

KENNETH H. RYESKY, ESQ., STATEMENT FOR THE RECORD, HOUSE COMMITTEE ON WAYS AND MEANS, SUBCOMMITTEE ON SOCIAL SECURITY, WRITTEN COMMENTS ON PROVISIONS RELATING TO SOCIAL SECURITY ADMINISTRATION'S DEATH MASTER FILE.

I. INTRODUCTION:

House Committee on Ways and Means Subcommittee on Social Security held a Hearing on 2 February 2012, regarding the accuracy and uses of the Social Security Administration's Death Master File. Public comments were solicited. This Commentary is accordingly submitted.

II. COMMENTATOR'S BACKGROUND & CONTACT INFORMATION:

Background: The Commentator, Kenneth H. Ryesky, Esq., is a member of the Bars of New York, New Jersey and Pennsylvania, and is an Adjunct Assistant Professor, Department of Accounting and Information Systems, Queens College of the City University of New York, where he teaches Business Law courses and Taxation courses. Prior to entering into the private practice of law, Mr. Ryesky served as an Attorney with the Internal Revenue Service ("IRS"), Manhattan District. In addition to his law degree, Mr. Ryesky holds BBA and MBA degrees in Management, and a MLS degree. He has authored several scholarly articles and commentaries on taxation, including one made part of the printed record of a hearing before the Senate Finance Committee.¹

Mr. Ryesky also engages in genealogical research, and has thereby facilitated the reconnection of relations within his own family approximately six decades following the cut-off of communications with siblings in the old country which was imposed upon his grandfather by the repressive policies of the Soviet Union.

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¹ *Tax: Fundamentals in Advance of Reform*, Hearing before the Committee on Finance, U.S. Senate, 110th Congress, 2nd Session, April 15, 2008, S. Hrg. 110-1037, pp. 113 - 150 <<http://finance.senate.gov/library/hearings/download/?id=fead52be-a791-4105-96da-0010264cd7ed>>.

Disclaimer: Notwithstanding various consultations between the Commentator and other interested individuals and organizations, this Commentary reflects the Commentator's personal views, is not written or submitted on behalf of any other person or entity, and does not necessarily represent the official position of any person, entity, organization or institution with which the Commentator is or has been associated, employed or retained.

III. COMMENTARY ON THE ISSUES:

A. Overview:

The Social Security Administration's Death Master File (DMF) ² is a publicly-available resource of great value to several constituencies, including but not limited to genealogical researchers. But information from the DMF has also been used by unscrupulous individuals for nefarious purposes, including tax fraud. The imperatives of genealogical research and sound tax administration are now on a collision course; nay, they have already collided. Congress now seeks to address the issues regarding the DMF, including H.R. 3215, H.R. 3475, H.R. 3482, S.1534, and including the subject Hearing.

The Commentator now provides to the Subcommittee his perspective, from his personal and professional backgrounds in both tax administration and genealogic research, on the intersection between those two areas.

B. Genealogical Research:

In addition to those who engage in genealogical research as gainful employment, there are many, many more, the Commentator included, who do it in other contexts. The Commentator is very disinclined to refer to these other individuals as "amateurs" or "amateur genealogists" because their research all too frequently is no less extensive, informative, scholarly or successful than that done by the professionals who research genealogy for a living. Accordingly, this commentary will use the term "individual researcher" and similar terms to refer to such persons.

² The DMF is available and utilized in another incarnation known as the Social Security Death Index (SSDI), and is often referred to as such.

Genealogical research plays a vital role in diverse areas of law and society. These include, but are not limited to, identifying the heirs to a decedent's estate,³ and in such a context, an attorney using the skills of an individual researcher can perform the required diligent search for heirs without burdening the decedent's estate with the expense of a professional genealogist.⁴ Indeed, the Commentator has had occasion, in a probate proceeding, to use his individual genealogical research skills to locate heirs theretofore unknown and/or believed deceased by the friends of the testator.

