
**HOUSE COMMITTEE ON STATE AFFAIRS
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2004**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
79TH TEXAS LEGISLATURE**

**JERRY MADDEN
CHAIRMAN**

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Committee On
State Affairs

January 5, 2005

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P.O. Box 2910
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The Honorable Tom Craddick
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

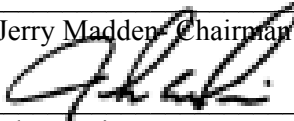
Dear Mr. Speaker and Fellow Members:

The Committee on State Affairs of the Seventy-Eighth Legislature hereby submits its interim report including recommendations for consideration by the Seventy-ninth Legislature.


Respectfully submitted,



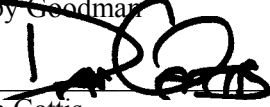
Jerry Madden, Chairman




John Davis



Toby Goodman



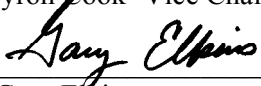
Dan Gattis



Michael Villarreal



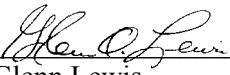
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INTRODUCTION

INTRODUCTION

On November 4, 2003, House Speaker Tom Craddick issued four interim charges to the House Committee on State Affairs. This report outlines the committee's examination of these issues, presents the facts and data learned by the committee, raises concerns, and summarizes the findings of the committee with respect to its interim charges.

Judicial Bypass of Parental Notification of a Minor's Abortion

Gather and study statistical information concerning judicial proceedings to bypass parental notification of a minor's abortion.

Social Security Numbers

Review and consider all issues related to disclosure protections for an individual's social security number to a member of the public in certain circumstances without the person's written consent.

Naming Public Buildings

Review the process and appropriateness for naming public buildings for individuals.

General Recommendations

Monitor agencies and programs under the committee's jurisdiction, including identifying possible ways to merge or streamline agency functions to produce long-term financial benefits to the state and better efficiency of the agencies.

The committee expects to consider legislation on each of these topics during the 79th Legislature and intends this report to be a reference for Members, staff, and interested parties when these issues are discussed.

INTERIM CHARGE ONE: Review the Process and Appropriateness for Naming Public Buildings for Individuals.

Background

Currently, the requirements for naming state owned buildings are found in Chapter 2165 of the Government Code. The Chapter provides that the Texas Building and Procurement Commission shall submit names proposed for a new state building to be used as a state or regional headquarters by a state agency, or proposals to rename an existing state building which is used as a state or regional headquarters by a state agency, to the presiding officers of the house of representatives and the senate. The name proposed by the commission for a state building to be used as a state or regional headquarters by a state agency may be approved and authorized only by concurrent resolution passed by the legislature and signed by the governor.

The Building and Procurement Commission is required to submit names proposed for a state building which will be used as a local headquarters by a state agency to the presiding officers of the house of representatives and the senate and the members of each body in whose district the building is located. The name proposed by the Building and Procurement Commission for a state building to be used as a local headquarters by a state agency may be approved and authorized only with the consent of the governor and the presiding officers of the house of representatives and the senate.

A building that will be used as a state or regional headquarters for a state agency, other than a university building, a secure correctional facility operated by the Texas Youth Commission, or a prison, may bear the name of a person only if the person is deceased and was significant in the state's history.

Public Hearing Findings

At the August 9th, 2004 public hearing of the House State Affairs Committee, Edward Johnson of the Texas Building and Procurement Commission (TBPC) explained that generally when legislation concerning naming buildings for individuals is passed, it tells them with sufficient particularity how to name the building. However, Mr. Johnson also stated that there could be a little clarification for TBPC, noting that the statute does require that if a building is going to be named after an individual, that individual must have made a significant contribution to the State of Texas and be deceased. He noted that institutions of higher education are exempt from this requirement, as well as prisons and Texas Youth Commission facilities.

John Wells, with the Texas Military and Veterans Affairs Commission, explained that his agency constructs all the facilities for the national guard throughout the state of Texas. Of the 312 facilities built by his commission, Mr. Wells stated that to his knowledge only four of them were named. He explained the process for naming those buildings that his agency currently has in place. Requests for a building to be named after a person who is not deceased come before a seven member commission appointed by the governor. If the individual is deceased, the committee makes a review and makes a recommendation. It then must be passed through the

Texas House of Representatives and Texas Senate by concurrent resolution, and by signed by the Governor, in order to pass.

Mr. Wells stated that his agency's concern is that only a handful of agencies have this responsibility. He recommended that the procedure for naming buildings for individuals be made uniform for all of the agencies.

The Committee would like to thank the following individuals who testified on August 9th, 2004: Edward Johnson and John Wells.

RECOMMENDATIONS TO THE 79th LEGISLATURE

Appoint a Commission to Oversee the Naming of Public Buildings for Individuals in Texas.

The current system is problematic for two main reasons. First, because it requires approval from both houses of the legislature, parties desiring to name a building after an individual must wait until the legislature is in session in order to obtain approval. Thus, a party who made a request to name a building after an individual immediately after the end of a regular session might have to wait a full two years until the next regular session for the process to be completed. Although this is not necessarily a terrible burden, it is also simply unnecessary for parties to have to deal with this inconvenience.

The other problem with the current system is its susceptibility to overly political considerations. Because it requires approval by both full houses of the legislature as well as the governor, the process is subject to the full political give and take. As a result, the concerns of the localities in which the building in question would be located may be overlooked.

The House State Affairs Committee recommends that the legislature appoint a permanent five member body to consider all requests to name public buildings for individuals that are currently subject to recommendations by the Building and Procurement Commission. The body would consist of the Governor, the Lieutenant Governor, the Speaker of the House of Representatives as permanent members, and would also include the state representative and the state senator who represent the location in which the building in question is located. Involving only the state representative and state senator would make the process more localized and less political. There would be no fiscal loss to the state in appointing such a body. The use of the even number five would assure that there would be no ties in decisions, thereby expediting the process. Moreover, because there would be no concurrent resolution involved, interested parties would not have to wait until the legislature is in session in order to obtain authorization to name a public building for an individual. The Governor, the Speaker, and Lieutenant Governor should also be allowed to designate one of their staff members to stand in for them in the decision making process. This would further expedite the process for instances in which the Governor, Speaker or Lieutenant Governor is not immediately available.

Institutions of higher education, the Texas Military and Veterans Affairs Commission, the Texas Youth Commission and state prisons should be exempt from this change and should continue to use their current procedures for naming public buildings for individuals.

INTERIM CHARGE #2: Review and Consider All Issues Related to Disclosure

Protections for an Individual's Social Security Number to a Member of the Public in Certain Circumstances Without That Person's Written Consent.

Background: Social Security Numbers and Identity Theft

According to a 2003 survey by the Federal Trade Commission (FTC), nearly ten million Americans in 2002 and one in eight adult Americans over the past five years have been victims of identity theft.¹ The survey found that in the year 2002, 3.23 million consumers discovered that new accounts had been opened, and other frauds such as renting an apartment or home, obtaining medical care or employment, had been committed in their name. In those cases, the loss to businesses and financial institutions was \$10,200 per victim. Individual victims lost an average of \$1,180. Where the thieves solely used a victim's established accounts, the loss to businesses was \$2,100 per victim. For all forms of identity theft, the loss to business was \$4,800 and the loss to consumers was \$500, on average.

According to the Theft Data Clearinghouse, Texas ranked 11th in the nation in the year 2001 in terms of number of identity thefts. The State of Texas averaged 30.2 identity theft victims per 100,000 people. Of the roughly 86,000 cases of identity theft reported in the United States in the year 2001, 6,496 of those were reported in Texas alone.

There are three main forms of identity theft. In financial identity theft, the imposter uses personal identifying information, primarily the Social Security Number, to establish new credit lines in the name of the victim. This person may apply for telephone service, credit cards or loans, buy merchandise, or lease cars and apartments. Subcategories of this crime include credit and checking account fraud.

Financial identity theft requires little criminal skill and no physical risk. Identity thieves armed with only a person's name and Social Security Number have learned to exploit the creditor/credit bureau practice – extremely prevalent in the “instant credit” context - of matching only these two identifiers in the credit granting process. Conversely, since consumers are not trusted users, as are creditors, a credit bureau requires a consumer, to obtain his or her own credit report, to provide a full name, a Social Security Number, an address, previous addresses for the past five years and, often, a xerox copy of a drivers' license or utility bill showing that same address. Of course, identity thieves are not seeking to obtain a person's credit report, but rather merely to obtain credit in the person's name at their address.

The second category of identity theft, criminal identity theft, occurs when a criminal gives another person's personal identifying information in place of his or her own to law

¹See Federal Trade Commission “Identity Theft Report,” released 3 September 2003, prepared by Synovate at <http://www.ftc.gov/opa/2003/09/idtheft.htm>.

enforcement. For example, Susan is stopped by the police for running a red light. She says she does not have her license with her and gives her friend's Social Security Number in place of her own. This information is placed on the citation. When Susan fails to appear in court, a warrant is issued for her friend (the name on the ticket).

Identity cloning is the third category of identity theft. This form of identity theft takes place when an imposter uses information derived from the victim's Social Security Number to establish a new life. He or she actually lives and works as the victim. This crime may also involve financial and criminal identity theft as well.

Homeland Security Concerns and Social Security Number Protections

Identity theft is by no means the only threat that can result from misappropriation of Social Security Numbers. Instances of terrorist activity linked to Social Security Number theft are well documented. According to recent news reports, a Kansas City man found out when he tried to purchase a car that his Social Security Number had been used by one of the suspected 9/11 hijackers' associates still at large.² Moreover, one of the associates of the 9/11 hijackers, Lofti Raissi, had been reported to be using the Social Security Number of a long-dead New Jersey woman.³

Following the September 11th attacks, the Office of the Inspector General (OIG) immediately received from the Federal Bureau of Investigation (FBI) the names and other personal identifiers (as they then knew them) of the 19 terrorist hijackers who died in those

²See "Man Trying To Buy Car Finds Out 9/11 Terrorist Took ID," Omaha News Channel, 21 April 2004, last accessed at <http://www.theomahachannel.com/news/3026399/detail.html> on 13 June 2004.

