMillen Seastrom, William Seltzer, Kenneth Prewitt, and Katherine Wallman. The panel session was organized by Gerald Gates, chair of the ASA Privacy and Confidentiality Committee, with the encouragement of President Straf, and was selected by the JSM 2002 Program Chair, to be one of the two late-breaking sessions to be included in the final program. In the words of the session organizer, the session panel will weigh the tradeoffs, discuss the role of informed consent procedures, and consider the long-term implications for federal statistics. The discussion will factor into decisions on the need for, and nature of, a formal response from the statistics profession. Given these two formal appearances of the topic on the program, it is likely that it will be the subject of wider discussion in the profession than heretofore.

(5) The general media, privacy advocates, and major data providers in the academic community To date, as far as we are aware, this issue has received no coverage in the general media. One story did appear in an online newsletter addressing privacy concerns, [GCN@INFO.POLIC](#), on March 4, 2002, Education Statistics Agency Plays Loose with Privacy [Gellman, 2002]. Unlike some in the privacy community, Gellman did not display a general distrust of statistics or the federal statistical system. For example, he referred to the confidentiality laws protecting the Census Bureau and several other agencies as a reasonable middle ground. Statistical data is available for legitimate purposes under controlled conditions that provide reasonably good privacy

protections. Instead Gellman focused only on NCES, at one point observing, in a burst of misplaced zeal, NCES sold its birthright. He concluded

NCES has demonstrated an appalling lack of judgment. After looking at the new law, schools would be acting reasonably to protect themselves and their students if they decided not to provide data to NCES in the future.

Perhaps more importantly, the major data providers, particularly the degree-granting colleges and universities seem as yet unaware of section 508 of the Patriot Act (and its gestating offspring, section 401 of HR 3801). For example, a story entitled *Colleges Fear Anti-Terrorism Law Could Turn Them Into Big Brother* that appeared in *The Chronicle of Higher Education* [Carlson and Forster, 2002: 31], while recounting a series of concerns expressed by college and university administrators and faculty about many provisions of the Patriot Act, made no mention of section 508.

At some point, this ignorance is likely to vanish. Universities may well be concerned that they are submitting complete student and faculty lists with identifying information and stratification characteristics to NCES, without knowing that such lists could be provided to the Justice Department under section 508. They may justifiably feel that NCES should have informed them promptly about the change in law. (Contemporary lessons in other fields abound where it was the failure to frankly and fully to disclose problems that caused more trouble than did the underlying problem itself.) It would appear, moreover, given the NCES sample designs, that those colleges and universities who are asked most frequently to provide NCES with such lists, and are thus the most likely targets of any use of section 508, are the very institutions likely to be

most vocal about the situation.

Part II: Issues

A. Types of Threats and Data Misuses

In general, the release of individually identifiable data in the custody of federal statistical agencies, or that have been collected in the name of such agencies or for the cause of statistics generally, poses different sorts of threats to the statistical agencies and the responding public. For the statistical agency, the threats include fears of loss of respondent confidence (leading to lower response rates or more response errors and loss of political support), violation of applicable confidentiality laws, and the opprobrium of professional colleagues and possibly the public when policy and ethical norms related to confidentiality appear to be violated. For responding public, threats from disclosure of protected data range from simple embarrassment through annoyance (and possibly costs) if the disclosures result in privacy invasions, to placing respondents (and persons with similar characteristics) at jeopardy for administrative detention or criminal prosecution.

The most serious threats to respondents are associated with two different kinds of potential misuse of statistical data systems. The first involves using the identifiable data files (paper or machine readable) to obtain additional information about named individuals. (For example, using a data file to discover where and with whom William Seltzer lived in 2000 or what Margo Anderson's earnings were.) The second kind of misuse involves using a data file to identify all members of a targeted population sub-group. (For example, using a data file to determine all

persons who are Japanese Americans or have Mohamad in a name field.) In practical terms, if the data file is large, this second type of misuse will usually depend on the availability of a machine readable data file.

It should be understood that neither of these potential misuses are abstract. They have roots in the past and are presently embodied in section 508 of the Patriot Act and reflected in other current legislative proposals.

(1) Some Historical Background

The Patriot Act is not the first instance when attempts were made to waive the legal guaranties of statistical confidentiality in a time of national crisis.¹⁸ By way of comparison, we recount one such episode from the late 1930s and early 1940s, leading up to the inclusion in the Second War Powers Act of a provision repealing the confidentiality protections of Title 13 governing the U. S. Census Bureau. This provision removed the statutory guarantee of statistical confidentiality from the enactment of this war time measure in March 1942 until its repeal in March 1947.

As with many aspects census-taking and official statistics, the modern concept of confidentiality of statistical data emerged only over time. Through the 1880s, individual census schedules were not considered confidential documents, and in fact, in the early 19th century, were posted in public places for the local citizenry to review to make sure they were complete and accurate. By the middle of the 19th century, Congress and census officials began to be concerned about such public posting, and discontinued it. Instead census officials concerned with the integrity of the

enumeration increasingly worried about an enumerator revealing information improperly, or making use of census information for private benefit. The instructions increasingly warned enumerators of their duties in this regard, and by 1910, the first presidential census proclamation proclaimed that "The census has nothing to do with taxation, with army or jury service...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" [Barabba, 1975: 27].

Nevertheless, over the years, various federal agencies, ranging from the FBI to The Women's Bureau, state and local governments, and courts attempted to gain access to individual census forms. These requests, coupled with the growth in the collection of economic statistics, prompted census officials to take an increasingly strict interpretation of who could view a census schedule, how the completed schedules were to be handled, and what could be published. Most requests for identifiable micro data were not granted, though some were. Yet, each request, whether granted or not, tended to tighten the constraints upon release of individual level reports.

Title 13 was first enacted in 1929, codifying a set of legal and administrative practices that had been emerging in census taking and official statistics in the United States over the previous 40 years. Thus it is not surprising that one of its provisions, Section 11, gave statutory protection to the modern concept of statistical confidentiality. Section 11 stated,

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. [Public Law 13, 71st Congress, June 18, 1929]

Similarly, Section 18 of Title 13, authorized the Census Director, to provide individuals with their own returns, undertake special tabulations, and

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...*Provided, however,* 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.

By the late 1930s, therefore, statistical confidentiality was embedded in law and the practice of the Census Bureau. Other government agencies stopped trying to gain access to individual level census questionnaires for administrative purposes and the principle and legislation appeared secure.