Genealogical research can determine title to real property,⁵ and qualification for loan guarantees for housing.⁶ Genealogical research is often vital to determining the status of Native American tribes and tribal members⁷ (and in such regard, figures into the legal battle over competition against retailers of tobacco products from the untaxed tobacco products sold by Indian tribe members).⁸

The effective repatriation to Americans and others of artwork looted during the Nazi era requires genealogical research data.⁹

³ *In re Estate of Wright*, 1997 Del. Ch. LEXIS 26 (Del. Ch., 1997); *Matter of Swingearn*, 2011 N.Y. Misc. LEXIS 6019, 2011 NY Slip Op 33230(U) (Surr. Ct., Nassau Co., 2011); *In re Estate of Rosen*, 819 A.2d 585 (Pa.Super 2003).

⁴ *See, e.g., Matter of Marsden*, 2009 N.Y. Misc. LEXIS 6347 at *7, 2009 NY Slip Op 33235(U) at *5 (Surr.Ct., Nassau Co., 2009).

⁵ *Eaton v. Town of Wells*, 760 A.2d 232 (Me. 2000).

⁶ 12 U.S.C. § 1715z-13b(a)(6)(B)(i); 24 C.F.R. § 1007.5.

⁷ *James v. Dept. of Health and Human Services*, 824 F.2d 1132, 1138 (D.C.App. 1987); *Muwekma Ohlone Tribe v. Salazar*, 2011 U.S. Dist. LEXIS 110400 at *15 - *16 (Dist. D.C. 2011); *Timbisha Shoshone Tribe v. Dept. of Interior*, 2011 U.S. Dist. LEXIS 51892 at *2 - *3 (E.D. Calif. 2011); Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*. 33 AM INDIAN L REV 243 (2008/2009).

⁸ *See Gristede's Foods, Inc. v. Unkechaug Nation*, 660 F. Supp. 2d 442, 447 - 448 (E.D.N.Y. 2009).

⁹ Statement of Catherine A. Lillie, p. p. 26, Review of the Repatriation of Holocaust Art Assets in the United States, Hearing Before the Subcommittee on Domestic & International Monetary Policy, Trade, & Technology, Committee on Financial Services, U.S. House Of Representatives, 109th Cong., 2d Sess., Serial No. 109-113, at p. 26 (27 July 2006) <<http://archives.financialservices.house.gov/pdf/ArchiveHearing/109-113.PDF>>.

And fees paid by genealogical researchers are a source of revenue for the United States government.¹⁰

Genealogical research, then, is a serious and salient matter which cannot be viewed merely as some sort of quaint pastime. Opportunities for individual researchers need to be fostered and facilitated, with due regard for the role it plays in so many areas and aspects of law and society.

There are, of course, limitations to the diversity of witnesses who can be called to any given Congressional hearing. Standing alone, the failure of the Subcommittee to invite testimony from the genealogical community (both the professionals and the individual researchers) denied a significant number of legitimate stakeholders of an opportunity to give their vital input. The Subcommittee now needs to pay serious regard to the materials in addition to this instant Commentary that surely will be submitted from members of the genealogical community, whether from professional genealogists, individual researchers, or the genealogical interest groups and societies.

C. Social Security Numbers and Tax Administration:

This Commentator has previously expounded, at greater length, to a different Subcommittee of the Ways and Means Committee, on the American system of voluntary compliance with the tax laws.¹¹ It now suffices to state that the American voluntary compliance system is a far less repressive alternative to other systems elsewhere, currently and in bygone days, but that the uncoerced compliance so vital to the system depends, in no small measure, upon the security of taxpayers' personal data.

In the taxation context, data security means more than restrictions on access to the data. Data security also refers to how data is processed. The failure to correctly process or verify data poses security issues no less deleterious than the improper access to that data.

¹⁰ See 8 U.S.C. § 1356(t); 8 C.F.R. § 103.7(b)(1)(i) (E) & (F).

¹¹ Statement of Kenneth H. Ryesky, Esq., *Hearing to Examine Tax Fraud Committed by Prison Inmates*: Hearing before the Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, 109th Congress, 1st Session, June 29, 2005, Serial No. 109-36, pp. 62 - 66.