³See testimony of Social Security Administration Inspector General James Huse before the House Judiciary Committee, 25 June 2002, at <http://www.house.gov/judiciary/huse062502.htm> Also see the 8 November 2001 Joint Hearing on the Social Security Administration Death Master File of the Ways and Means Committee and Subcommittee on Social Security and the Financial Services Oversight and Investigations Subcommittee archived at <http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=83>

attacks.⁴ Those names and identifiers were matched against Social Security Administration (SSA) indices. The Security Administration associated Social Security Numbers with 12 of the 19 names. Of the Social Security Numbers associated with these 12 names, 5 appeared to be counterfeit (Social Security Numbers that were never issued by SSA). In addition, 1 was associated with a child, leaving 6 names associated with Social Security Numbers that were issued by SSA. Further, 4 of these 6 names were associated with multiple Social Security Numbers.

RECENT HISTORY OF FEDERAL LEGISLATION DEALING WITH SOCIAL SECURITY NUMBER PROTECTIONS

The Fair Credit Reporting Act

Under a 1994 decision of the Federal Trade Commission (FTC), consumer reporting agencies (credit bureaus) had developed a business of selling Social Security Numbers without consumer consent. The Fair Credit Reporting Act defines “Consumer Reporting Agencies” to encompass the three credit bureaus currently active in the United States. The FTC had granted an exemption in the Fair Credit Reporting Act to the definition of a credit report when it modified a consent decree with TRW (now Experian, whose representative testified at the August 9th, 2004 hearing of the Texas House State Affairs Committee). The FTC stated that certain information would not be regulated under the Fair Credit Reporting Act. Sometimes referred to as the “credit header loophole,” this ruling allowed credit bureaus to separate a consumer’s so-called header or identifying information from the balance of an otherwise strictly regulated credit report and sell it to anyone for any purpose.

“Credit headers” include information ostensibly not bearing on creditworthiness and therefore not part of the information collected or sold as a consumer credit report. The sale of credit headers involved the stripping of a consumer’s name, address, Social Security Number, and date of birth from the remainder of the person’s credit report and selling it outside of the Fair Credit Reporting Act’s consumer protections. Trans Union, another of this country’s three credit bureaus, sold this data separately to a number of business and governmental entities, which then used the information for both commercial and noncommercial purposes, including target marketing and fraud prevention. Products offered to such entities by Trans Union included “Trace,” which allowed a customer to input a person’s social security number and receive, in return, the name and address of that person; “Retrace,” which enabled a customer who had an

⁴ See testimony of Social Security Administration Inspector General James Huse before the House Judiciary Committee, 25 June 2002, at <http://www.house.gov/judiciary/huse062502.htm>.

individual's name and address to obtain the person's social security and phone numbers; and "ID Search" which allowed a customer with a person's name and phone number to obtain that person's social security number and current or former address. Consumer reporting agencies also sold credit header information to individual reference services, which typically work with government agencies to identify and locate individuals for a variety of purposes, including the prosecution of financial crimes and enforcement of child support orders. Media and political campaign organizations used individual references services to verify the identities of campaign donors.

Because of concerns about abuses of this exemption, the "credit header loophole" was reconsidered in subsequent federal legislation. While the information, marketing and locator industries contend that credit header information is derived from numerous other sources, consumer groups contended that the best source of credit header data is still financial institution information, which is updated regularly. Consumer groups warned that private customer identifying information maintained by financial institutions was subject to a high risk of misappropriation and unauthorized use under the "credit header loophole" exemption.

The Gramm-Leach-Bliley Act

The Gramm-Leach-Bliley Act (GLB Act) attempted to address the responsibility of financial institutions to protect the privacy of the personal financial information of their customers. This includes financial information that was previously subject to the "credit header loophole" in the Fair Credit Reporting Act.

The GLB Act gives authority to eight federal agencies and the states to administer and enforce the "Financial Privacy Rule" and the "Safeguards Rule." These two regulations apply to "financial institutions," which include not only banks, securities firms, and insurance companies, but also companies providing many other types of financial products and services to consumers. Among these services are lending, brokering or servicing any type of consumer loan, transferring or safeguarding money, preparing individual tax returns, providing financial advice or credit counseling, providing residential real estate settlement services, collecting consumer debts, and an array of other activities. Such non-traditional "financial institutions" are regulated by the FTC. It should be noted, however, that the FTC's regulation applies only to companies that are "significantly engaged" in such financial activities.

The law requires that financial institutions protect information collected about individuals. It does not, however, apply to information collected in business or commercial activities.

Financial Privacy Rule

The Financial Privacy Rule governs the collection and disclosure of customers' personal financial information – including social security numbers - by financial institutions. It also applies to companies, whether or not they are financial institutions, who receive such information.

Safeguards Rule

The Safeguards Rule requires all financial institutions to design, implement and maintain safeguards to protect customer information. The Safeguards Rule applies not only to financial institutions that collect information from their own customers, but also to financial institutions – such as credit reporting agencies – that receive customer information from other financial institutions.

To implement its information security program, each financial institution must:

1. Designate an employee or employees to coordinate the program;
2. Identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information and assess the sufficiency of any safeguards in place to control the risks;
3. Design and implement safeguards to address the risks and monitor the effectiveness of these safeguards;
4. Select and retain service providers that are capable of maintaining appropriate safeguards for the information and require them, by contract, to implement and maintain such safeguards; and
5. Adjust the information security program in light of developments that may materially affect the program.

Although each information security program must include these basic elements, the Rule allows companies to select specific safeguards that are appropriate to their size and complexity, the nature and scope of their activities, and the sensitivity of the customer information they maintain.

The Pretexting provisions of the GLB Act protect consumers from individuals and companies that obtain their personal financial information under false pretenses, a practice known as “pretexting.”

Protecting the privacy of consumer information held by "financial institutions" is at the heart of the financial privacy provisions of the Gramm-Leach-Bliley Financial Modernization Act of 1999. The Act requires companies to give consumers privacy notices that explain the institutions' information-sharing practices. In turn, consumers have the right to limit some - but not all - sharing of their information. Here's a look at the basic financial privacy requirements of the law.

Consumers and Customers

A company's obligations under the GLB Act depend on whether the company has consumers or customers who obtain its services. A *consumer* is an individual who obtains or has obtained a financial product or service from a financial institution for personal, family or household reasons. A *customer* is a consumer with a continuing relationship with a financial institution. Generally, if the relationship between the financial institution and the individual is significant and/or long-term, the individual is a customer of the institution. For example, a person who gets a mortgage from a lender or hires a broker to get a personal loan is considered a customer of the lender or the broker, while a person who uses a check-cashing service is a consumer of that service.

This distinction between consumers and customers is important because only customers are entitled to receive a financial institution's privacy notice automatically. Consumers are entitled to receive a privacy notice from a financial institution only if the company shares the consumers' information with companies not affiliated with it, with some exceptions. Customers must receive a notice every year for as long as the customer relationship lasts.

The Privacy Notice

The privacy notice must be given to individual customers or consumers by mail or in-person delivery; it may not, for instance, be posted on a wall. Reasonable ways to deliver a notice may depend on the type of business the institution is in: for example, an online lender may post its notice on its website and require online consumers to acknowledge receipt as a necessary part of a loan application.

The privacy notice must be a clear, conspicuous, and accurate statement of the company's privacy practices; it should include what information the company collects about its consumers and customers, with whom it shares the information, and how it protects or safeguards the information. The notice applies to the "nonpublic personal information" the company gathers and discloses about its consumers and customers; in practice, that may be most - or all - of the information a company has about them. For example, nonpublic personal information could be information that a consumer or customer puts on an application; information about the individual from another source, such as a credit bureau; or information about transactions between the individual and the company, such as an account balance. Indeed, even the fact that an individual is a consumer or customer of a particular financial institution is nonpublic person information. But information that the company has reason to believe is lawfully public - such as mortgage loan information in a jurisdiction where that information is publicly recorded - is not restricted by the GLB Act.

Opt-Out Rights

Consumers and customers have the right to opt out of - or say no to - having their information shared with certain third parties. The privacy notice must explain how - and offer a

reasonable way - they can do that. For example, providing a toll-free telephone number or a detachable form with a pre-printed address is a reasonable way for consumers or customers to opt out; requiring someone to write a letter as the only way to opt out is not.

The privacy notice also must explain that consumers have a right to say no to the sharing of certain information - credit report or application information - with the financial institution's affiliates. An affiliate is an entity that controls another company, is controlled by the company, or is under common control with the company. Consumers have this right under the Fair Credit Reporting Act. The GLB Act does not give consumers the right to opt out when the financial institution shares other information with its affiliates.

The GLB Act provides no opt-out right in several other situations. For example, an individual cannot opt out if:

- a financial institution shares information with outside companies that provide essential services like data processing or servicing accounts;
- the disclosure is legally required;
- a financial institution shares customer data with outside service providers that market the financial company's products or services.

Receiving Nonpublic Personal Information

The GLB Act puts some limits on how anyone that receives nonpublic personal information, including Social Security Numbers, from a financial institution can use or re-disclose the information. Take the case of a lender that discloses a customer's Social Security Number to a service provider responsible for mailing account statements, where the consumer has no right to opt out. The service provider may use the customer's Social Security Number for limited purposes - that is, for mailing account statements. It may not sell the Social Security Number to other organizations or use it for marketing.