Nevertheless, as war broke out in Europe in fall of 1939, the Roosevelt administration found the constraints of Title 13 burdensome and sought to amend it to support national defense. In November 1939, the Attorney General drafted a bill to amend the census statute to give the military and intelligence agencies access to individual level census micro data and transmitted this proposal to the Bureau of the Budget. The memorandum accompanying the draft legislation noted,

Under existing law individual reports of the census office are confidential and may not be examined by any person other than sworn employees of that office. While this rule of law is generally desirable, it appears advisable in the interests of national defense to make an exception in connection with investigations of violations of the laws against espionage and other matters relating to national defense. In connection with such investigations the Federal Bureau of

Investigation of the Department of Justice, the Office of Naval Intelligence of the Department of the Navy, and the Intelligence Division of the Department of War, should be permitted to have access to such reports. [FDR Library, President's Official File: 3b-3c, Department of Commerce, Box 6, Folder: Commerce Department, 1939-1940, Census Bureau]

The actual text of the bill, much like the Patriot Act, attempted to accomplish its purpose by adding new language into the very provision that explicitly guaranteed statistical confidentiality in that case, Section 11 of Title 13. The proposed new legislation amended Section 11 by inserting the following:

Provided, however, that the records of the Bureau of the Census, including the individual reports, shall be available to the Federal Bureau of Investigation of the Department of Justice, Office of Naval Intelligence of the Department of the Navy, and the Intelligence Division of the Department of War in connection with violations of the laws against espionage and other matters relating to the national defense whenever, in the opinion of the Attorney General, the Secretary of War or the Secretary of the Navy, the public welfare would be served by according such access to said records. [FDR Library, President's Official File: 3b-3c, Department of Commerce, Box 6, Folder: Commerce Department, 1939-1940, Census Bureau]

The Budget Bureau sent the draft legislation and covering memoranda to the Commerce Department, which in turn sent them on to the Census Bureau. When the bill arrived at the Bureau, the reaction was immediate. Officials mobilized to squelch the legislation as quickly as possible. Calvert Dedrick, Chief Statistician, Division of Statistical Research, wrote to Stuart Rice, Chairman of the Central Statistical Board on December 5, 1939: We consider this one of the most dangerous pieces of legislation which could be introduced, particularly at the time of the decennial census and during a campaign year. Dedrick included a four page memorandum detailing the history of the development of the confidentiality requirements protecting individual level census information. The Attorney General's recommendation, he pointed out, runs

directly counter to the development of public policy in this respect for the past 60 years. [RG29, NARA, Entry 210, Dedrick Papers, Box 210, Folder: Rice, Dr. Stuart A., Dedrick to Rice, December 5, 1939; RG51, NARA, Entry 20A, History of General Legislation, 76th -79th Congress, 1939-1946 (39.1) (Legislative History of Unenacted and Vetoed Public Bills), Box 27, Folder C158(1)-(5), Commerce Department, Census Bureau # 2, Dedrick to Austin, December 5, 1939].

A confrontation between the Department of Justice and the Department of Commerce loomed if the Bureau strenuously opposed the legislation. David Niles, a trusted aide of Harry Hopkins, then Secretary of Commerce, responded to the emerging opposition in the Census Bureau by seeking guidance from the President on the matter. On December 7, 1939, Presidential Secretary Pa Watson sent a memorandum to Roosevelt, along with a copy of the draft legislation, informing the President that

Niles said it had never been done and the Census Bureau would like to get the President's reaction before they formulated their plan of action. If the President is interested, Niles will not make any opposition; otherwise, I believe they [the Commerce Department] will oppose it. [FDR Library, President's Official File: 3b-3c, Department of Commerce, Box 6, Folder: Commerce Department, 1939-1940, Census Bureau]

The next day Roosevelt dictated his response through Watson,

Tell Dave Niles that unrestricted access to Census files should not be given to Army or Navy Intelligence or F.B.I. However, where G2 [as Army Intelligence was called], O.N.I. or F.B.I need information regarding a specific person, the information should be given to them in confidence after they have stated the reason for asking it. [FDR Library. (POF), 3b-3c, Department of Commerce, (Box #6), Folder: Commerce Dept., 1939-40 Census Bureau. A copy of this memorandum is also in the FBI 1939 folder, POF, 10b, at the FDR Library (O Reilly, 1982,

footnote 32)]

Roosevelt's brief response provides little confidence that he was concerned with preserving statistical confidentiality. Nor did he clarify what to do with the draft legislation. His response suggests tacit support for amending Title 13 to make the information on individuals and firms available to the intelligence agencies. We have been unable to find records indicating if Watson ever communicated Roosevelt's response to Niles, or if Niles ever communicated Roosevelt's wishes to the Census Bureau, G2, ONI, or the FBI. The normal channels of communication between Watson and Niles would have been oral.¹⁹ Roosevelt was proposing something that was illegal. The Census Director could not lawfully provide such information regarding a specific person to the intelligence agencies. It is not surprising that Roosevelt's directive, if it was transmitted, was not transmitted through normal bureaucratic channels.

Indirect evidence, nevertheless, suggests that Bureau officials were aware of the interest in the administration in giving the intelligence agencies access to individual level census reports. For example, at a meeting of the American Statistical Association-American Economic Association Census Advisory Committee (CAC) in the fall of 1940, William Mott Stewart, Census Director during the 1920s, asked the current Director, William Lane Austin, to report if the Justice Department had requested names of individual aliens from the Bureau, or if there had been requests from the Army or the Navy for names of individual manufacturers. Austin reported there had been no such requests [RG29, NARA, entry 148, General Records of the Census Advisory Committee, Meeting of October 11 and 12, 1940].

Bureau officials continued to oppose the legislation in early 1940 as the enumeration date of the 1940 Census approached. Ultimately FDR agreed to withdraw consideration of the legislation, as officials pointed out it conflicted with Census Proclamation which Roosevelt had issued. In a memorandum to the President in late February, Bureau of the Budget Director Harold Smith noted the language concerning census confidentiality in the President's recent proclamation of February 9, 1940 pertaining to the 16th census, and reminded Roosevelt, that "It does not seem to me, therefore, that the enactment of the legislation proposed by the Department of Justice should be considered as being in accord with your program, and, if you approve, I will so advise the Attorney General and the other departments which have submitted their views with respect thereto [FDR Library, Presidents Official File (POF) 3b-3c: Folder: Commerce Dept., 1939-40 Census Bureau]. In a hand written note, the President replied, "I agree with you [Note from FDR to HDS, 3/2/40]."

