BACKGROUND REPORT

ORIGIN AND USES OF THE FEDERAL SOCIAL SECURITY ACCOUNT NUMBER

INTRODUCTION

Everyday Americans are being confronted with requests or demands from many sources to disclose their Social Security number. Many states are now requiring the display of Social Security numbers on drivers' licenses. Public school officials demand that school age children have Social Security numbers before they may be enrolled in any public school. Some hospitals intimidate parents into applying for a Social Security number for their new born child, by informing the new parents that without complying with this policy the child cannot be discharged. Private parties of all kinds, from banks to employers, claim federal and state law mandates that they obtain the Social Security number of everyone with whom they conduct business. Qualified potential employees have not been hired because they do not have or were not willing to supply a Social Security number. Employees have been terminated when they refused to obtain a Social Security number. With all these entities making such inquiries and demands, surely the law must contain a requirement that everyone must have such a number. Or, is it possible that people are acting like cattle, dutifully following the herd instinct without question, assuming that such a requirement exists and taking no more thought of it? Simply put, does federal law and regulations require every American to apply for and furnish a Social Security number upon demand, or are such purported assertions merely assumed?

The purpose of this report is to help individuals understand their rights and responsibilities under the Federal Social Security Act by addressing congressional and judicial action regarding disclosure and privacy issues associated with the Social Security number.

In order to understand one's responsibilities under the Act, let's first ascertain whether an individual is even required to have a Social Security number by examining the policy and practice relative to the issuance and use of the Social Security number, including prohibitions, restrictions, conditions, or other qualifications on the issuance and use of the number.

The Federal Social Security Act (Pub. Law 74-271, August 14, 1935, 49 Stat. 620; as amended) is codified at 42 U.S.C. §§ 301-1399. First, if there were a requirement that every American must have a Social Security number, one would expect to find such language in the act. No such language appears within the act, and further there is no section therein which could remotely be considered as a mandate that every individual must have a Social Security number.

Since the statutory law fails to impose this requirement on an individual, the next question is whether the regulations promulgated pursuant to the statute imposes such a duty, but here, the regulations are no broader than the act itself, and the duty to apply for and obtain a Social Security number is found at 20 C.F.R. § 422.103 which provides:

> Applying for a number - (1) Form SS-5. An individual *needing* a social security number may apply for one by filing a signed form SS-5, "Application for A Social Security Number Card," at any social security office and submitting the required evidence. (emphasis added).

The first mention of the Social Security number in a law or regulation is a Bureau of Internal Revenue regulation dated November 5, 1936 under which an identifying number, called an "account number," was assigned to employees covered under the Act. T.D. 4704, 1 Fed. Reg. 1741, Nov. 7, 1936; 26 C.F.R. Part 401 (1st ed., 1939). This regulation was issued pursuant to Section 807(b) of the Social Security Act of 1935 and was intended to have a directory and not mandatory effect.

For some years after its inception in 1936, there was no substantial use of the Social Security number other than it being required as an identifier for those individuals receiving benefits under the unemployment compensation programs contained in the Act and administered by the States. Most Americans by the 1940's had not been issued a number since they were not receiving these benefits, and few organizations felt the need of a numeric identifier for purposes of data processing.

Although many people today are under the impression that a Social Security number is required for more than just social security purposes, this is not the case and never has been. This impression may have arisen, in part, from the fact that in 1943, the Civil Service Commission decided that there should be a numerical identification system for all Federal employees and proposed to the bureau of the budget that the use of the Social Security number be authorized for this purpose. This led to the issuance of Executive Order 9397.

That order provides in part as follows:

> *WHEREAS* certain Federal agencies from time to time require in the administration of their activities a system of numerical identification of accounts of individual persons; and;
> *WHEREAS* it is desirable in the interest of economy and orderly administration that the Federal Government move towards the use of a single, unduplicated numerical identification system of accounts and avoid the unnecessary establishment of additional systems;
> *NOW, THEREFORE*, ...it is hereby ordered as follows:
> 1. Hereafter any Federal department, establishment, or agency shall, whenever the head thereof finds it advisable to establish a new

> system of permanent account numbers pertaining to individual persons, utilize exclusively the Social Security Act account numbers.