However, it's a different scenario when a company receives Social Security Numbers or other nonpublic personal information from a financial institution that provided an opt-out notice -- and the consumer didn't opt out. In this case, the recipient steps into the shoes of the disclosing financial institution, and may use the information for its own purposes or re-disclose it to a third party, consistent with the financial institution's privacy notice. That is, if the privacy notice of the financial institution allows for disclosure to other unaffiliated financial institutions - like insurance providers - the recipient may re-disclose the information to an unaffiliated insurance provider.

This provision has been the subject of some degree of criticism. In a recent Washington Post article, it was noted that credit bureaus currently are adding a boilerplate notice to requests

for credit reports or subscriptions to their credit monitoring services, which could allow them to bypass the GLB Act restrictions. In the article, Washington Post writer Don Oldenburg stated:

“And another 'gotcha': 'There is and even higher price,' the reader says. 'Reading the privacy disclosure information, I was surprised that you were agreeing to let them use everything in your credit report for marketing - by them, by their affiliated companies and by others.'”

Bad enough that many privacy policies state that they’re going to share your name, address, phone, Social Security number, birth date, even credit-card number for marketing purposes - resulting in more junk in the mail, spam and telemarketing (yes, even if you signed on to the federal Do Not Call Registry, because now you have a business relationship).”⁵

Other Provisions

Other important provisions of the GLB Act also impact how a company conducts business. For example, financial institutions are prohibited from disclosing their customers' account numbers to non-affiliated companies when it comes to telemarketing, direct mail marketing or other marketing through e-mail, even if the individuals have not opted out of sharing the information for marketing purposes.

Legality of GLB Act

The D.C. Circuit, U.S. Court of Appeals, has upheld the Gramm-Leach-Bliley Act privacy regulations promulgated by the Federal Trade Commission in order to implement the Act, and thereby narrowed the credit header loophole. On July 16th, 2002, the D.C. Circuit upheld an April, 2001 United States D.C. District Court ruling that the privacy rules under Gramm-Leach-Bliley are constitutional.⁶ TransUnion and other plaintiffs had contended, among other things, that the regulations were overbroad and improperly restricted the plaintiffs’ speech under the First Amendment, that they imposed restrictions on Trans Union that are not imposed on entities that are not consumer reporting agencies, in violation of the Fifth Amendment. The Court found that nothing in the GLB Act created constitutional conflicts.

The Federal Fair and Accurate Credit Transactions Act (FACT Act) of 2003

On December 4, 2003 the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) was signed into law. The FACT Act amends the federal Fair Credit Reporting Act (FRCA) and extends the federal preemption of state law provided by the FRCA that was scheduled to expire on December 31, 2003. The Federal Trade Commission stated that provisions of the

⁵ See Oldenburg, Don, "Free Credit Reports That Cost You Your Privacy", The Washington Post, 17 Feb 04.

⁶ *Trans Union LLC v. Federal Trade Commission*, Civil Action No. 00-2087, see <http://www.dcd.uscourts.gov/00-2087.pdf>.

FACT Act will help reduce identity theft and help victims recover. In testimony to the House Ways and Means Committee's Subcommittee on Social Security, Howard Beales, Director of the FTC's Bureau of Consumer Protection, said that many of the provisions will go into effect over the course of this year.

The FACT Act significantly changes the landscape of identity theft regulation in the United States. One of the newly enacted provisions requires the three major credit reporting agencies to provide consumers with a free copy of their own credit report every 12 months. The requirement will become effective in December of 2004, but will be phased in over nine months from West to East. The reports allow consumers to discover and correct errors in their credit records and to assure that accounts have not been fraudulently opened in their names.

Another provision of the FACT Act that will help prevent identity theft is the National Fraud Alert System. Consumers who reasonably suspect they have been or may be victimized by identity theft, or who are military personnel on active duty away from home, can place an alert on their credit files. The alert will put potential creditors on notice that they must proceed with caution when granting credit. This provision takes effect December 1, 2004.

A provision of the FACT Act will require that account numbers on credit card receipts to be shortened or "truncated" so that merchants, employees, or others who may have access to the receipts do not have access to consumers' names and full credit card numbers.

The FTC is working with banking regulators to identify "red flag" indicators to help financial institutions and creditors analyze identity theft patterns so that they can take action to prevent further incidences of identity theft. The agencies also are working together to develop a rule that will require appropriate disposal of sensitive credit report information. The stated goal of this requirement is to help to ensure that sensitive consumer information, including Social Security Numbers, is not simply left in a trash dumpster, for instance, once a business no longer needs the information.

Measures that will help consumers recover their credit reputations after they have been victims of identity theft include:

- *A provision that will require credit reporting agencies to stop reporting allegedly fraudulent account information when a consumer establishes that he or she has been the victim of identity theft;
- *A provision that requires creditors or businesses to provide copies of business records of fraudulent accounts or transactions related to them. This information can assist victims in proving that they are, in fact, victims. For example, they may be better able to prove that the signature on the application is not their signature.
- *A provision that will allow consumers to report accounts affected by identity theft directly

to creditors - in addition to credit reporting agencies - to prevent the spread of erroneous credit information.

The most significant result of the FACT Act is its amendment of the FRCA. As noted, the FACT Act extends the preemptive effect of the FRCA. In addition, the FACT Act expands the FRCA preemption of state law in the areas of affiliate information sharing, pre-screening, obsolescence periods, and compliance duties. The FACT Act preempts any more-stringent state identity theft laws pertaining to these issues.⁷ This change confirms the FRCA as the national standard for the identity theft procedures of credit reporting agencies and some others.

At least some consumer advocacy groups are unimpressed with this legislation. One of the main complaints is that the FACT Act reduces the states' authority to enact tougher laws, by expanding federal preemption.⁸ The FACT Act also fails to stop banks and credit card companies from sharing certain customer information, such as Social Security Numbers, with their affiliates.⁹ While the FACT Act's proponents argue that it gives consumers new opportunities to catch and/or constrain fraudulent activity, some advocacy groups criticize the FACT Act's lack of penalties against institutions that violate the law and report incorrect information.¹⁰

LEGISLATION CONCERNING DISCLOSURE PROTECTIONS FOR SOCIAL SECURITY NUMBERS FROM 78th SESSION OF THE TEXAS LEGISLATURE

Texas Senate Bill 473

Among other provisions, Texas Senate Bill 473 amended the Texas Civil Practice and Remedies Code to prohibit a person, other than the state government or a governmental agency or subdivision, from:

- * publicly displaying in any manner an individual's social security number;
- * requiring an individual to transmit a social security number over the Internet, unless the connection is secure or the social security number is encrypted;
- * requiring an individual to use a social security number to access an Internet website, unless a password or unique personal identification number or other authentication device is also required to access the website;
- * printing an individual's social security number on any card required for the individual to have access to products or services provided by the person; or

⁸ *Consumer advocates disappointed with House ID theft bill*, Consumer Fin. Services L. Rep., Oct 8, 2003.

⁹ *Id.*

¹⁰ *Id.*

* with certain exceptions, printing an individual's social security number on any materials that are mailed to the individual, unless state or federal law requires the social security number to be printed on the document to be mailed.

The Social Security Number provisions in the bill do not take effect until January 1st, 2005. The Office of Consumer Credit Commission was required to review the impact and efficacy of the bill's provisions and to make a recommendation to the lieutenant governor and the speaker of the house of representatives by no later than December 31, 2004 as to whether the provisions of the bill should remain in effect after September 1, 2005. At the time this report was submitted, that review had not yet been completed. However, according to anecdotal evidence in the form of constituent feedback to state legislators, the new provisions have been well received by the people of Texas. One legislative office reported to the House State Affairs Committee that many of their constituents were pleased with the passage of the new law, but that they also were confused as to why the law did not apply to governmental agencies and had expressed the desire that the display of social security numbers by governmental agencies be similarly restricted.

Texas Senate Bill 611

Texas Senate Bill 611 prohibits the display of an individual's social security number on any device required to access products or services. The bill provides an exemption if the individual has requested such a printing in writing, but forbids issuers to require such a request as a condition of access to the product or service. Originally designed to require insurance companies to remove social security numbers from policyholders' insurance cards, this bill has potential ramifications for numerous industries.

The bill provides a civil penalty for a violation of this law, not to exceed \$500 for each violation. The bill authorizes the attorney general, or the prosecuting attorney in the county in which the violation takes place, to recover the penalty, or restrain or enjoin a person from violating this law, by legal means.

This law does not apply to the collection, use, or release of a social security number for internal verifications or administrative purposes, or as required by law.

In order to give companies time to comply, this law will not go into effect until March 1, 2005. The bill authorized persons who would be affected by this law to request a hearing before the credit union commissioner for additional time to comply with the bill if needed. The commissioner is required, if making a determination that the person has made a good faith attempt but is unable to comply with the provision in the bill by March 1, 2005, to issue an order for the person to take the required actions to come into compliance with the bill within a time frame of up to one year. Any such hearing conducted, and all related materials, are deemed confidential. Any person not provided additional time to comply with the provisions of the bill

will be subject to all of the provisions of the bill as of March 1, 2005.

Proposed Texas House Bill 1015

C.S.H.B. 1015 would have added Section 552.140 of the Government Code to prohibit a governmental body from disclosing a person's social security number to a member of the public in certain circumstances without that person's written consent. The consent would be required to be given on a clear and understandable form that the attorney general would be required to prescribe for that purpose. The bill provided that if the consent form is part of a larger document, the consent form must be a separate page of the larger document and the person's signature must appear on that page.