The issue, however, did not die. While Roosevelt was convinced that a legislative battle over Title 13 during a census and an election year was politically dangerous, there are again strong signals that he was not going to let the issue die. In 1941, secure in their win from the 1940 election, New Dealers again looked at strengthening national defense and again looked to gain access to the individual level information in census data. William Lane Austin, Census Director who led the battle against the 1939 legislation, retired in January 1941, and was replaced on May 22, 1941 by J.C. Capt, a Director much more attuned to administration wishes. Almost immediately, on June 6, 1941, Census Director Capt initiated and obtained the support of Commerce Secretary Jesse Jones for legislation to eliminate the 1941 Census of Manufactures, to

provide authority for periodic surveys for national defense needs, and to make individual level census reports available for use in the national defense program. Section 3 of the S1627 provided:

That notwithstanding any other provision of law, any individual census report or any information contained therein may be used in connection with the national defense program under such rules and regulations as may be prescribed, with the approval of the President, by the Secretary of Commerce. No person shall disclose or make use of any individual census report or any information contained therein contrary to such rules and regulations; and anyone violating this provision shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding \$500 or be imprisoned not exceeding six months or both. [Congressional Record (77th Cong., 1st Session), volume 87, pt. 6, p. 6969, August 11, 1941]

The Senate report accompanying the bill was explicit about the goals of the legislation,

The needs of the defense program are of such a character as to require full and direct information about specific individuals and business establishments. It is clearly the intent of Congress and of the administration to implement in every possible way the defense program. An essential part of this implementation must be through the proper use of statistical data to speed production and to provide the detailed knowledge needed for the planning of total defense. To continue to impose the rigid provisions of the present confidential use law of the Census Bureau on data now in the possession of the Bureau and that to be gathered and used for national defense would defeat the primary objects of the legislation here proposed. As a safeguard against the possible misuse of information submitted in individual census reports, the Secretary of Commerce is given the authority to prescribe with the approval of the President the terms and conditions for use in the defense program only of such information. A penalty is provided for the disclosure of any individual census report or any information contained therein contrary to the terms and conditions prescribed by the Secretary. [77th Congress 1st session, Senate Rept 495, June 26, 1941, to accompany S 1627]

The bill passed the Senate in August 1941 and went to the House, where it remained until the attack on Pearl Harbor brought the United States into the war. Four days later, on December 11, 1941, J. C. Capt reminded the Commerce Secretary that the Census Bureau was still constrained

by the confidentiality requirements of Title 13, and proposed to write the language of S1627 into an executive order to get around the ban. As Capt wrote,

[T]he Bureau of the Census has no authority at the present time to permit other governmental agencies to obtain from Census records information about individuals or business establishments that may be indispensable to the defense of the nation. Authority therefore is needed for the Bureau of the Census to make available for war purposes any record of information in the possession of the Bureau of the Census when directed to do so by the Secretary of Commerce.

In my judgment, it is necessary to have these powers vested in the Secretary of Commerce at once to make possible the flexible, efficient, and economical war-time operation of the Bureau of the Census in obtaining and making available statistics for planning and directing war efforts. [NARA, RG40, General Records of the Department of Commerce, Office of the General Council, General Council s Subject and Index File, 1903-1946, Box 152, File 5706 -33. Memorandum from J.C. Capt to the Secretary of Commerce, 12/11/41]

This time, it was the Justice Department, now under a new Attorney General, that objected to the proposal to void the confidentiality provisions of Title 13. The Attorney General s Office decided that there was no legal authority for such an Executive Order [NARA, RG40, General Records of the Department of Commerce, Office of the General Council, General Council s Subject and Index File, 1903-1946, Box 152, File 5706 -33. Memorandum to the file, E.T. Quigley, 12/23/41].

Instead, the matter was handled legislatively and incorporated into section 1402 of the Second War Powers Act enacted on March 27, 1942, which in part read,

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... [U.S. Code Congressional Service, 1943, P.L. 507, 77th Congress, 2d Session (S2208)]

Although there were slight differences of wording between Capt s initial legislative effort of the previous year and section 1402, with the former explicitly referring to any individual report, section 1402 effectively implemented Capt s and the administration s proposals.

The language of the 2001 Patriot Act, echoing the language of the proposed 1939 amendment to Title 13, of Director Capt s proposed legislation and Executive Order, and of section 1402 of the Second War Powers Act, is so broad that it permits using protected data to pursue both individual suspects and to identify all members of a suspect population subgroup.

One difference between the 1942 Second War Powers Act and the Patriot Act occurred in the period after these laws were enacted. Both laws contain language indicating that procedures for the release of protected information need to be developed.²⁰ In the case of the 1942 War Powers Act, the Presidential Executive Order (# 9157) as called for by the act was issued on May 9, 1942, about a month and half after the law s enactment on March 27, 1942 [U.S. Code Congressional Service, 1943]. One important feature of this order was the promptness with which it was issued. Equally important, was that the order prescribed that at each stage of the process of the release of protected information under the Second War Powers Act that if the requested information is of a statistical character that the Division of Statistical Standards of the Bureau of the Budget (the predecessor of OMB s Office of Statistical Policy) be informed. It would appear this represented an effort by Stuart Rice, then the Assistant Director for

Statistical Standards in the Bureau of the Budget, to control Census Director Capt's clear enthusiasm to open the records of the Census Bureau to the war agencies.

By contrast, under the Patriot Act, NCES, the Department of Education, and the Department of Justice, completely bypassed the Executive Office of the President and the Office of Statistical Policy. As a result, the latter Office appears to have been relatively inactive until March or April 2002.

The final questions are whether the efforts to repeal the confidentiality provisions of Title 13 in fact affected individuals during World War II and how the confidentiality provisions were restored. Our research in this regard is ongoing, and we provide only limited results here. As noted in Seltzer and Anderson (2000), by early 1942, the Census Bureau was providing tract level tabulations of Japanese Americans from the 1940 Census to the Office of Naval Intelligence, had out posted one of the most senior members of the Bureau's technical staff, Calvert Dedrick, to San Francisco to assist the Western Defense Command of the War Department in the evacuation and internment effort, and provided census block maps showing the number of Japanese American enumerated as residing in each block to assist round up operations [Seltzer and Anderson, 2000; summarized in Seltzer and Anderson, 2001].²¹ Our review of the policy and bureaucratic discussions surrounding these decisions indicates that Census Director Capt and others, including the President, were willing to disregard the basic pledge made to the American public that a person filling out a census form would not be harmed in any way by furnishing the information required.

Section 1402 of Title XIV of the Second War Powers Act was repealed as part of the First Decontrol Act of 1947 (S931), Chapter 29, Public Law 29, passed March 31, 1947, (50 U.S.C.A. Appendix, Section 644a). The act ended governmental control of the economy except in the case of commodities and products that were still in short supply or needed control during reconversion at home or abroad (e.g., rubber and sugar). The opening section of that law noted that The Congress hereby declares that it is vital to a free economy and full production in the United States that all emergency controls and war powers under the Second War Powers Act be removed except in certain limited instances. The language continued by detailing the limited circumstances in which control could continue, with no further mention of Section 1402.

(2) Some parallel current concerns

The importance of the issues raised by section 508 and the responses to it by NCES and others is exemplified by two ongoing endeavors one statistical and one legislative. Each poses a potential risk to the future of statistical confidentiality, a risk enhanced by the precedent of section 508 of the Patriot Act and reinforced by section 401 of HR 3801. These two examples are cited not only for their own relevance, but also to remind us all that there are quite likely to be other ongoing developments that, unless identified and responded to in a timely manner, pose substantial risks to statistical confidentiality. It should also be noted that these two examples illustrate that risks to confidentiality can arise from our own actions as statisticians and the actions of others in the example cited, actions in the legislative arena.