The order directed the Social Security Board (the predecessor agency of the Social Security Administration), to provide for the assignment of an account number to any person required by any Federal agency to have one, and to furnish the number, or the name and identifying data, pertaining to any person or account number upon request of any Federal agency using the Social Security number for a numerical identification system of accounts under the order.

The issuance of Executive Order 9397 in 1943, theoretically may have provided the basis for this change in conception of the role of the Social Security number. This interpretation was taken from the wording of the order which speaks of the efficiency to be gained from "a single...system of accounts...." To interpret the order as applying to all kinds of Federal agency record systems was arguably beyond the meaning of its language.

In 1946 the Social Security Administration, complying with the provisions of the Administrative Procedures Act of 1946 (Pub. Law 79-404, 60 Stat. 237) which required among other things, "uniformity, impartiality and fairness in the procedures employed by federal administrative agencies," issued and published in the Federal Register its regulations on the issuance and use of social security numbers. 20 C.F.R. § 422.1(ii) published at 11 F.R. 177A-568, September 11, 1946 provides:

> (ii) Any person who *wishes* to file an application for an account number may do so by filing Form SS-5. (emphasis added).

What many regard as the single most substantial impetus to use the Social Security number for purposes other than the Social Security program occurred in 1961, when the Internal Revenue Service, after discussion with the Social Security Administration, decided to use the Social Security number for taxpayer identification. This decision was implemented by an amendment to the Internal Revenue Code (Pub. Law 87-397, 75 Stat. 828, Internal Revenue Code of 1954, Sec. 6109), that authorized the Secretary of the Treasury to request that each person making "a return, statement, or other document" under the Internal Revenue Code to "include such identifying number as may be prescribed for securing proper identification of such person." The Secretary delegated his authority to the Commissioner of Internal Revenue, who issued a number of regulations. The combined effect of this will be examined further.

In a decision dated April 16, 1964, the Commissioner of Social Security approved the issuance of social security numbers to pupils in the ninth grade and above, if a school requests such issuance and indicates willingness to cooperate in the effort. The Social Security Administration Claims Manual explains that this decision was made to accommodate requests from school systems "desiring to use the Social Security number for both automatic data processing and control purposes, so that the progress of pupils could be traced throughout their school lives across district, county, and state lines." The school enumeration program, however, is entirely voluntary.

In June 1965 the Commissioner of Social Security authorized the issuance of a Social Security number to every recipient of State old-age assistance benefits who did not already have one, in order to establish a more efficient process for exchange of information between these agencies and the Social Security Administration.

In June 1965 the Civil Service Commission began to add Social Security numbers to the retirement records of their annuitants.

The Congress, in Section 137 of the Social Security Amendments of 1972 (Pub. Law 92-603, 86 Stat. 1329, 42 U.S.C. § 405(c)(2)(B)(i)(II)), requires the Secretary of the Department of Health, Education and Welfare (the predecessor agency of the Department of Social and Human Services) to take affirmative measures to issue Social Security numbers "to any individual who is an applicant for or recipient of benefits under any program financed in whole or in part from Federal funds including any child on whose behalf such benefits are claimed by another person." The quoted language of this requirement appears to call for the issuance of a Social Security number to virtually everyone in America who did not already have one, but the legislative history clearly indicates that such universal enumeration was not intended.

Under the 1972 amendments, all members of Aid to Families with Dependent Children (AFDC) households, including children, are required to furnish their Social Security number in order to qualify for benefits. See 42 U.S.C. § 602(a)(25) (1976).[1] If they do not have a Social Security number, they must apply for them. *See* 45 C.F.R. § 232.10(f) (1973). This regulatory requirement was upheld in Chamber v. Klein, 419 F.Supp. 569 (D.C.N.J. 1976) which ruled that requiring Social Security numbers as one condition for receiving aid (AFDC) did not violate any constitutionally protected right to privacy.