The bill would not have prohibited the disclosure of a person's social security number without the person's consent:

- to a federal, state, or local governmental entity for a legitimate governmental purpose;
- by a local governmental body if the social security number was contained in information that was created, assembled, or first maintained by or for the local governmental body before September 1, 2003, and the disclosure of the number is not otherwise prohibited by law;
- to a private vendor as necessary to allow the vendor to perform a service for a governmental body under a contract with the governmental body (the vendor likewise may only disclose the number as necessary for this purpose);
- in connection with the collection of delinquent child support payments; and;
- if the person whose social security number is disclosed has been convicted of a felony, and the disclosure is relevant to establishing the person's identity.

The bill also would have amended Subsection (d) of Section 552.024 of the Government Code (Electing to Disclose Address and Telephone Number). That Section provides that each employee or official of a governmental body and each former employee or public official of a governmental body shall choose whether to allow public access to the information in custody of the governmental body relating to the person's home address and telephone number, and that if the employee or official fails to state that choice within the designated time period, the information is subject to public access. The amendment to this provision in C.S.H.B. 1015 would have clarified that the exception making information about a person subject to public access unless they choose otherwise does not authorize the release of a person's social security number to the extent it is protected from disclosure under proposed Section 552.140 or other law.

INFORMATION THAT CAN BE ACCESSED WITH A SOCIAL SECURITY NUMBER

One of the concerns voiced by members of the House State Affairs Committee at its August 9th, 2004 public hearing was the volume of personal information that a person can easily obtain via the internet once they have obtained a person's Social Security Number. The Committee's concern was whether the restrictions placed on consumer reporting agencies and other financial institutions by the above referenced federal statutes were sufficient to prevent other entities that are not regulated by those statutes from using information derived from Social Security Numbers. It appears that that is not yet the case. At the moment, the following information can be currently be found with an internet search using Google or a comparable search engine, or by visiting websites such as www.usatrace.com, which offers the following invitation to people who visit the website and submit a person's name and social security number. Alarming, that particular website provides a wealth of identifying information regarding persons that the company proclaims was "derived from archived major consumer reporting agency records." This was the search result that was obtained by entering the fictitious name John Doe and the fictitious social security number 123-45-6789:

“The Subjects Name Is **John Doe** And Their 9 Digit SSN Is **123-45-6789**. Would You Like To Verify That This Is **John Doe's** SSN?”

4. Wouldn't You Also Like To Search The National Investigative Database To Verify Or Reveal;

Date and Year SSN:123-45-6789 was issued

Automatically Detect and Flag If John Doe's SSN:123-45-6789 Has Been Used In A Death Claim File

John Doe's Address from SSN:123-45-6789

John Doe's Address history for the last 7 years, possibly up to 10 years including Months and Years All Addresses Were Used by John Doe

Possible Age and Year of Birth of John Doe

Possible Spouses John Doe May Have

Possible Relatives John Doe May Have

Any Bankruptcies John Doe May Have

Any Judgments and Liens John Doe May Have

Property Records That John Doe May Have

Any Listed Phone Numbers John Doe May Have

Other Names and or SSN's Being Used By John Doe

Possible aka's (Names John Doe may have used with other marriages or aliases)

John Doe's Neighbors and Their Addresses Including Any Listed Phone Numbers They May

Have

Address History For Other Names and Or SSN's Being Used By John Doe

If SSN:123-45-6789 Is Being Used By Anyone Else and Who It Is, Along With Their
Address History For The Last 7 Years Possibly Up to 10

How a Social Security Number Trace Is Conducted

First John Doe's social security number 123-45-6789 is entered into a National Investigative Database. The primary information that is returned from a social security number search is derived from archived Major consumer reporting agency records. This information comes from the top portion of credit reports called the "header", where identifying information about the individual is contained. Specifically, address information. Accessing this information is undetected by the subject and they are never notified.

This is by far the single most powerful effective search in existence. Why? Because SSN's are the greatest source of identifying information on an individual thanks to Uncle Sam. Yep, Big Brother wants to keep track of your every move (literally). Just keep in mind Various activities from John Doe can provide address information, Year of birth , aka, and others associated with John Doe's SSN. Or others who have used John Doe's SSN, and addresses (like a spouse, roommate, friend, etc.) without them even knowing this will be compiled with the bureaus. This goes way beyond your traditional credit application. Now days more and more companies are needing your ssn for just about anything and this information will eventually end up with the bureaus. This report can return all reported addresses for John Doe and possible listed phone numbers for the last 7-10 years. Often times John Doe's age and YOB (year of birth) is also returned . The SSN:123-45-6789 will be identified as a valid or invalid number and provide the year and state the social security number was issued in. Also what is really great about this report is if John Doe tries to use a SSN that is different than their own, 9 times out of 10 this is immediately flagged, and will provide their real SSN and the new social security number they are using along with any addresses John Doe has used with them as well. The same applies with AKA'S (other names John Doe might have been using) will show up on this report too! In addition, many times spouses will show up on this report also. Oh, and if John Doe is trying to hide by using a social security number that was issued in a death claim file, this will be flagged instantly!! This report can also provide you with addresses and listed phone numbers of neighbors for each of the addresses returned, any Judgments, Liens, bankruptcies, John Doe may have, as well as Property Records. See "**Personal Profile**" for 25% more crucial information on John Doe or to search by an old address (no more than 7 years old) that John Doe may have previously used.

First John Doe's social security number 123-45-6789 is entered into a National Investigative Database derived primarily from archived major consumer reporting agency records. The SSN:123-45-6789 is then cross referenced with billions of other records(yes I said billions) to reveal John Doe's reported addresses, listed phone numbers, and neighbors of theirs.

Our reports do not stop there! They are much different than a typical social security number search ,which will only provide you address information.

We will also automatically search other National Databases for information John Doe may have.

Including judgments, Liens, bankruptcies, Property Ownership, Others who may have used the addresses of John Doe (like a spouse, relative, friend, roommate). Verify that the SSN:123-45-6789 is valid and which state and year the ssn was issued to them. Listed phone numbers for each address, There is no other report of its kind!

Just look below at what a typical report can return. Don't be fooled by other agencies! If they don't say a SSN TRACE includes all of this information then 95% of the time they don't! The remaining 5% of the agencies who do offer this search are charging as much \$79.00, There is no other report of its kind anywhere for our price!!”

The reason private companies such as usatrace.com are able to exploit information derived from a person’s Social Security Number in this manner is that although the credit reporting agencies from whom they obtained this information are prohibited by law from misusing private consumer, there is no privity of contract between the consumer and usatrace.com itself. Hence groups like usatrace.com are not bound to adhere to the assurances given to the consumer by the credit reporting agencies. This was one of the chief concerns expressed by legislators at the August 9th hearing of the House State Affairs Committee. It is imperative that the legislature extend the Social Security Number protections contained in federal statutes to other entities not in privity of contract with consumers, to assure that those entities do not use the consumer’s Social Security Number for any improper or unauthorized purposes.

PUBLIC HEARING FINDINGS

Testimony on Interim Charge Two was taken at a public hearing held August 9th, 2004 in Austin, Texas.

Murray Johnston, representing Experian, stated that laws similar to last session's proposed House Bill 1015 were unnecessary. The reason Mr. Johnston felt that additional regulation would be harmful was that it would undermine the accuracy of consumer credit reports, because if a public record does not have a social security number, it can be difficult for credit reporting agencies to attach that record with the correct consumer file. He noted that Congress recently did a massive re-authorization, called the FACT act, that regulated the manner in which financial institutions may utilize this information. Representative Byron Cook countered that small banks, not regulated by the SEC, did not fall within the provisions of the federal statutes.

Mr. Johnston stated that the Social Security Numbers and the records they are attached to are also used for identifying people, for protecting and identifying fraud, and for homeland security purposes. He stated that the Social Security Number has become a unique identifier. Representative Cook expressed concern about the use of social security numbers as a “national identifier” because he felt that Experian’s industry didn’t give adequate assurances that the information would be kept confidential. Mr. Johnston replied that Experian’s system for keeping

social security number information confidential is very rigorous and strict, and that they have auditors who make sure that all of the confidentiality requirements are complied with. He noted that Social Security Numbers can only be used for a particular purpose under Gramm-Leach-Bliley.

Mr. Johnston estimated that Experian had "somewhere in the thousands" in terms of number of clients in Texas. He stated his company had 31,000 customers across the U.S., and they had 6,000 employees. He explained that they have a consumer credit reporting business as well as a marketing business.

Mr. Johnston defended his company's practices with the statement that his company would not do business with clients who did not safeguard consumers' Social Security Number information. He stated that Experian had in fact stopped doing business with clients for this reason in the past, although he was unable to name any specific instances in which that had occurred.

Claudia Lezell offered testimony on behalf of the Identity Theft Resource Center, an entity whose stated goal is to combat identity theft, empower consumers, aid law enforcement, and reduce business loss. She cautioned that "suppress files," which are files used by credit reporting agencies to merge credit files with those of perpetrators because their names are the same, had ruined victim's lives. She stated that use of suppress files by credit bureaus was sloppy, and that suppress files still exist to this day even though credit reporting agencies would deny it. She reiterated that the Social Security Number's overuse as a unique identifier was the reason that such abuses took place.

Ms. Lezell cautioned that the business community in Texas could be damaged if the overuse of Social Security Numbers is allowed to continue. She cited a Michigan State study that 70% of identity theft happens in the work place. She then gave an example of a hotel maid who was fired for identity theft, but was placed in a five star hotel that didn't do criminal background check and defrauded a person who just used his credit card. Such instances not only hurt the consumer, but reflected badly on the businesses where the identity theft took place and whose employees were involved.

Ms. Lizell cautioned that Texas, as a border state, should be aware that illegal immigrants are likely to use social security numbers since they are using illegal papers. She also questioned how much money credit reporting agencies make by selling this information. She noted that identity theft victims, in order to remove their information from a credit report, are asked to fax their social security number to the credit agency.