(a) U.S. Census Bureau s ESCAPII data files with individual identifiers

A traditional operational safeguard the Census Bureau has relied on to protect the confidentiality of identifiable microdata was that names and addresses are separated from the electronic files that contain an individual's answers when no longer needed, to protect the respondent's confidentiality [U.S. Census Bureau, 2001]. Indeed, in prior decennial censuses the machine readable files did not contain name or individual address information other than the census geocodes and in some earlier censuses the actual address information was recorded in the house listing book physically separate from the census enumeration forms. All these steps added to the difficulty of using recent censuses to trace individuals, certainly on a mass basis.

However, as part of Census 2000 processing for the first time personal identifiers have been captured from the forms [Barron 2002; Fay, 2001: 2]. These computer files permitted the Bureau, as part of the 2000 Census evaluation program, to carry out a series of sophisticated case by case matches to all 280 million or so individuals enumerated in the 2000 Census [Mule, 2001]. Responding to a suggestion that it would be prudent to delete these files now that the results of these matches had been taken into account in adjustment and other technical and policy decisions [Seltzer, 2001b], the Acting Census director responded

the Census 2000 files with individually identified data are still very much needed. These files are being retained for two sets of critical activities. First, we are in the process of further developing these files for permanent archiving of the Census 2000 responses. Once these indexed archival records are produced, they will be provided to the National Archives and Records Administration, in accord with our negotiated agreement, and to our National Processing Center for age search purposes. Secondly, there are several critical evaluation and review projects under way that require individually identified data, even though, as you are aware, the recommendation and reports for the Executive Steering Committee for Accuracy

and Coverage Evaluation (A.C.E.) policy (ESCAP II) have been completed. Evaluations will continue for several years, including those relating to why the A.C.E. failed to identify erroneous enumerations. Furthermore, research on duplication will continue over the decade in preparation for the 2010 census. These data of course will remain confidential within the U.S. Census Bureau.... Please be assured that we will continue to provide the same legal, technical, and operational safeguards to the Census 2000 and survey files as we have provided in the past to sample survey files with personally identifying data. [Barron, 2002]

There are always valid reasons to retain almost any file once created. Yet, if the principle of statistical confidentiality is itself under stress as we now fear, we think that it would be prudent for the Census Bureau to reconsider its decision to retain these files in their current form.

Moreover, such a reconsideration will need to take into account that the risks of substantial harm to respondents is far greater from files based on complete counts than from those based on samples [Seltzer and Anderson, 2001: 496-497]. It appears from Dr. Barron's response that the added risk associated with full-count files was ignored in the earlier decision. Finally, it is not at all clear why the further study of duplicate enumerations and other evaluation issues requires the full census file rather than a suitable sample drawn from this file, particularly since the studies carried out to date based on the full file should enable Census Bureau statisticians to develop reasonably reliable variance and bias estimates for ensuing studies limited to a sample of census records.

(b) Senate bill 1733, Name Matching for Enforcement and Security Act of 2001

In late November 2001, Senator John Edwards (Dem - NC) introduced a bill to develop and implement a unified electronic data system to enhance access to information that is relevant to determine whether to issue a visa or admit an alien to the United States, and for other purposes.

The proposed legislation was referred to the Senate Judiciary Committee, on which Senator Edwards serves, but has not been yet scheduled for a hearing. While the proposed bill is set solely in the context of intelligence, immigration control and law enforcement, it exemplifies a technological approach that could easily be broadened to include population-based statistical files, including hitherto protected files, in response to some new terrorist threat or attack.

B. Implications for Safeguards Against Misuse

(1) Need for reassessment in light of recent developments

As we have stressed elsewhere a complementary set of safeguards is available to statistical agencies to help protect identifiable microdata from being misused through breaches in statistical confidentiality or otherwise [Seltzer and Anderson, 2001; Seltzer, 2001a]. These safeguards include substantive, technical or methodological, and organizational and operational approaches as well as legal and normative safeguards.

As we believe we have demonstrated in this paper, as important as legal safeguards are to the protection of statistical confidentiality, such safeguards are placed under special stress in times of war and fear of war. Broadly speaking we suggest that there appears to be strong evidence that during the Civil War, World War I, and World War II, data on individuals collected initially for statistical purposes were used to assist in government efforts to investigate, incarcerate, confiscate personal property, or prosecute those accused of violations against the government.²² In these circumstances, even as we attempt restore the full legal basis for statistical confidentiality at NCES and guard against its erosion elsewhere, we must reassess the other safeguards available to

the federal statistical system.

Beyond legal safeguards, most ongoing work in the federal statistical system on safeguards is in the area technical safeguards and related procedural approaches. Two recent examples of such work may be cited: the recently published set of studies edited by Doyle, Lane, Theeuwes, and Zayatz [2001] and the CNSTAT sponsored study [Duncan, Jabine, and de Wolf, 1993]. Indeed, NCES has been active in this area and the first of these studies includes some of the NCES experience [Seastrom, 2001]. Other examples of NCES work in these areas may be found by searching the NCES website.

As important as technical and methodological approaches are, they are not the only kinds of safeguards available. Indeed, there may be some danger that their very attractiveness for statisticians — they usually depend on statistical methods — may blind us from the need to investigate other kinds of safeguards such as substantive, operational, and normative approaches. In light of the concerns raised by section 508 of the Patriot Act, the balance of this section will further address legal safeguards and normative approaches.

(2) Legal protections and liabilities

Several federal statistical agencies have legislation specifically designed to safeguard the confidentiality of individual responses obtained during the course of their data gathering operations. Other agencies must rely on more general legislation, for example the 1974 Privacy Act, that in a number of circumstances offer far less protection. Among those agencies with

strong laws relating to the confidentiality of statistical information are the Census Bureau, the National Center for Health Statistics, the Statistics Division of the Internal Revenue Service and, until the passage of the Patriot Act, the National Center for Education Statistics. Typically, these laws both prohibit the use of the protected individual information in criminal or administrative proceedings and impose substantial criminal penalties on those in the agency who might divulge the protected information. Such legislation can, if effectively used, deter others from gaining access to protected information, help in developing a concern about confidentiality and data protection issues and procedures among agency staff and management, and may help in promoting respondent cooperation.

Unfortunately, even strong confidentiality legislation appears to be only as enduring as is the will to maintain it and a legislative majority and a presidential signature to permit it to continue. As described earlier, in World War II the confidentiality provisions of Title 13 that provided protection for information provided to the Census Bureau were set aside by the Second War Powers Act enacted in the Spring of 1942. In the case of the partial repeal of confidentiality protections afforded by the 1994 NCES Act, the goal appears to have been to gain access to individual-level student data to investigate or prosecute terrorism. Looked at in starkly quantitative terms these two repeals occurred within 13 and 7 years after the original protections were enacted in 1929 and 1994, respectively.