In April 1974 it was decided that participating States could enumerate Medicaid recipients in addition to AFDC beneficiaries.

Under the Tax Reform Act of 1976 (Pub. Law 94-455, 90 Stat. 1520), states are authorized to require Social Security numbers as identifiers for state programs, including general public assistance. See 42 U.S.C. § 405(c)(2)(C).

In addition, since 1980, Social Security numbers are an eligibility requirement for many food stamp

[1] This statutory scheme has since been amended, although the social security number requirement has been retained in virtually identical form. *See* Deficit Reduction Act of 1984, Pub. Law 98-369, § 2651(a), 98 Stat. 1147.

household members. See 7 U.S.C. § 2025(e).

This review of the Federal actions described above (which does not by any means constitute an exhaustive list) makes it clear that the Federal government itself has been in the forefront of expanding the use of the Social Security number. But it should also be clear that the enumeration of individuals under the Social Security Act was intended to be limited to those receiving Federal entitlements. The requirement for and the use of the Social Security number in connection with these federal and state administered welfare programs enhances the program's efficiency and helps to reduce the tremendous problems of mispayment of benefits by the agencies involved with the administration of these programs. *See* Callahan v. Woods, 736 F.2d 1269, 1274 (9th Cir. 1984).

With increasing demands being placed on individuals to furnish a Social Security number in circumstances when use of the number is not required by Federal law or regulation, the Congress in 1974 passed the Privacy Act of 1974 (Pub. Law 93-579, 88 Stat. 1896; as amended). Section 7 of Public Law 93-579 provides:

> (a)(1) It shall be unlawful for any Federal, State, or local governmental agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

The relevance of this Act is simply that it highlights the importance of privacy interests associated with social security information. *Cf*. Wolman v. United States, 501 F.Supp. 310 (D.C.D.C. 1980), remanded 675 F.2d 1341 (D.C. Cir. 1982), *vacated on other grounds*, 542 F.Supp. 84 (D.C.D.C. 1982). Section 7 of the Privacy Act was intended, the District Court found, to block indiscriminate governmental use of social security information as the "universal identifier." *See* United States v. Two Hundred Thousand Dollars in U.S. Currency, 590 F.Supp 866 (S.D. Fla. 1984).

In enacting Section 7, Congress sought to curtail the expanding use of Social Security numbers by federal and local agencies and, by so doing, to eliminate the threat to individual privacy and confidentiality of information posed by common numerical identifiers. *See* S.Rep.No. 1183, 93rd Cong., 2nd. Sess., reprinted in [1974] U.S. Code Cong. & Admin. News, pp. 6916, 6944. Underlying this legislative effort was the recognition that widespread use of a standard identification number in collecting information could lead to the establishment of a national data bank or similar informational system, which could store data gathered about individuals from many sources and facilitate government surveillance of its citizens. *Id*. at 6944-45, 6957. It was anticipated that as the use of the Social Security number proliferated, the incentive to consolidate records and to broaden access to them by other agencies of government would in all likelihood correspondingly increase. *Id*. at 6945. Thus, Congress saw a need for federal legislation to restore to the individual the option to refuse to disclose his Social Security number without repercussion, except in specifically delineated circumstances outlined in section 7(a)(2).

In 1985, the Federal courts ruled the Privacy Act applies equally to the private sector. Their requests for social security numbers must conform to the disclosure requirements of the Privacy Act. Yeager v. Hackensack Water Co., 615 F.Supp. 1087, (D.C.N.J. 1985).

The plain language of the Federal Social Security Act, its legislative history, regulations, and the relevant decisional precedents makes it clear that there is simply not a requirement that an individual must obtain and disclose a Social Security number, unless they receive federal entitlements and the disclosure of the number is required under applicable federal law. Since federal law does not require any individual to apply for and accept any federal benefits, let's now examine whether (1) federal law requires every employee to have a Social Security number in order to work, and (2) a Social Security number is required in order for an employer to meet all tax filing and reporting requirements under state and federal law.

