

NCES AND THE PATRIOT ACT: AN EARLY APPRAISAL OF FACTS AND ISSUES

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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.

Our full study, is available at <http://www.uwm.edu/~margo/govstat/integrity.htm>, along with related documents and other writings. The study 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. Our presentation at this session is limited to a description of the provisional time line of events related to the subject covering the period September 11, 2001 to June 30,2002, which is drawn from Appendix B of the full study. The full list of references used in the study is also included here.

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 information 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.		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.
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.	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.
		<u>February</u>	
<u>November</u>		–	David Banks' article on "Statistics in Homeland Defense," which refers to section 508, appears in winter issue of <i>Chance</i> . Gerry Gates developing proposal for late-breaking session at JSM 2002 on the subject.
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.	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.
		<u>March</u>	
<u>December</u>		1	Article on college concerns related to the Patriot Act appearing in the <i>Chronicle of Higher Education</i> makes no mention of section 508.
3	In further messages to NCES authors explicitly raise issue of misleading statements about confidentiality on NCES website.	4	Gellman article critical of NCES actions with respect to the Patriot Act appears in an online publication for privacy advocates.
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."	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.
14	Discussion of the implications of the Patriot Act at the Quarterly COPAFS meeting, Washington, DC, including comments by an NCES staff member minimizing the impact of section 508.	19	ASA President Straf writes to Congressman Castle and others in House opposing HR 3801.
2002		<u>April</u>	
<u>January</u>		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.
–	ASA President Straf devotes his first "Presidential Corner" column in the January issue of <i>AMSTAT News</i> to a discussion of the implications of September 11 to the statistical profession, including some of the issues raised by section 508.	17	Authors again contact NCES asking for information to assist in preparation of JSM 2002 paper.
–	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.	25	HR 4598 designed to provide for the sharing of homeland security information, but whose broad
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,		

language may be construed as also affecting statistical data collected under pledges of confidentiality, introduced in the House.

Technical Paper 37. Washington, D.C.: US Government Printing Office.

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.

Barron, William G., Jr. 2002. Email to W. Seltzer, 1/8/02.

Becker, Patty. 2002. “NCES data and privacy.” Association of Public Data Users List Server posting, March 11, 2002.

Bohme, Frederick G. and David N. Pemberton. 1991. “Privacy and Confidentiality in the US Censuses -- A History.” Paper prepared for presentation at the annual meeting of the American Statistical Association, August 18-22, Atlanta, GA.

Carlson, Scott and Andrea L. Foster. 2002. “Colleges Fear Anti-Terrorism Law Could Turn Them Into Big Brother.” *The Chronicle of Higher Education* March 1, 2002.

COPAFS Meeting. December 2001. “Discussion of the Patriot Act.” Quarterly COPAFS Meeting, Washington, D.C., December 14, 2001. Minutes of the December Quarterly Meeting accessed 1/29/02 from the COPAFS website <<http://members.aol.com/copafs>>

Doyle, Pat, Julia I. Lane, Jules J.M. Theeuwes, and Laura V. Zayatz (eds.). 2001. *Confidentiality, Disclosure, and Data Access: Theory and Practical Applications for Statistical Agencies*. Amsterdam: Elsevier.

Duncan, Joseph W., and William C. Shelton. 1978. *Revolution in United States Government Statistics, 1926-1976*. Office of Federal Statistical Policy and Standards. Washington, DC: U.S. Department of Commerce.

Duncan, George T., Thomas B. Jabine, and Virginia A. de Wolf (Eds.). 1993. *Private Lives and Public Policies: Confidentiality and Access of Government Statistics*. Panel on Confidentiality and Data Access, Committee on National Statistics, National Research Council and the Social Science Research Council. Washington, DC: National Academy Press.

Fay, Robert G. 2001. “Evidence of Additional Erroneous Enumerations from the Person Duplication Study.” Executive Steering Committee on Accuracy and Coverage Policy II (ESCAP II), Report 9. Preliminary version, Oct. 26, 2001

Gellman, Robert. 2002. “Education Statistics Agency Plays Loose with Privacy.” GCN@INFO.POLIC, on line article, published March 4, 2002, accessed at <<http://www.gcn.com/cgi-bin/udt/im.display.printable?client.id=gcn2&story.id=18064>>.

Goldberg, Joseph P., and William T. Moyer. 1985. *The First Hundred Years of the Bureau of Labor Statistics*. Washington, DC: US Government Printing Office. 1985).

McMillen Seastrom, Marilyn. 2002a. Email to W. Seltzer, 4/12/02.

_____ . 2002b. Email to W. Seltzer, “NCES Statistical Standards

References

[References marked with an asterisk (*) are available, either directly or through a link, at the website <www.uwm.edu/~margo/govstat/integrity.htm>.]

Anderson, Margo J. 1988. *The American Census: A Social History*. New Haven (CT): Yale University Press.

Arafeh, Sousan and Mary McLaughlin. 2002. *Legal and Ethical Issues in the Use of Video in Education Research*. National Center for Education Statistics Working Paper No. 2002-01. Washington, DC: U.S. Department of Education, January 2002.

ASA [American Statistical Association]. 1999. “Ethical Guidelines for Statistical Practice.” Alexandria (VA): American Statistical Association. Also available at <<http://www.amstat.org/profession/ethicalstatistics.html>>.