Moreover, the retrospective character of the repeal of the absolute confidentiality protections provided under the 1994 NCES Act appears to be reasonably secure legally. Although legal

scholars from Coke and Blackstone to Troy have commented on the essential unfairness of retroactive legislation [Troy 1998] and the American constitution explicitly prohibits *ex post facto* laws, the Supreme Court from the earliest days of the new republic limited the scope of this provision [*Calder v. Bull*, 3 U.S. 386 (1798)] to specifically enumerated aspects of criminal law.²³

Moreover, as Justice Chase stated in his opinion

Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement ...[at 391]

In these circumstances, it seems clear that statutory protections of statistical confidentiality while useful in many circumstances, offer limited protections against government initiated efforts to undermine them, particularly in times of national crisis. One important corollary to this conclusion is the heightened importance of other types of safeguards.

(3) The role of policy and ethical norms

At first glance the role of policy and ethical norms may seem a weak defense against misuse. However, the evidence is clear that appropriately placed individuals motivated by such normative concerns can often prevent serious abuses or dampen their impact. In Seltzer and Anderson [2000], we cited the example of Forrest Linder's explicit citing of normative grounds for questioning the wisdom of establishing population registration in 1942 as a war-time measure.

Closer to the issue at hand, we note two examples where heads of federal statistical agencies

risked contempt citations in their efforts to protect the confidentiality of individual data. Two decades ago, in the politically highly-charged run-up to the 1980 Census, the Census Bureau's then director, Vince Barabba, publicly indicated that he was prepared to be cited for contempt of court rather than turn over to a court what he considered to be confidential census materials [Mitroff, et al. 1983: 15]. Similarly, Herman Byer, Assistant Commissioner of Labor Statistics in the late 1940s, recounted the story of Commissioner Ethelbert Stewart's defiance of congressional pressure in the 1920s to reveal identifiable microdata. According to Byers, Stewart was asked at a Congressional hearing to reveal the data on individual automobile manufacturers to Congress, and he refused on grounds of confidentiality. When the committee chair threatened Stewart, Mr. Stewart, our committee will subpoena those records, Stewart responded, You do, and I'll burn them first [Duncan and Shelton, 1978: 168].

Stewart's action, at least as portrayed by Byers, is particularly notable because it demonstrates that the importance of protecting statistical confidentiality has long been recognized and because he took the stand he did even though the materials he sought to keep confidential lacked specific statutory protection. In this, Stewart was also reflecting a picture of continuing vigilance concerning statistical confidentiality by Commissioners of Labor Statistics dating back to the origins of the modern concept.

Congress created the Department of Labor, predecessor of the Bureau of Labor Statistics, in 1884. From the outset, its first Commissioner, Carroll Wright, was cognizant of the need to maintain the confidentiality of responses from individuals and firms. At the time Wright's

investigations into labor conditions were exceedingly controversial. He relied on voluntary responses. He knew he would not receive cooperation from respondents, or confidence in his analyses, without objective and complete data. He made it a point to reassure respondents, for example, telegraphing a San Francisco businessman in 1898 that I pledge my word as a government officer that names of your plants and of city and State in which located shall be concealed. This will be done for all plants. If senator or representative should ask for these names, he should not have them [Goldberg and Moye, 1985: 13].

Both Barabba and Stewart were successful in their efforts to protect statistical confidentiality. Moreover, the stand that each took was consistent with the special responsibilities that accrue to those in positions of authority to protect the professional freedom and responsibilities of more subordinate statistical practitioners to comply with ethical norms [ASA, 1999: II.H.5].

A more extensive discussion of a broad range of coping and prevention strategies for dealing with ethical threats in government statistical work may be found in Seltzer [2001a: section 7].

Part III: Discussion and conclusions

Since some of the events that we have recounted here are still partially conjectural, we would therefore begin by urging that all those involved to be more forthcoming about these events, their role in them, and the lessons learned by hindsight. In this connection, we welcome both factual corrections and support of our factual conjectures. We also welcome views on the soundness of our interpretation of the factual record. In all cases, corrections and comments that contain

concrete evidence are particularly appreciated.

We next would suggest that four inter-related but distinct issues are involved in any thorough discussion of the subject from a statistical policy and ethical perspective. These are:

" The responsibilities and actions of NCES and its leadership when the problem first arose between September 11th and September 20th.

" The responsibilities and actions of NCES and its leadership and those of the federal statistical community after it became clear that a waiver of NCES confidentiality was likely to be a feature of the Patriot Act, and particularly after October 26, 2001, when the Patriot Act became law.

"The responsibilities and actions of the federal statistical community and the statistical profession generally in an era that may place continuing and increased pressures to waive statistical confidentiality for a higher good.

"The responsibilities and actions of the statistical profession toward the current legislative effort to recodify a terrorist exception to confidentiality protections as part of the normal legislative process.

We will close with a few comments on each of these issues.

(1) The immediate reaction of NCES.

In many ways we find the initial response of NCES, both the most damaging and the most understandable of all the actions in this sorry episode. Unless we seriously misunderstand the

nature of the NCES data gathering programs, and we are certainly open to correction, we cannot see how NCES was a ever unique source of useful information in the war on terrorism. We can certainly believe that a particular student or teacher included as one sampled case in an NCES survey seemed suspicious but this individual, and many more, were more likely to be identified by investigative agencies on the ground at the concerned education or training institutions.

However, as we as discussed earlier, taken as a class the NCES data files are not really very useful from an investigative point of view, except possibly the student and faculty lists used for sampling purposes. But these lists are available for only a very small fraction of vocational training facilities. By its apparent failure to think through such issues clearly, to explain them convincingly to colleagues, and to seek the assistance of the broader statistical community when the problem first arose, NCES exposed itself and the entire federal statistical system to a needless and continuing challenge to statistical confidentiality.

Nevertheless, we recognize that the urge to do something almost anything in response to the attacks of September 11th was very strong among most Americans in this period. In these circumstances, we understand and sympathize with those at NCES who believed they had an answer. However, the staff at the Census Bureau and NCHS, for example, were no less patriotic than those at NCES. The question, therefore, arises why did NCES react the way it did, when other statistical agencies, with perhaps richer files, acted otherwise?

We offer one tentative and partial answer. Despite its large and diverse program of gathering primary data, NCES seems to be, as an agency, rather divorced from its data gathering

operations. A relatively small part of its statistical operations are carried out internally and nearly all of its data gathering operations, one time and continuing, are contracted out to private sector vendors. For example, in fiscal 2002, NCES received \$ 198 million in direct funding in the federal budget [OMB, 2001: Tables 1 and 3]. It spent about 3 percent (\$ 6 million) of this amount in-house, and the balance (\$ 192 million) for the purchase of statistical services externally. Of this \$ 192 million, nearly 95 percent (\$ 180 million) was for purchases from the private sector. (Among all federal statistical agencies, NCES in fiscal 2002 was both the largest purchaser of external statistical services and the largest purchaser from the private sector.)