THE SOCIAL SECURITY CARD AS A NATIONAL IDENTITY CARD OR FEDERAL WORK PERMIT

Since the passage of the Immigration Reform and Control Act of 1986 (IRCA) which sought to prevent illegal immigrants, principally from Mexico and other Hispanic countries, from finding work in the United States, by imposing civil and criminal penalties against employers who knowingly hired such workers, there has been a movement by both Democrats and Republicans to require that every American have a national identification card - or work permit - issued by a federal bureaucracy. While supporters of such a national identity card claim its use would be limited only to the control of illegal immigration, it takes little imagination to see a governmental attempt in expanding its use in the future, to deny individuals the right to earn a living by denying them a card. For example, Congress might pass legislation allowing the Internal Revenue Service the power to deny or suspend an individual's work permit for alleged non-payment of taxes, or information of alleged importance such as whether a prospective employee had a criminal record or had an infectious disease might be required on an identity card.

Supporters of a national identity card claim that it could be little more than a "counterfeit proof" Social Security card. However, in order for the Federal government to solve the problem of the phony identifications already being used to acquire Social Security cards, an "improved" Social Security card would require a huge data gathering bureau to cross-check every piece of identification. This bureau presumably would have to record each individual's birth, job changes, address changes, and death, effectively charting their every movement from the cradle to the grave.

In an effort to rewrite American immigration policy, Representative Lamar Smith of Texas, introduced legislation designed to reduce the numbers of aliens, who settle in the United States and crack down on illegal immigration.[2] One major provision of the bill requires employers to verify that job applicants are eligible to work in the United States. Employers would have to call the Federal government to check the authenticity of applicants' Social Security number.

It is unclear whether the foregoing provision of Representative Smith's legislation is designed solely for the control of immigration, or is actually, an attempt under the guise of immigration policy to place every working American under the control of the Federal government. It should be noted however, that it is a well settled principle of American Constitution Law, that every member of a community has a right to enjoy a free labor market, to have a free flow of labor for the purpose of carrying on the business in which he has chosen to embark. This right is not merely an abstract one; it is one recognized as the basis of a cause of action where there is an unlawful interference therewith. Specifically, laborers have a right to a free and open market in which to dispose of their labor, or a right to a free access to the labor market for the purpose of maintaining or increasing the incorporeal value of their capacity to labor. A laborer has the same right to sell his labor as any other property owner.

[2] *See* H.R. 2202 "Immigration in the National Interest Act of 1995."

Labor is deemed to be property, especially within the meaning of constitutional guaranties. Thus, the right to acquire property includes the right to acquire property by labor. Since the right to labor is protected by the Constitution and numerous guaranties of state constitutions, one cannot be deprived of such right by arbitrary mandate of the state legislatures and/or by the Federal government.

In Patton v. Bellingham, 179 Wash. 566, 38 P.2d 364 (1937), the Washington State Supreme Court reaffirmed the principle of law that labor is a right of property by declaring:

> "The right to labor or earn one's livelihood in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgment of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution." Yee Gee v. City and County of San Francisco, 235 Fed. 757, 759.

Any national legislation establishing a Federal Work Permit or National Identify Card, utilizing a Social Security number as a condition for obtaining employment in the United States, seeks only to deprive Americans of a fundamental freedom - the right to earn a living. Since the right to labor and to its protection from unlawful interference is a constitutional, as well as a common-law right and since man has a natural right to the fruits of his own industry regardless of governmental demands, any legislation passed by Congress requiring every employer to verify an employee's Social Security number before commencing work, would not be intended for controlling immigration, but passed solely for the purpose of destroying rights and the principles of freedom and justice upon which the Constitution rests.

FEDERAL LAW DOES NOT REQUIRE DISCLOSURE OF A SOCIAL SECURITY ACCOUNT NUMBER IN ORDER TO COMPLY WITH STATE AND FEDERAL REPORTING REQUIREMENTS

Today it is common for an employer to require a Social Security number from an employee, under the mistaken belief that unless the employee has a number, the employer would be in violation of Internal Revenue Regulations and subject to numerous penalties. The employee is notified unless they obtain a Social Security number, they will be terminated.