Karen Neeley, representing the Independent Bankers Association of Texas, shared some of the laws imposed by Congress that required banks to collect Social Security Numbers. She noted that the USA Patriot Act requires banks to verify the identity of each customer. She stated

that one of the pieces of information the Patriot Act requires banks to collect is the Taxpayer Identification Number (TIN), which is usually a person's Social Security Number. Thus, the homeland security laws as written in the Patriot Act have mandated that banks obtain this information. She explained that banks had previously been required to obtain customers Social Security Numbers under the Bank Secrecy Act of 1972, but that there was an alternative at that time whereby customers could refuse to give their Social Security Number, and the bank would maintain a list of those persons which could be requested by the Department of Treasury at any point in time. Ms. Neeley explained that this alternative is no longer an option under the USA Patriot Act; banks are now required to obtain customer's TINs without any exceptions.

She also explained that backup withholding came with the Tax Reform Act. IRS required banks to obtain a TIN of a customer, and use a form W-9 or a functional equivalent of a form W-9 to verify the TIN so that the banks can accurately report interest and dividends earned on 1099s in a given year. If the TIN is not accurately collected, backup withholding may be imposed. Moreover, banks that have mismatches in TINs can be fined fifty dollars for each mismatch. In sum, she noted, these laws left banks with no flexibility with regard to their duty to collect customers' Social Security Numbers.

Ms. Neeley acknowledged that banks also use the Social Security Number in dealing with credit reporting agencies to verify that the customer is getting the right credit report. She gave an example of a person with her same name that used the same bank that she did in Austin. She acknowledged that although the system evolved toward using the Social Security Number as a unique identifier for this purpose, it might have been unwise and perhaps there should have been a better system. Ms. Neeley stated, however, that was simply "what we've got right now."

Ms. Neeley gave background information about the Fair Credit Reporting Act. She explained that the FTC does regulate the three credit reporting agencies and that they are willing to sue them. She also noted that the Gramm-Leach Bliley Act, Section 5, has very specific privacy protections for consumers. All financial institutions are mandated to have procedures in place to protect non-public personal information. She noted that financial institutions are defined "unbelievably broadly" in the Gramm-Leach Bliley Act, including not only banks, but also retailers such as Sears, pawn shops, finance companies, etc. The result is that many of the entities obtaining information from credit bureaus are identical to the rules that bind banks.

Ms. Neeley noted that the financial institution must also, in all its contracts with third parties, have contracts to ensure that those parties will have equivalent provisions in place to ensure privacy and security. As an example, she noted that for physical security, she trains employees to shred documents and put them in a locked shredder box. She also urges criminal background checks on janitors. Any third party with whom this information is shared is required to have similar protections.

Ms. Neeley acknowledged that other entities do not get examined as frequently as banks

do. They have regulators who can enforce the provisions, usually as the result of a complaint, but this is not the same as an examination. She admitted that this is a weakness in the current system. With regard to examinations of banks, Ms. Neeley explained that those procedures are reviewed in an examination checklist that is part of the overall examination.

Ms. Neeley noted that one of the amendments to the Fair Credit Reporting Act, which is being phased in slowly due to its cost, will be to entitle consumers to one free credit report per year regardless of whether the consumer has applied for credit or not. She explained that right now, a consumer is entitled to a free credit report only if he or she gets turned down.

Ms. Neeley also discussed some changes in the law about correcting consumer's information. She gave an example of a lawsuit against a credit card bank that got a complaint that the information in one of their customers' credit reports being wrong. She said that the bank neglected to do so, and that they got sued and that a judgment was imposed against the entity for not correcting that information. Thus, she explained, there are punitive provisions in the Fair Credit Reporting Act that afford opportunities for civil lawsuits to recover, but that there are also provisions to implement the procedures for correcting the data.

Ms. Neeley also shared that the Texas Independent Bankers Association has joined with the Texas Credit Union League, the Southwestern Automated Clearinghouse Association, and a number of other entities to create a "Loss Avoidance Alert System" in which they share information about identity theft problems. She noted that the group works with a lot of law enforcement officers, and that they share information in a very confidential manner to work on the types of cases exemplified by Claudia Lizzell and others. She explained that under the Loss Avoidance Alert System, identity theft problems are posted and sent out quickly to alert other groups to "watch out" for the problem. Texas law and the FACT Act both include this alert system, and Ms. Neeley noted that she was very supportive of that provision because it was in the best interests of the consumers as well as the banks. She explained that banks have no interest in giving loans to persons who have stolen someone else's credit.

April Bacon, an attorney who works for the county auditor's office, spoke about the relation of Social Security Number protection concerns to the Open Records requests her office frequently deals with. She noted that Open Records requests are usually broad enough to include Social Security Numbers, which requires an Attorney General opinion because of the privacy issues. She gave an example in which she needed to request a W-9, which has a Social Security Number on it, and the Attorney General's office told her that although she could not send in the W-9 because it was protected under federal law, the county auditor's office had to give up the Social Security Number that was in its own data. She warned that this was the type of gap in the law that legislators needed to be aware of.

Ms. Bacon noted that many times when a business is not allowed to ask for a person's Social Security Number, they simply ask the consumer instead for the last four digits of that

number as identifying information. She warned that this practice could also be dangerous in terms of making it easier for someone to commit identity theft.

The Committee would like to thank the following individuals who testified on August 9th, 2004: April Bacon, Murray Johnston, Claudia Lezell, and Karen Neeley.

RECOMMENDATIONS TO THE 79th LEGISLATURE

If the Social Security Number is available in fewer places, on fewer documents and used for fewer commercial transactions or database identifiers when it shouldn't be, identity thieves, stalkers, and even terrorists will be less able to harvest it for misuse. It is well-documented, for example, that identity thieves will often seek employment as temporary office employees, solely to harvest Social Security Number and other bits of "financial DNA." Identity theft is a serious crime. It costs the economy billions and wreaks untold havoc on the lives of hard-working citizens who face the emotional distress and nightmare of clearing their names.

It is nevertheless tantamount that any additional Social Security Number protections considered by the legislature do not so unduly burden Texas businesses or government entities

that their ability to function is seriously hindered. Although the use of the Social Security Number as a unique identifier in both the public and private sectors is a practice that needs to be curtailed, businesses and agencies must be given a reasonable amount of time to adjust to any such changes so as not to severely disrupt the state's economy or the efficiency of state government.

Restrict the Sale or Display of Social Security Numbers by Governmental Entities.

There are strong public policy reasons for implementing provisions similar to those found in last session's C.S.H.B. 1015. One of the arguments made by opponents of that bill was that it was somewhat redundant and that many of its goals were already accomplished by the passage of Senate Bills 473 and 611. However, the key distinction with regard to C.S.H.B. 1015 is that it would have applied to governmental entities, who are *not* included among the groups regulated by Senate Bills 473 and 611. As noted earlier, identity theft and other problems that can result from the overuse or display of the Social Security Number can just as easily result from uses by governmental entities as they can from use by private sector entities.

The House State Affairs Committee therefore recommends that the legislature take steps to prohibit a governmental body from disclosing a person's social security number to a member of the public in certain circumstances without that person's written consent. The consent should be required to be given on a clear and understandable form that the attorney general would be required to prescribe for that purpose. If the consent form is part of a larger document, the consent form should be a separate page of the larger document and the person's signature must appear on that page.

However, it is important that this prohibition not be overly disruptive to certain key government functions. Therefore, the legislature should maintain exceptions to this recommendation that would not prohibit the disclosure of a person's social security number without the person's consent:

- to a federal, state, or local governmental entity for a legitimate governmental purpose;
- by a local governmental body if the social security number was contained in information that was created, assembled, or first maintained by or for the local governmental body prior to a certain date, and the disclosure of the number is not otherwise prohibited by law;
- to a private vendor as necessary to allow the vendor to perform a service for a governmental body under a contract with the governmental body (the vendor likewise may only disclose the number as necessary for this purpose);
- in connection with the collection of delinquent child support payments; and;
- if the person whose social security number is disclosed has been convicted of a felony, and the disclosure is relevant to establishing the person's identity.

Take steps to wean the private sector of its over-reliance on the Social Security Number as a unique identifier.

Even when they are required to obtain a person's consent in order to do so, private businesses are still likely to continue the use of social security numbers as unique identifiers due to the convenience and pervasiveness of its use. Although the Social Security Number was originally intended only for Social Security and certain tax purposes, a very large number of businesses have come to rely on the Social Security Number as a crutch, and will switch away from its use only grudgingly. Credit bureaus, for example, are continuing to utilize people's social security numbers by installing boilerplate notices that comply with court restrictions in requests for consumer credit reports. Therefore, the Legislature should ensure that any exceptions granted to private businesses with regard to the use or display of social security numbers will only be for limited purposes and specific time durations. Limiting the use of the social security number as a unique identifier will also make it more difficult for groups such as usatrace.com to create thriving businesses whose sole purpose is to amass personal information about individuals and sell it on the internet, without that individual's consent.

To address the problem of over-reliance on Social Security Numbers in the private sector, the State Affairs Committee recommends that the Legislature examine the extent of the federal pre-emption created by the implementation of the FACT Act rules that should take place by the end of 2004, and once that issue is settled, enact similar Social Security Number protections at the state level to cover smaller businesses and entities that will not fall within the purview of the FACT Act regulations. The Office of Consumer Credit Commission expects to submit its report on this topic to the Legislature in December of 2004, after the FTC has finalized its implementation of the FACT Act regulations. Once that process is complete, the legislature should immediately act to fill in the gaps to enact comparable regulations for any businesses or entities who are not covered by the federal statutes. For example, federal statutes require that all entities categorized as "financial institutions" must assure that the third parties with whom they contract have the same policies and procedures in place to protect the confidentiality of Social Security Numbers that the financial institutions themselves have in place. The Legislature should extend this provision to any smaller banks or entities that are determined not to be subject to the federal statutes by the final FTC regulations. This will address the concerns of several of the State Affairs Committee members that smaller businesses and other entities are able to utilize the Social Security Numbers they obtain in ways that the consumer would not approve of, because there is no privity of contract between those entities and the consumer.