The point here is not to criticize the process of sub-contracting, or the vendors chosen, but rather to speculate whether something in the nature or extent of these subcontracting arrangements contributes to distancing NCES from its ultimate data providers, the responding public and institutions. Perhaps indicative of such an outlook, NCES in its new draft statistical standards, places its entire discussion of confidentiality, including confidentiality assurances to respondents, in chapter 4, Processing and Editing of Data, rather than in chapter 2, Planning and Design of Surveys, or chapter 3, Collection of Data [U.S. Department of Education, NCHS, 2002].

(2) Subsequent reactions to the Patriot Act

While we believe that the efficacy of section 508 of the Patriot Act is open to debate, we consider there is no justification for silence about what happened or the failure to promptly and fully inform respondents and the public about the new limits to confidentiality that followed from section 508. We do not believe that these obligations, up to now, have been fully met.

(3) Responsibilities in a time of crisis

A nation at war is a nation that faces threats to its official statistical system. Acknowledging and understanding those threats are important both to those charged with managing and developing the statistical system, and to the larger political leadership and national public charged with conducting the war. These statements are true whether we are facing a traditional war, a cold war, or a war on terrorism.

Over the past century official statistical agencies have developed practices guaranteeing respondent confidentiality (for organizational and individual respondents) both for ethical reasons, and for practical reasons of assuring truthful data collection. In current official statistical practice there is a sharp distinction between data collected for an administrative purpose, and those collected for a statistical or research purpose. Administrative data are data which fundamentally serve administration purposes. The administrative agency collects identifiable information on individual respondents to secure the administration of the tax, program, or service. Statistical data are essentially anonymous, concerned with distributions, patterns and averages, and individual identifiers function to guarantee data integrity: We don't want two responses from the same business or household. Administrative data which are to be analyzed for statistical purposes are stripped of their identifiers and anonymized to make the data like survey data.

Nevertheless, as we have shown, in times of war and crisis, the temptation to violate those pledges of confidentiality and transform statistical records into administrative and surveillance records can be tremendous. It should be understood that this temptation may be as strong or

stronger among some in the statistical community as among those in the surveillance community. However, if we are to continue to be able to rely on federal statistics with a minimum of willful misreporting and based on reasonably high response rates, statisticians and users of federal statistics will need to renew our joint efforts to protect the statistical system from misuse. As we have argued, this involves attention to a set of safeguards (substantive, technical, operational, legal, and ethical) that are mutually reinforcing.

(4) How should we react to HR 3801

As described in some detail earlier, buried in the midst HR3801, a House approved measure for a major restructuring of federal research and statistics in the education sector, and now pending in the Senate Committee on Health, Education, Labor, and Pensions, is section 401. This section will carry forward the same broad terrorism exception to statistical confidentiality that is now in section 508 of the Patriot Act. HR 3801 drew broad by-partisan support in the House and there was no known discussion of section 401. We would urge that the federal statistical community, the statistical profession, users of federal statistics, and major institutional providers of education data together make a concerted effort to amend section 401 to eliminate the terrorism exception or at least to sunset this exception by the end of 2003. Such a concerted effort with respect to section 401 of HR 3801 is an important element of our general responsibility of promoting safeguards against misuse.

* * * *

Of course, defending against potential legislative or administrative threats to statistical confidentiality is an ongoing effort. In this paper we have discussed several such current and past

threats, most sharing the common feature of explicitly focusing on statistical data. Threats to statistical confidentiality and hence threats to public confidence in the statistical system may also arise from more general legislation. For example, on June 26, 2002, the House overwhelmingly passed (422 to 2) HR 4598, the Homeland Security Information Sharing Act, intended to provide for the sharing of homeland security information by Federal intelligence and law enforcement agencies with State and local entities. Despite its well-defined and restricted purpose, the breadth of the language used in the actual bill to define federal information is so broad that it appears to encompass confidential statistical microdata. Indeed, OMB recognized this concern in its statement of administration policy on this legislation:

While the administration supports the bill's goals, the definition of homeland security information needs to exclude individually-identifiable information that has been collected solely for statistical purposes under a pledge of confidentiality. Unless we preserve the trust and cooperation of respondents to Federal statistical surveys, there will be a significant deterioration in the ability of the Federal statistical system to provide high quality aggregate data to guide critical economic and social policy decisions. [OMB, 2002b]

We join with the Administration in hoping that this matter will be satisfactorily resolved when the Senate takes up this legislation. By the same token, and for the same reasons so well-stated by OMB, we hope that the other homeland security legislation now being considered by the Administration and Congress will be drafted so as to protect statistical confidentiality unambiguously. Finally, it is our hope that the Administration and Congress will also work together to restore statistical confidentiality to the field of education statistics.

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Appendix A - Text of Section 508 of the Patriot Act of 2001

SEC. 508. DISCLOSURE OF INFORMATION FROM NCES SURVEYS.

Section 408 of the National Education Statistics Act of 1994 (20 U.S.C. 9007), is amended by adding after subsection (b) a new subsection (c) to read as follows:

(c) INVESTIGATION AND PROSECUTION OF TERRORISM-

(1) IN GENERAL- Notwithstanding subsections (a) and (b), the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an *ex parte* order requiring the Secretary to permit the Attorney General (or his designee) to

(A) collect reports, records, and information (including individually identifiable information) in the possession of the center that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such information, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) APPLICATION AND APPROVAL-

(A) IN GENERAL- An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the information sought is described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) PROTECTION- An officer or employee of the Department who, in good faith, produces information in accordance with an order issued under this subsection does not violate subsection (b)(2) and shall not be liable to any person for that production.

Appendix B - Time Line of Events Related to NCES and the Patriot Act

(September 11, 2001 - June 30, 2002; provisional)

2001

September

- 11 Terrorist attack on the World Trade Center and the Pentagon.
- 12-16 Use of NCES microdata to fight terrorism first proposed (hearsay evidence only).
- 17 Legislative provisions designed to amend NCES confidentiality protections under discussion and Office of Statistical Policy makes initial efforts to oppose or limit these provisions.
- 20 Department of Justice submits a Consultation Draft of Anti-terrorism Act of 2001 to congress containing language in one section (sec. 158) intended to override the National Statistics Act (sic) to enable results of NCES surveys to be used for terrorist and other national security investigations.
- 21 Acting NCES Commissioner Phillips presentation to Quarterly COPAFS meeting, Washington, DC. No mention of confidentiality issues or proposed legislation, although some general discussion by others of the consequences of September 11 on the federal statistical system took place.
- 24 House Judiciary Committee hearings on the Administration's Draft Anti-Terrorism Act of 2001. Section 158 of the administration draft not among the sections cleared by the ranking minority member. A copy of a section-by-section analysis of the administration bill included in the record.