Banks, David L. 2002. “Statistics for Homeland Defense.” *Chance* 15:1 (Winter) 8-10.

Barabba, Vincent. 1975. “The Right of Privacy and the Need to Know.” In U.S. Census Bureau, *The Census Bureau: A Numerator and Denominator for Measuring Change*,

- _____. 2002b. Email to W. Seltzer, "NCES Statistical Standards and changes to the NCES Web site to reflect the impact of the USA Patriot Act," 6/2/02.
- _____. 2002c. Email to W. Seltzer, 6/4/02
- Mitroff, Ian, Richard O. Mason, and Vincent Barabba. 1983. *The 1980 Census: Policymaking amid Turbulence*. Lexington (MA): Lexington Books.
- Mule, Thomas. 2001. "ESCAP II: Person Duplication in Census 2000." Executive Steering Committee on Accuracy and Coverage Policy II (ESCAP II), Report No. 20. Washington, DC: U.S. Census Bureau, October 11, 2001.
- National Research Council. 2001. *Principles and Practices for a Federal Statistical Agency*. Second Edition. Margaret E. Martin, Miron L. Straf, and Constance F. Citro, eds. Committee on National Statistics. Washington, DC: National Academy Press.*
- OMB [Office of Management and Budget]. 1997. "Order Providing for the Confidentiality of Statistical Information." *Federal Register* 62:124 (June 27) 35044-35050, accessed 5/30/02 from www.whitehouse.gov/OMB/inforeg/statpol.html.*
- _____. 2001a. *Statistical Programs of the United States Government, Fiscal Year 2002* Report dated September 4, 2001, accessed 5/30/02 from www.whitehouse.gov/OMB/inforeg/statpol.html.
- _____. 2001b. "Statement of Administration Policy, H.R. 2975 - Provide Appropriate Tools Required To Intercept and Obstruct Terrorism (PATRIOT) Act." October 12, 2002.
- _____. 2002a. "Strengthening Federal Statistics (February 4, 2002)." *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2003*, chapter 12, pages 261-264, accessed 5/30/02 from www.whitehouse.gov/OMB/inforeg/statpol.html.
- _____. 2002b. "Statement of Administration Policy, H.R. 4598 - Homeland Security Information Act." June 26, 2002 (House).
- O'Reilly, Kenneth. 1982. "A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security." *The Journal of American History* 69:2 (December) 638-658.
- Phillips, Gary. 2001. "Initiatives in Education Statistics." Presentation to the Quarterly COPAFS Meeting, Washington, D.C., September 21, 2001. Minutes of the Quarterly Meeting accessed 1/29/02 from the COPAFS website <http://members.aol.com/copafs>
- _____. 2002. Letter to W. Seltzer, 5/31/02.
- Seastrom, Marilyn M. 2001. "Licensing." In Doyle et al. *Confidentiality, Disclosure, and Data Access: Theory and Practical Applications for Statistical Agencies*. Amsterdam: Elsevier, chapter 11, pp. 279-296.
- Seltzer, William. 2001a. "U.S. Federal Statistics and Statistical Ethics: The Role of the American Statistical Association's Ethical Guidelines for Statistical Practice." Paper based on presentation to the Washington Statistical Society, February 2001. Draft of September 17, 2001.*
- _____. 2001b. Email to W. G. Barron, Jr. 12/3/01.
- Seltzer, William and Margo Anderson. 2000. "After Pearl Harbor: The Proper Role of Population Data Systems in Time of War." Paper presented at the annual meeting of the Population Association of America, March 23-25, 2000, Los Angeles, CA.*
- _____. 2001. "The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses." *Social Research* 68: 2 (Summer) 481-513.*
- Straf, Miron. 2002a. "President's Corner." *AMSTAT News*, January 2002.
- _____. 2002b. Letter to Michael N. Castle, dated and faxed 3/19/02.
- _____. 2002c. Letter to Ted Kennedy, dated 6/26/02.
- Troy, Daniel E. 1998. *Retroactive Legislation*. Washington, D.C.: The AEI Press.
- United Nations Economic and Social Council. 1994. Report of the Special Session of the Statistical Commission, *New York, April 11-15*. E/1994/29. Also available at <http://www.un.org/depts/unsd/statcom/1994docs/e1994.htm> and reproduced in National Research Council, 2001.*
- U.S. Census Bureau. 2001. "The Public's Privacy - No idle pledge!" Washington, DC: U.S. Census Bureau, November 2001, downloaded from www.census.gov on 10/25/01.
- U.S. Code Congressional Service. 1943. *Acts of 77th Congress, Second Session, January 5 to December 16, 1942*. St. Paul, MN: West Publishing Co.
- _____. 1947. *Laws of 80th Congress, First Session (January 3, 1947-December 19, 1947)*. St. Paul, MN: West Publishing Co.
- U.S. Department of Education, NCHS [National Center for Education Statistics]. 2001. *Programs and Plans of the National Center for Education Statistics, 2001 Edition*. NCES 2001-038, September 2001, Editor, Celestine Davis. Washington, DC.
- _____. 2002. "NCES Statistical Standards." Draft, May 2002. Accessed at 4/30/02 at http://nces.ed.gov/statprog/stat_standards.asp.
- Zarate, Alvan O. 2002. Email to W. Seltzer, 4/11/02.