INTERIM CHARGE THREE: Gather and Study Statistical Information Concerning Judicial Proceedings to Bypass Parental Notification of a Minor's Abortion.

Background: The Texas Parental Notification Act and Rules

The Texas Parental Notification Law, and the rules enacted by the Texas Supreme Court regarding this law, derive much of their language from two principles of federal constitutional law. First, the United States Supreme Court has held that the federal constitution recognizes a right to obtain an abortion. Second, the United States Supreme Court subsequently has recognized that states may, to some extent, limit the exercise of this right by minors through statutes requiring some form of parental involvement, i.e. consent or notification. Over time, a

body of federal constitutional case law has evolved defining, to some degree, how parental involvement requirements may be constitutionally imposed.

A seminal case defining constitutional standards for parental involvement statutes is *Bellotti v. Baird*. In *Bellotti*, the United States Supreme Court struck down a Massachusetts law requiring minors to obtain parental consent before obtaining an abortion. In so doing, the Court held that states could impose parental consent requirements only if they also provided an alternative procedure whereby a minor in certain circumstances could obtain a court order permitting an abortion. The court must grant an order if the minor demonstrates either that (1) she is “mature enough and well informed enough to make her abortion decision, in consultation with her physician, independent of her parents’ wishes,” or (2) an abortion would be in her “best interests,” or that parental involvement in her decision would not be in her “best interests.” The Court stated that this procedure was required to maintain the *anonymity* of the minor, and that it had to be completed with “sufficient expedition to provide an effective opportunity for an abortion to be obtained.” The effect of the anonymity requirement was to ensure that the proceeding was non-adversarial, because the minor’s parents, or others who might be opposed to the abortion, could not participate in the proceedings. The Court in *Bellotti*, however, did not impose any requirement that such proceedings be kept completely *confidential*, which, as will be discussed below, is a different concept than anonymity.

Bellotti’s standards ultimately became the primary template nationwide for state statutes requiring parental involvement in a minor’s abortion decision. A majority of states have enacted statutes forbidding abortion on a minor unless one or more of the minor’s parents consent or are notified. Virtually all of these statutes include a judicial bypass along the general lines of the *Bellotti* standards.

The Texas Legislature included the judicial bypass provision in the Texas Parental Notification Act so as to ensure that the Act complied with the federal constitutional standards announced in *Bellotti* and its progeny. The provision was derived from *Bellotti*, other federal cases addressing the constitutionality of parental involvement statutes, and other states’ parental involvement statutes that are based on those cases.

Tracking the standards set forth in *Bellotti*, the Legislature required that when a minor files a judicial bypass application, the court shall determine by a preponderance of the evidence whether:

- 1) The minor is “mature and sufficiently well-informed to make the decision to have an abortion performed without notification to either of her parents;” or
- 2) Notification would not be in the best interest of the minor; or

3) Notification may lead to physical, sexual, or emotional abuse of the minor.¹¹

If the court makes any of these determinations, the court “shall enter an order authorizing the minor to consent to the performance of the abortion without notification to either of her parents.”¹²

The Parental Notification Act requires trial courts to rule on an application for a judicial bypass order and issue findings of fact and conclusions of law by 5 p.m. on the second business day after the date on which the application is filed.¹³ If a court fails to rule on an application during that time frame, the application for judicial bypass is automatically deemed granted by operation of law.¹⁴ Likewise, courts of appeals are required to rule on any appeals from orders denying a judicial bypass by 5 p.m. on the second business day after the date on which the appeal is filed.¹⁵

The Parental Notification Act includes a provision requiring that both trial courts and courts of appeals give judicial bypass proceedings “sufficient precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly.”¹⁶ The rules

¹¹Tex. Fam. Code Ann. Section 33.002 (a) (Vernon Supp. 2000)

¹²Id.

¹³Tex. Fam. Code Ann. Section 33.003 (h) (Vernon Supp. 2000)

¹⁴Id. Section 33.003 (h), 33.004 (b).

¹⁵Id. Section 33.004(b)

¹⁶See id. Section 33.003(h), 33.004(b).

adopted by the Texas Supreme Court to implement this provision also require adjudication “as soon as possible.” Rule 1.2(b) mandates that courts and clerks serve the documents required under the Parental Notification Act and the rules in a manner assuring “prompt actual notice in order that the deadlines imposed by Chapter 33, Family Code, can be met.”¹⁷ The rules also impose a time requirement of “instanter,” meaning “immediately, without delay,” and require all actions to be done “at the first possible time and with the most expeditious means available.”¹⁸ Generally, instanter means the court should “drop everything” and perform the task.

Statistical Information Available Under the Current System

Although the rules promulgated by the Supreme Court allow access to statistical summaries of the Texas Department of Health’s expenditures relating to judicial bypass procedures, such summaries do not yield the exact number of applications, nor do they provide information on the disposition of those applications. (See Figure 1, Page 33).

¹⁷Tex. Parental Notification R. 1.2(b).

¹⁸Id.

Figure 1. Payment for Court Costs Under Family Code, Chapter 33.

County or County Groupings	Total # of Cases by Fiscal Year			Total Amount of Cases Paid by Fiscal Year		
	FY 02	FY 03	FY 04	FY 02	FY 03	FY 04*
Bexar	72	67	53	41,975.00	42,765.00	32,005.00
Cameron	10	15	9	6,500.00	8,570.00	6,400.00
Dallas	12	13	10	12,631.78	8,442.54	9,358.50
El Paso	28	20	24	22,620.00	22,110.00	24,522.00
Ft. Bend	10	7	4	3,498.00	3,665.50	1,996.00
Harris	2	12	4	1,050.00	15,346.00	6,622.50
Hidalgo	18	17	12	6,945.00	6,840.00	3,100.00
Lubbock	8	8	3	5,681.00	8,146.00	3,532.00
Nueces	42	18	16	17,935.00	10,390.00	11,040.00
Tarrant	5	19	20	4,885.00	16,409.00	20,009.00
Travis	45	44	25	31,522.00	23,776.00	13,366.00
Other	21	24	14	18,349.00	22,909.53	10,821.00
Totals	273	264	194	173,591.78	189,369.57	142,772.00

* FY 04 Data provisional (Sept. 2003 – August 2, 2004)

One of the most alarming omissions in this data is that it does not report instances in which judges either elect not to hear a judicial bypass or otherwise fail to rule on an application within the forty eight hour time frame during which they are required to take action. Because no hearings would be held in such instances, there would be no court costs paid by the Texas Department of Health. The importance of obtaining data about these types of instances cannot be understated. The intent in including the judicial bypass provision in the Parental Notification Act was, among other things, to determine whether or not parental notification was in the “best interests” of the minor. When the forty eight hour time period lapses without any action being taken, this determination of the child’s best interests is neglected. This data does not differentiate instances in which judges either elect to not conduct a hearing on a judicial bypass application or otherwise fail to rule on an application after a full hearing has been held, within the 48 hour requirement. Because attorneys are generally involved in the filing of an application and counties are entitled to costs, reimbursement may be requested in cases where no hearing is held, at the same rate as for other judicial bypass applications. Further, courts can fail to rule within the 48 hour period after a full hearing is held and thus the application is “deemed granted”, but still attorneys fees, guardian ad litem fees, interpreter fees, if one is used, and court costs may be paid in those instances. Nonetheless, the manner in which the application is granted (by court order or by being “deemed granted” by application of law) is not indicated in the current Department of Health data.

An area of concern is that because these statistics report only expenditures related to court costs and attorney and guardian ad litem fees, they may not include cases in which the attorneys involved do not request any reimbursement from the state. Because of the confidentiality of the proceedings, evidence as to the number of cases that fall into this category is purely anecdotal. At the August 9th public hearing of the State Affairs Committee, attorney Rita Lucido, President of Jane’s Due Process (a group that assists minors in judicial bypass proceedings) testified in her individual capacity that she and her firm probably represented more minors in judicial bypass proceedings than anyone else in the Houston area, offered her estimate that nearly “100%” of her cases were ones in which the attorney did not apply for reimbursement from the State. Dallas attorney Susan Hays, testifying in her individual capacity and who is also a director of Jane’s Due Process, stated at the same hearing that she had “only taken fees once.” However, Ms. Lucido also noted that the clerks of the district courts may request reimbursement for filing fees. Therefore, without a more accurate statistical reporting mechanism, it is impossible for the Legislature to determine the number of judicial bypass cases that are going unreported due to attorneys not seeking reimbursement or counties not requesting reimbursement for filing fees.

The numbers that are available for judicial bypass cases for which some sort of fee or cost reimbursement was requested from the Department of Health create some perplexing questions, particularly in regard to the two largest metropolitan areas in the state. Harris County requested fees for only 2 judicial bypass proceedings in Fiscal Year 2002, for only 12 in Fiscal Year 2003, and for only 4 through the beginning of August in Fiscal Year 2004. Similarly, Dallas County requested fees for only 12 such cases in Fiscal Year 2002, for 13 cases in 2003, and for 10 cases

thus far in Fiscal Year 2004. These numbers are significant because they are well below the number of cases for which fees were requested in two of the other largest metropolitan areas in the state - Bexar County and Travis County. Bexar County has seen 72 judicial bypass cases in FY 2002, 67 cases in FY 2003, and 53 cases so far in FY 2004. Travis County saw 45 judicial bypass cases in FY 2002, 44 cases in FY 2003, and 25 cases thus far in FY 2004.