October

- 2 First version of Patriot act formally introduced in the House by the Chair of the Judiciary Committee. The bill contains no mention of NCES.
- 3 House Judiciary Committee considers the proposed legislation and receives some statements from agencies and others. No mention of NCES.
- 4 Senate Judiciary Subcommittee on the Constitution, Federalism & Property Rights holds hearings on Protecting Constitutional Freedoms in the Face of Terrorism. Discussion was in terms of the September 20 administration draft and two of the ten people making statements referred to sec. 158.

- 10 Heads of federal statistical agencies briefed by the Office of Statistical Policy on the proposed legislation during regular monthly meeting.
- 11 OMB issues its Statement of Administration Policy on Senate bill with no mention of concern about section 508 or statistical confidentiality concerns. Bipartisan leadership in Senate introduces a somewhat different version of the legislation than introduced in the House on October 2, including the text of what will become the final language of section 508.
- 12 OMB issues its Statement of Administration Policy on House bill with no mention of concern about section 508 or statistical confidentiality concerns. Senate approves its version. House accepts the Senate text as its own, including section 508. Subsequently the House modifies other parts of the bill, section 508 remains unchanged.
- 25 Final Congressional approval of the Patriot Act.
- 26 President Bush signs the Patriot Act into law. The Committee on National Statistics holds a luncheon meeting with the federal statistics agency heads. The discussion topic: Implications of War on Terrorism, including changes in confidentiality legislation and issues surrounding a national ID card. NCES does not participate in luncheon.

November

- 26 Authors first learn of the existence of section 508 of the Patriot Act.
- 28 Authors first contact NCES expressing concern about the implications of section 508 on NCES's considerable past achievements in promoting statistical confidentiality.

December

- 3 In further messages to NCES authors explicitly raise issue of misleading statements about confidentiality on NCES website.
- 5 NCES informs us that they are still working on language--to be cleared by OMB, and working on the required confidentiality guidelines to be agreed to by both the Attorney General and the Secretary of Education and that they will modify their website when these issues are resolved.
- 14 Discussion of the implications of the Patriot Act at the Quarterly COFPAS meeting, Washington, DC, including comments by an NCES staff member minimizing the impact of section 508.

2002

January

ASA President Straf devotes his first Presidential Corner column in the January issue of *AMSTAT News* to a discussion of the implications of September 11 to the statistical profession, including some of the issues raised by section 508.

Revised confidentiality assurances explicitly warning about the possible use of information provided to investigate or prosecute acts of terrorism introduced into survey carried out jointly by NCES and NCHS at the request of NCHS.

7-9

In the course of floor discussion at the Conference on Confidentiality, Disclosure, and Data Access Theory and Practical Applications for Statistical Agencies held in Washington, DC, NCES senior staff member indicates that no requests for data have been received under section 508 and provides limited information relating to the origins and anticipated impact of section 508.

29

Authors write to NCES informing them of their plans to prepare the present paper and seeking information from NCES about events leading to the drafting of section 508 and the NCES response, including information on changes introduced into NCES confidentiality assurances.

February

David Banks article on Statistics in Homeland Defense, which refers to section 508, appears in winter issue of *Chance*. Gerry Gates developing proposal for late-breaking session at JSM 2002 on the subject.

27

Congressman Castles introduces HR 3801 to restructure the research and statistical activities of the Department of Education and which contained provisions to include section 508 as part of normal agency legislation.

March

1

Article on college concerns related to the Patriot Act appearing in the *Chronicle of Higher Education* makes no mention of section 508.

4

Gellman article critical of NCES actions with respect to the Patriot Act appears in an online publication for privacy advocates.

7

Authors write to OMB, NCES, and two NCES contractors (RTI and Westat) expressing concerns based on the results of their research that found that NCES surveys with out-of-date confidentiality assurances were still

proceeding through the OMB clearance process in 2002.

19 ASA President Straf writes to Congressman Castle and others in House opposing HR 3801.

April

12 First mention of section 508 of the Patriot Act posted on NCES web site along with a statement that the Attorney General will protect the confidentiality of the data. NCES informs authors of newly posted material and indicates they are in the process of revising their standards and anticipate that a draft of the revised standards, including their confidentiality standard, will be placed on their website shortly.

17 Authors again contact NCES asking for information to assist in preparation of JSM 2002 paper.

25 HR 4598 designed to provide for the sharing of homeland security information, but whose broad language may be construed as also affecting statistical data collected under pledges of confidentiality, introduced in the House.

30 OMB issues brief statement of administration policy on HR 3801 that endorses measure but looks forward to working with Congress to improve the legislation. House passes HR 3801.

May

1 Draft revised NCES statistical standards posted on NCES website for public comment from May 1 to May 31, later extended to June 17.

31 NCES replies to letter of January 29 and message of April 17 from authors. Only new information provided was that the concerns leading to enactment of Section 508, of course, were law enforcement concerns of the affected federal agencies. Those agencies were responsible for the development of the bill.

June

25 NCES reconfirms it has received no requests for data under section 508.

26 OMB issues statement of administration policy on HR 4598 that endorses the goals of legislation, but raises explicit concerns about statistical confidentiality issues. House passes HR 4598. ASA President Straf writes to Senator Kennedy and others in Senate opposing House-passed HR 3801.

Endnotes

1. The law has several different names. Its formal short title is Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001. The parenthetical version of the title is based on the first letters of the full short title. In common use, this is often shortened further to the 2001 Patriot Act or simply, the Patriot Act. We use the final two terms in this paper. The law is also identified as Public Law 107-56 of October 26, 2001 or 115 Stat. 272.
2. Within the National Education Statistics Act of 1994 Act (Public Law 103-382 of Oct. 20, 1994, 20 USCS §§ 9001 et seq.) the confidentiality provisions may be found in section 408.
3. For example, the two authors of this paper first learned about section 508 of the Patriot act at the end of November 2001 from a non-federal statistician.
4. Section 408(b)(2) of this act provides that a Department of Education employee or staff member who knowingly publishes or communicates any individually identifiable information ..., the disclosure of which is prohibited ... and that comes into such employee or staff's possession by reason of employment (or otherwise providing services) ..., shall be found guilty of a class E felony and imprisoned for not more than five years, or fined as specified in ... title 18, United States Code, or both. [NCES website at <<http://nces.ed.gov/statprog/rudman/d.asp>>, accessed 1/30/02]. The amount of the fine specified in title 18 is not more than \$ 250,000 (see also NCES website at <<http://nces.ed.gov/statprog/confid4.asp>>).
5. In an effort to obtain more authoritative information we wrote and sent email messages to NCES on numerous occasions between November 2001 and April 2002 requesting information on this and a number of other aspects of the subject. To date, we have received only limited and guarded responses from NCES to any of the questions we raised. In response to our questions on the role of NCES staff and management in the concerns that gave rise to section 508 of the Patriot Act and the respective roles of NCES professional staff and others in the origins of section 508 [Seltzer to Phillips, letter dated 1/29/02 and Seltzer to McMillen Seastrom, email message dated 4/14/02], we were simply informed that the concerns leading to enactment of Section 508, of course, were law enforcement concerns of the affected federal agencies. Those agencies were responsible for the development of the bill [Phillips to Seltzer, 5/31/02].
6. With the wisdom of hindsight, such an argument seems less persuasive. It would serve to undermine all laws protecting confidentiality statistical and otherwise. For example, it implies the Census Bureau and its staff, once aware that evidence concerning felonies or suspected felons is lurking in the Bureau's protected data files, it must disclose this to the Department of Justice.