However, the Internal Revenue Code and regulations do not contain an absolute requirement that an employer must provide an employee's Social Security number to the Internal Revenue Service. Code Section 6109(a)(3) provides:

> Any person required under the authority of this title to make a return, statement or other document with respect to another person, shall request from such other person, and shall include in any return statement, or document, such identifying number as may be prescribed for securing proper identification of such other person.

The IRS regulation interpreting Section 6109 provides:

> If he does not know the taxpayer identifying number of the other person, he shall request such number of the other person. A request should state that the identifying number is required to be furnished under the authority of law. *When the person filing the return, statement, or other document does not know the number of the other person, and has complied with the request provision of this paragraph, he shall sign an affidavit on the transmittal document forwarding such returns, statement, or other documents to the Internal Revenue Service so stating*. (emphasis added). 26 C.F.R. § 301.6109-1(c).

The applicable Federal statute and regulation place a duty on the employer to "request" a taxpayer identifying number from the employee. If any return, statement, or other document must be furnished to the Internal Revenue Service and the employer has been unable to obtain an identifying number from the employee, after requesting the number, then the employer need only to include on the transmittal document forwarding such returns, statements, or other documents, an affidavit stating that the request for the number was made.

Until December, 1989, 26 U.S.C. § 6676 (1989), set forth the penalties for failing to supply the Internal Revenue Service with the identifying number. This section states that a $50.00 penalty will be imposed for failure of an employer to provide an identifying number on any document filed with the Internal Revenue Service unless it is shown that the failure is due to reasonable cause and not willful neglect. The regulation interpreting the statute provides:

> Under Section 301.6109-1(c) a payer is required to request the identifying number of the payee. If after such a request has been made, *the payee does not furnish the payer with his identifying number, the penalty will not be assessed against the payer*. (emphasis added). 26 C.F.R. § 301.6676-1(a)(3).

The Omnibus Budget Restoration Act of 1983 (Pub. Law 101-239, Title VII, Section 7711(b)(1)), repealed Section 6676 of the Internal Revenue Code effective for statements or documents filed after December 31, 1989. Since December 31, 1989, Code Section 6723 has governed the failure to comply with information reporting requirements. Section 6723 provides that a penalty of $50.00 shall be assessed for each failure to comply with a reporting requirement. However, 26 U.S.C. § 6724, provides for a waiver of any penalties assessed under the code upon a showing of reasonable cause. Section 6724(a) provides:

> No penalty shall be imposed under this part with respect to any failure if it is shown that such failure is due to reasonable cause and not willful neglect. 26 U.S.C. § 6724(a).

The Code and regulations mandates a payer to only request the identifying number of the employee or payee. If after such a request has been made, the payee does not furnish the payer with his identifying number, the penalty will not be assessed against the payer, upon the filing of an affidavit with the Internal Revenue Service state that a request for the payee's identifying number was made.

CONCLUSION

The American people are jealous of their personal privacy. They resent the need to account for their actions and their lives to the government. For example, in 1990 over 45 percent of the American households did not initially return their census forms on time, feeling, as one Chicago woman summed it up, that "it's too much personal information to give out to a government agency." Every day demands are being placed on individuals to furnish a Social Security number in circumstances when use of the number is not required by the Federal government for Federal program purposes. The Social Security number is demanded of individuals by state motor vehicle departments, public utility companies, landlords, credit grantors, schools, colleges, employers, and innumerable other organizations.

If the Social Security number is to be stopped from becoming a National Identity Card, the individual must have the option not to disclose his number unless required to do so by the Federal government for legitimate Federal program purposes, and there must be legal authority for his refusal. The American people must be educated to the fact there is no legal authority compelling enumeration into the so-called Social Security scheme. As examined in this report, existing Federal law offers clear authority for this refusal.

National Organization for Non-Enumeration
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