Another large metropolitan county, Tarrant County, has, like Dallas and Harris Counties, requested fees for a smaller number of bypass cases than would reasonably be expected for such a populous area. However, the county appears to be demonstrating a rapid increase in number of cases for which the Department of Health has received a request for fees. Tarrant County's number of judicial bypass fees requests have increased from 5 in FY 2002 to 19 in FY 2003 and already 20 thus far in FY 2004.

While Tarrant County's numbers are rising, other areas of the state have witnessed a decline in number of judicial bypass proceedings for which the Department of Health has received a request for fees. The number of such proceedings in Nueces County dropped from 42 in FY 2002 to just 18 in FY 2003, and 16 through the end of August in FY 2004. Fort Bend County has demonstrated a much less dramatic decrease, but has nevertheless seen its number of reported cases for which fee reimbursement was sought decline from 10 in FY 2002 to 7 in FY 2003 to 4 thus far in FY 2004.

The numbers in El Paso County have been relatively consistent, at least in relation to other areas of the state. El Paso county requested fees for 28 judicial bypass proceedings in FY 2002, 20 cases in FY 2003, and 24 cases thus far in FY 2004. Cameron County has also been relatively steady, requesting fees for 10 cases in FY 2002, for 15 cases in FY 2003, and for 9 cases so far in FY 2004. Hidalgo County also appears to be fairly consistent from year to year, requesting fees for 18 cases in FY 2002, for 17 cases in FY 2003, and for 12 cases thus far in FY 2004. Lubbock County requested fees for 8 judicial bypass proceedings in both FY 2002 and FY 2003, but has done so for only 3 such cases in FY 2004 to date.

The rest of the regions in the state are grouped together under the Texas Department of Health's current reporting mechanism into the single category of "Other." These regions have combined to request fee or cost reimbursement for 21 judicial bypass proceedings in FY 2002, 24 proceedings in FY 2003, and 14 proceedings in FY 2004 to date.

Perhaps the most telling statistic of all is that while there have been rather large fluctuations in the number of bypass cases reported in individual counties, and while some counties have requested fees for disproportionately larger or smaller numbers of bypasses than others, the total number of bypass cases for which Department of Health data is available in the state of Texas as a whole has remained relatively constant. In total, the Texas Department of Health reported expenditures related to 274 judicial bypass proceedings in FY 2002, and 263 judicial bypass proceedings in FY 2003. Those numbers are extremely similar. Through the end

August of FY 2004, the Texas Department of Health had reported expenditures for 194 judicial bypass proceedings in the state of Texas. It is difficult to predict what the final tally will be in FY 2004, but it seems likely that the number will again be somewhere in the mid-200s range. This consistency in number of bypass proceedings for the state as a whole is perplexing when compared with some of the dramatic variations in number of cases from year to year in particular counties within the state.

Questions Regarding Venue

One question raised by the varying numbers of bypass applications among different counties is whether or not minors are traveling away from their homes, to different counties, in order to obtain judicial bypasses. The Texas Parental Notification Rules authorize minors to file judicial bypass applications “in any county court at law, court having probate jurisdiction, or district court, including family district court, in this state.”¹⁹ There is no venue requirement. A minor may file a judicial bypass application in any Texas county, regardless of her residence or the county in which the abortion is sought. Moreover, as a result of the broad confidentiality requirements included in the rules, the county of residence of the minor is not recorded at the time the minor applies for a judicial bypass. It is therefore currently impossible to determine whether the disproportionately large number of judicial bypass proceedings for which fees are requested in Travis and Bexar Counties involve minors who are residents of those counties, or if they involve minors who are residents of other counties who have traveled there in order to apply for a judicial bypass.

At the August 9th hearing of the State Affairs Committee, Dallas attorney Susan Hays indicated to the Committee that the process of forum shopping between one large metropolitan area and another “simply doesn’t happen” because it is in practice very difficult and costly to transport minors to other venues. Ms. Hays told the Committee that for minors who live in abusive households, there is simply no time to transport the minor a long distance. Ms. Hays stated that she had never been counsel in a case in which she had counseled a minor to move more than one county away from the minor's residence in order to obtain a judicial bypass.

If the testimony that the practice of transporting minors long distances in order to obtain a judicial bypass is extremely uncommon is presumed to be true, it leads to a much more compelling question for the legislature. The question becomes whether these minors are simply not being granted judicial bypass hearings or otherwise receiving rulings on their applications within the forty eight hour time frame allotted, and thereby receiving their bypasses automatically.

If forum shopping by minors is uncommon, one would expect to see the extremely low number of reported expenditures relating to judicial bypass proceedings in Dallas and Harris

¹⁹See Id. S 33.003(b).

Counties to be offset by a corresponding large number of expenditures relating to bypass proceedings in adjacent counties. The statistics reported by the Texas Department of Health show no such trend. For example, based on the large population base in Dallas County, one would expect that the number of judicial bypass hearings for minors who are residents of that county could number into the hundreds. However, neighboring Tarrant County, which itself also has an extremely large population base, has reported an average of only 14 bypass proceedings per fiscal year since 2002. Nor does it appear that those minors are traveling to other, more rural adjacent counties. In fact, all rural counties in Texas combined to average only 21 bypass proceedings per fiscal year since 2002.

Thus, if the extremely low numbers of requests for fees relating to bypass proceedings in Dallas and Harris counties are not the result of minors or their attorneys traveling long distances to judicial bypass proceedings in Bexar and Travis counties, and if adjacent and rural counties are not demonstrating a large increase in requests for fees relating to bypass proceedings, then one logical conclusion is that minors in the state's largest metropolitan areas are being automatically granted judicial bypasses *without receiving a hearing or a ruling from the Court*.

Another theory involves the systems created to handle these cases in certain counties and the willingness of attorneys in Harris and Dallas counties to waive their fees. Bexar and Travis Counties have set up procedures within their court houses whereby attorneys are appointed by the Court and are routinely paid for their services. Thus attorneys in Bexar and Travis Counties, in serving the Court, are routinely granted fees in these cases. However, in Dallas and Houston, minors must locate their own attorneys through other sources, and according to witnesses, Ms. Lucido and Ms. Hays, fees have not been regularly requested in those instances. However, because there is no data available to the State about the number of cases in which fees were not requested, this evidence is purely anecdotal.

Compelling State Interest in Gathering Data

The State clearly has a compelling interest in obtaining statistical data that can be used to determine whether or not trial courts are actually hearing judicial bypass applications. The Texas Supreme Court noted in *In Re Jane Doe*:

“The Legislature undoubtedly intended the bypass procedure to be a meaningful one. In requiring that a minor demonstrate that she is mature and sufficiently well informed, the Legislature took into account the gravity and potential consequences of the irreversible decision to terminate a pregnancy, and sought to assure that the minor’s decision was thoughtful and informed.”²⁰

²⁰Id at 255.

The importance of conducting a proper hearing on the issue is crucial to a legitimate determination of whether the minor is “mature and sufficiently well informed” and whether a bypass is in the minor’s best interests. In discussing the discretion given to trial courts in determining a minor’s best interests in a judicial bypass proceeding, the Texas Supreme Court noted:

“Because trial courts can view a witness’s demeanor, they are given great latitude in believing or disbelieving a witness’s testimony, particularly when the witness is interested in the outcome. Acting as fact finder, the trial judge can, therefore, reject the uncontroverted testimony of an interested witness unless it is readily controvertible, it is clear, positive, direct, and there are no circumstances tending to discredit or impeach it.”²¹

Similarly, Justice Hecht stated in a dissenting opinion in *In Re: Jane Doe 4* that:

“The Legislature clearly intended to set high standards for obtaining an abortion without parental notification, and to afford trial courts discretion in their decisions.”²²

That excessive use of the automatic bypass without a hearing or ruling, if that practice is occurring, is counter to legislative intent is made clear by the comments of the legislators most closely affiliated with the passage of the bill. Discussing legislative intent, Representative Dianne White Delisi, the House sponsor of the Parental Notification Act, stated in an April 2000 letter to a fellow state representative that “our message...is that this is a bill about parents’ rights, and it should be interpreted as such. All of us took the time and effort to pass a meaningful parental notification bill, and it is our responsibility to ensure its preservation by the state judiciary.” In the same letter, she expressed the concern of both herself and Senator Florence Shapiro, the author of the Parental Notification Act, that the law should not be changed “from strong, pro-parental rights legislation to a weaker and more easily circumvented law” through the judiciary.

This clear legislative intent is totally circumvented if the judicial bypass is deemed automatically granted without a hearing or without otherwise issuing a ruling on the issue. The purpose of the forty eight hour time frame was to accelerate the process, and the purpose of deeming it granted after the time period lapsed was to take into account those rare occasions in which uncontrollable or emergency circumstances made it impossible for the judge to conduct a hearing within that time frame. If, on the other hand, numerous judicial bypasses are being deemed automatically granted simply because no action is being taken within that two day time frame, the purpose of the provision is defeated.

²¹19 S.W. 3rd 325.

²²19 S.W. 3rd 334.

Moreover, the language of the Parental Notification Act itself makes it clear that the intent was for the courts to have a hearing and issue a ruling on the issue if at all possible. The Parental Notification Act includes a provision requiring that both trial courts and courts of appeals give judicial bypass proceedings “sufficient precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly.”²³ There would be little point in including a provision to expedite the judicial bypass hearing if the legislature did not intend for the court to “reach a decision” but rather to merely deem the bypass automatically granted because it failed to have a hearing or issue a ruling.

At the August 9th hearing of the State Affairs committee, numerous witnesses expressed serious concerns about protecting the minor’s right to due process. Yet as Committee Chairman Jerry Madden pointed out, the most fundamental right of due process for the minors involved is for them to be given a full hearing and to have a judge determine the outcome of their case. Witnesses on both sides of the issue made statements that echoed this sentiment.