Presumably, protected records from the 2000 Census include information about a substantial number of suspect felons, as do many large data sets.

7. For example, Acting Commissioner Phillips made no mention of the issue in his September 21, 2001 presentation to COPAFS [Phillips, 2001].

8. In mid-April 2002, the number of hits dropped sharply to about 160. However, the number subsequently again increased and was 327 as of 6/26/02. By contrast, a search for the term Patriot Act had no hits until mid April 2002. As of 6/26/02 this term had 4 hits.

9. The two surveys identified were the Baccalaureate and Beyond Longitudinal Study Third Follow-up, with RTI as the contractor, and Early Childhood Longitudinal Study (ECLS) - Kindergarten cohort, third grade followup, field test for fourth and fifth grade survey activities, with Westat as the contractor. There may well have been further NCES surveys in the clearance process. However, the identification of two cases was sufficient for the purposes of our assessment.

10. For example, in the case of the survey to be carried out by RTI the study leaflet to be given to respondents stated, all information you or others provide will be used for research purposes only. Similarly, in the survey to be carried out by Westat, the introductory portion of the telephone survey instrument called for interviewers to assure respondents, the information you provide will be kept completely confidential and private as required by law, while the confidentiality assurance on the cover of the draft facilities questionnaire stated in part, No information collected under this authority may be used for any purpose other than the purpose for which it was supplied.

11. According to Zarate [2002], the full text of ECLS-B confidentiality assurance was

All health and development data we collect in ECLS-B will be kept private. When we allow licensed researchers to use a special restricted version of the survey data, we protect your privacy. We assign code numbers in place of names or other facts that could identify you or your child. We gather and protect information in keeping with the requirements of Federal law: The Public Health Service Act (42 USC 242k and 242m), and the National Education Statistics Act of 1994 (20 USC 9003a and 9007, as amended) authorize the collection of these data and, together with the Privacy Act of 1974 (5 USC 552a), protect the privacy of individually identifiable information. These laws limit the use of the data to the purposes for which it was collected in this case, for research and statistical reports, unless the information is acquired by the Attorney General of the United States under court

order to be used to investigate and prosecute acts of terrorism.

12. Written statistical standards were first developed at NCES in 1987 and the present set of statistical standards (available at <http://nces.ed.gov/statprog/1992stand.asp>) was issued by NCES in 1992. As described in the introduction to the new draft standards, the current revision process began in the summer of 1999. Subsequently, they appear to have also become part of the NCES response to the OMB guidelines for ensuring and maximizing the quality of information disseminated by Federal agencies [U.S. Department of Education, 2002]. It was only relatively late in this process that they also seemed to be invoked as an agency response to section 508 of the Patriot Act [McMillen Seastrom, 2002b].

13. See, for example, The Spring 2002 Special Education Teacher Questionnaire, Part b, of the Early Child Longitudinal Study, Prepared for the U.S. Department of Education, National Center for Education Statistics by Westat, which includes the following language on the cover page of self-enumeration form, under the heading Assurance of Confidentiality

No information collected under this authority may be used for any purpose other than the purpose for which it was supplied. Information will be protected from disclosure by federal statute (42 US Code 242m, section 308d).

14. It is likely that the matter was again discussed by the heads of major federal statistical agencies along with members of the Committee on National Statistics at a luncheon meeting on October 26, 2001. At least the announced topic that day of an agency heads luncheon meeting in connection with a meeting of CNSTAT was Implications of War on Terrorism, including changes in confidentiality legislation and issues surrounding a national ID card [accessed 10/25/02 at www.nas.org].

15. Appendix B of the 1997 OMB confidentiality order does not provide for a specific text for the assurance to be used in cases where the unqualified confidentiality assurance is not permitted. In fact, it appears that OMB has some discretion in the matter and a range of different wordings have been approved in different circumstances in the past.

16. We first became aware that such legislation was being considered on February 15, 2002.

17. Between meetings of the ASA Board, all such letters by an ASA President must be approved by a committee consisting of the current ASA President, the immediate preceding President, and the President elect.

18. The section which follows draws on our ongoing research on the history of statistical confidentiality.

19. We contacted Raymond Teichman, supervisory archivist at the FDR Library (email communication of February 12, 2002) to determine the normal channels of communication between Watson and Niles. Teichman indicated that since the library does not have White House telephone records, we are unable to determine if Watson followed up with David Niles. Teichman indicated their communications would probably have been oral. Teichman also indicated that he found no evidence that the White House communicated about the matter with the agencies in writing in the FDR Library.

20. The 1942 law specified that The President shall issue regulations with respect to the making available of any such record, schedule, report, return, information or data, and with respect to the use thereof after the same has been made available. The Patriot Act refers to such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

21. In addition to the note of 12/9/39 forwarding the President's decision to authorize violations of title 13 on an individual basis and Director Capt's request for an executive order modifying Title 13 cited here, other evidence of such hypothesized violations, previously documented in Seltzer and Anderson [2000], included (1) a January 1942 statement by Census Director Capt to the Census Advisory Committee that [i]f the defense authorities ... wanted the names of [missing] Japs ... I would give them further means of checking individuals, (2) a July 1942 memorandum to Calvert Dedrick, then a once and future senior Census staff member, from his military supervisor asking his assistance in obtaining address information for two lists of Japanese Americans, and (3) the large number of individual name searches of the 1940 census schedules carried out by the Census Bureau between July 1941 and June 1942 for reasons unrelated respondent initiated requests.

22. For information about such practices in the Civil War, see Anderson [1988] and for World War I, see Bohme and Pemberton [1991].

23. There is only one aspect of criminal law listed by Justice Chase as constitutionally prohibited that seems to have any applicability to the retroactive character of section 508, i.e., every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender [. This type of prohibited action, however, appears to be directed more toward the evidence needed for conviction than the manner in which evidence was obtained.