<<http://www.gpo.gov/fdsys/pkg/CHRG-109hhr24905/pdf/CHRG-109hhr24905.pdf>>.

Mr. Agin's testimony at the subject 2 February 2012 Hearing, together with the testimony of Mr. McClung at a recent Senate Finance Committee hearing, spotlight such improper processing of tax information by the Internal Revenue Service.¹² As related by Mr. McClung, his income tax return was rejected because his deceased *dependent child* had already been claimed on a filed return. It is noted that the Social Security Administration's Form SS-5, Application for a Social Security Card, emphatically requires, in the case of an infant child, the parents' Social Security Numbers. In the case of Mr. McClung, the fraudster who claimed his deceased daughter apparently filed a tax return where the person purportedly claiming the McClung infant used a Social Security Number other than Mr. McClung's or his wife's. The failure of the IRS to "red flag" the first return, filed by the fraudster, for further inquiry is a processing failure.

The case of Mr. Agin is similar, but is all the more egregious because Mr. Agin and his wife presumably filed prior tax returns in prior years with their correct Social Security Numbers; the subsequent claiming of the same infant dependent by another purported taxpayer with a different Social Security Number should have been an additional "red flag" for the IRS. And, as further reflected in Mr. Agin's testimony, his case was far from unique.

D. Approaches to Resolving the Conflict:

There are several approaches which Congress ought to take in resolving the conflict between the need to facilitate genealogical research and the need to prevent and punish tax fraud. These might include the following:

1. Criminal penalty statutes for those who fraudulently use Social Security Numbers. These can include criminal sanctions against those who misuse their positions (*e.g.*, hospital records administrator, prison corrections officer, college or university registrar, et cetera).
2. Private causes of action, in the Federal courts and elsewhere, for victims of the fraudulent misuse of Social Security Numbers. This can include statutory damages in addition to actual damages.

¹² Statement of Terry D. McClung, Jr., The Spread of Tax Fraud by Identity Theft: A Threat to Taxpayers, A Drain on the Public Treasury, United States Senate Committee on Finance, Subcommittee on Fiscal Responsibility and Economic Growth (25 May 2011).
<<http://finance.senate.gov/imo/media/doc/Testimony%20of%20Terry%20McClung.pdf>>.

3. Mandates that the IRS use various data processing parameters and standards in handling, checking and verifying the tax returns it receives from taxpayers.¹³

There seems to be an intent on the part of some members of Congress to restrict the availability of information in the DMF. While some restrictions may well be appropriate, it must be remembered that the DMF is a valuable information resource developed at the expense of the American people, and should be availed to the public for legitimate purposes. The unnecessary restriction of access to the DMF to individual genealogical researchers would not only work an injustice to the American people, but would impede the accomplishment of many legitimate legal and social processes, and would further facilitate the IRS's laxity in its processing of taxpayer information.

E. Conclusion:

The United States Congress has already declared it to be in the national interest to preserve and protect America's historical roots abroad.¹⁴ This being so, it is all the more in the national interest to protect and preserve genealogical information in America. The problem of tax fraud using Social Security Numbers is a significant problem that requires Congressional attention. Resolution of the problem must give not unduly burden the conduct of legitimate genealogical research.

5 February 2012
Respectfully submitted,



Kenneth H. Ryesky, Esq.

¹³ The IRS has demonstrated broad ineptitude in its tracking and processing of Social Security Numbers *see, e.g. United States v. Nielsen*, 1 F.3d 855, 857 (9th Cir. 1993), *cert. denied*, 525 U.S. 827 (1998); *Wallin v. Commissioner*, 744 F.2d 674, 677 (9th Cir. 1984); *United States v. Shafer*, 1996 U.S. Dist. LEXIS 56165 (E.D. Pa. 1996); *Grimland v. Commissioner*, T.C. Memo 1993-367; *In re Washington*, 172 B.R. 415, 418 - 419 (Bankr. S.D. Ga. 1994).

¹⁴ 16 U.S.C. § 469j (establishing the Commission for the Preservation of America's Heritage Abroad).