In speaking about this issue, attorney Brent Haynes, appearing on behalf of Texas Alliance for Life, said of the minor’s right to due process:

“The point is not that she gets a fair determination by the court as to whether or not she should have an abortion. The point of due process is for her to get a fair determination by the government through its judicial branch as to whether or not she is mature and sufficiently well informed to have an abortion, or whether or not it is in her best interests.”

Women’s Health and Family Planning Association director Peggy Romberg, in proclaiming that her most serious concern was with protecting due process for minors, stated: “I think they are entitled to a hearing.” When asked by Chairman Madden whether or not she felt it was justice for minors to simply not receive a hearing on judicial bypass, Ms. Romberg stated:

“I’m not sure whether that is or not. I think that the Supreme Court, and the Texas legislature in their wisdom to follow the Supreme Court...is that the judge needs to make a decision whether she is mature and sufficiently well-informed, or..if it’s not in her best interest, or notification leads to her abuse.”

However, a judge cannot make a proper determination as to whether the minor is mature and sufficiently well-informed, whether an abortion is in the minor’s best interests, or whether parental notification would lead to abuse if there is no hearing on the issue. Without more accurate data about this issue, the legislature cannot determine whether this is in fact a widespread problem. Thus, creating a mechanism whereby the State can collect data on the

²³See Family Code Section 33.003(h), 33.004(b).

number of judicial bypass applications that are not receiving a full hearing is necessary to achieve the compelling government interest of assuring that the due process rights of minors are not being violated.

Confidentiality and Anonymity

It is also imperative, however, that any reporting mechanism implemented by the legislature must be compatible with the anonymity and confidentiality provisions in the Parental Notification Rules to the extent that those provisions are constitutionally required and the product of clear legislative intent. In order to examine this issue, it is first necessary to understand the concepts of anonymity and confidentiality within the context of the Parental Notification Rules, and to note the differences between the two.

As a result of the U.S. Supreme Court's ruling in *Bellotti*, it is well settled that the anonymity of a minor seeking a judicial bypass should be protected throughout the judicial bypass proceedings. However, subsequent U.S. Supreme Court decisions have tempered that requirement with the statement that "even if the *Bellotti* principal opinion is taken as setting the standard, we do not find complete anonymity critical." The Court determined, for example, that a parental notification statute will be upheld so long as it "takes reasonable steps to prevent the public from learning of the minor's identity."

The Texas Supreme Court nevertheless chose to use the principal opinion in *Bellotti* as the guideline for implementing the anonymity requirements of the Texas Parental Notification Act. Therefore, the Texas Supreme Court adopted in Rule 1.3(a) a general requirement that all proceedings under the Texas Parental Notification Rules be conducted in a manner that ensures the anonymity of the minor. The requirement is based on a similar requirement in section 33.003(k), Family Code. Rules 1.3(b) and (c) impose two specific requirements designed to advance this goal. Both provisions were borrowed from the judicial bypass rules of other states.

Rule 1.3(b) forbids any reference to the minor's name, address, or other identifying information in any court documents, including the reporter's record. Instead, the minor is to be referred to only as "Jane Doe." The sole exceptions to this rule are communications from the court notifying the ad litem of their appointments and the "verification page" of the minor's application.

However, it is important to note that anonymity is a specific type of confidentiality, and that while the United States Supreme Court has stated that the legislature must take "reasonable steps" to protect a minor's anonymity in judicial bypass proceedings, it has *not* mandated that such proceedings be kept confidential.²⁴ Confidentiality, at least as the term is used in the Texas

²⁴See Tex. Parental Notification R. 1.3, 1.4. See generally Tex. Fam. Code Ann. S 33.004(c) (Vernon Supp 2000)

Parental Notification Rules, refers broadly to the secrecy of *all* aspects of the proceedings - the minor's identity, the conduct and outcome of the proceedings, and the judge's identity. Anonymity, on the other hand, refers *only* to the confidentiality of the *minor's identity*. That is, even if other aspects of a Chapter 33 proceeding were public, the minor would remain anonymous if her identity was not made public.²⁵

Confidentiality of Bypass Proceedings

Although not explicitly required by the United States Supreme Court's rulings, the Texas Parental Notification Act contains strict requirements for confidentiality of the judicial bypass proceeding at every stage. The Act forbids trial courts from notifying a minor's parent, managing conservator, or guardian that the minor is pregnant or that the minor wants to have an abortion.²⁶ The judicial bypass application, a trial court order, a court of appeals ruling, and "all other court documents pertaining to these proceedings" are "confidential and privileged and are not subject to disclosure under Chapter 552 of the Texas Government Code,²⁷ or to discovery, subpoena, or other legal process.²⁸ A trial court order or court of appeals ruling "may not be released to any person but the pregnant minor, the pregnant minor's guardian ad litem, the pregnant minor's attorney, another person designated to receive the [order or ruling] by the minor, or a governmental agency or attorney in a criminal or administrative action seeking to assert or protect the interests of the minor."²⁹

The Texas Supreme Court, in adopting the Parental Notification Rules, made the confidentiality requirements applicable to "all officials and court personnel."³⁰ This provision contemplated not only judges and clerks, but also individuals such as bailiffs and court reporters who may be involved in a Chapter 33 proceeding, but may not be formally employed by the Court itself.³¹ Rule 1.4 (b) incorporates the confidentiality requirements applicable to trial and appellate

²⁵See *Id.*

²⁶Tex. Fam. Code Ann. S 33.003 (k).

²⁷See Public Information Act, 74th Leg., R.S., ch 1035 S 29, 1995 Tex. Gen. Laws 5127 (current version at Tex. Gov't Code Ann. SS 552.001-353 (Vernon Supp. 1999)).

²⁸Tex. Fam. Code Ann. S 33.003 (k), (l), 33.004 (c) (Vernon Supp. 2000).

²⁹*Id.* S 33.003 (l), 33.004 (c); see also *id.* S 33.010 (providing that information arising from notification or bypass procedures that is reported to law enforcement, the Department of Protective and Regulatory Services, or other appropriate agencies is confidential except to the extent necessary to prove sexual assault, aggravated sexual assault, or unlawful sexual conduct with a relative.)

³⁰See Tex. Parental Notification R. 1.4(a).

³¹*Id.*

court documents in Family Code sections 33.003(k)-(l) and 33.004(c) and embodies the drafters' interpretation of those provisions in light of what the drafters decided was their legislative history. It provides that "the application and all other court documents pertaining to the proceedings are confidential and privileged and are not subject to disclosure."³²

In adopting the Parental Notification Rules, the Texas Supreme Court justified these strict confidentiality requirements by indicating that the legislature intended the rules to ensure confidentiality not only of the minor, but also that of the court's ruling and the judge's identity.³³ The drafters believed Chapter 33 unequivocally restricted disclosure of all documents in trial court proceedings and court of appeals' rulings. They also concluded that these restrictions would extend to the types of information contained within court documents made confidential, and not merely to the documents themselves. Thus, for example, a clerk could not disclose, orally or through public docketing information, matters contained in trial court documents in a Chapter 33 proceeding.

In an article published in the South Texas Law Review, co-written by the chair of the special subcommittee that drafted the rules and a member of the subcommittee's staff, the authors clarified the quotes they were referring to as evidence of the "manifest legislative intent."³⁴ They cited the statement of Senator Florence Shapiro, author of the Parental Notification Act, during a March 1999 hearing of the Senate Human Services Committee that judicial bypass "is confidential for the child, for the decision, as well as the judge's identity, and is constitutionally sound."

They also cited a remark by Representative Delisi, the House Sponsor of the Parental Notification Act, during a House State Affairs Committee hearing in April 1999 that the judicial bypass provision is "confidential for the child; it's confidential for the decision; and confidential for the judge's identity." Lastly, they noted a statement by Representative Wohlgemuth during debate on the bill on the floor of the House of Representatives that "identity of the judges would be confidential."

However, other statements by legislators make the intended scope of the confidentiality provisions less clear. In a letter regarding legislative intent written to the Rules Attorney for the Texas Supreme Court during the deliberations of the Special Subcommittee on the implementation of the Parental Notification Act, Senator Shapiro responded to questions about scope and constitutionality as follows:

³²Tex. Parental Notification R. 1.4(b)

³³See page 73, "A Guide to Proceedings Under the Texas Parental Notification Statute and Rules" - Ann Crawford McClure, Richard Orsinger; Robert H. Pemberton; South Texas Law Review, Summer 2000.

³⁴Id at page 73.

“How do we respect the open courts provision of the constitution and still provide confidentiality for the minor? What rights of confidentiality does the judge deserve?”

Only the minor’s confidentiality was discussed - the court should decide on the constitutionality of others, but with a minors’ decision in the balance, I would think it would justify confidentiality of the decision as well.”³⁵

This statement suggests that the stance of legislators on the confidentiality of judges and the courts were unclear. It is important for the legislature to be aware, therefore, that the confidentiality provisions with regard to the identity of the judge and the court itself are not required by law. In response to an inquiry about these broad confidentiality provisions from the staff of the House State Affairs Committee in September 2004, Representative Dianne White Delisi, the house sponsor of the bill, explained that “we were told it was necessary.” However, case law has held that although a state may have very legitimate reasons for keeping certain information confidential, protecting the identity of a judge who issues a ruling is not one of them. During the House State Affairs Committee interim hearing on August 9th, one legislator noted that once a person decided to become a public official, they still have rights to privacy as to their private lives, but they do not have a right to confidentiality as to their acts as public officials.³⁶

A major purpose of the First Amendment is to protect the free discussion of governmental affairs, which includes discussion of the operations of the courts and judicial conduct. In its opinion in *New York Times Co. v. Sullivan*, the United States Supreme Court stated:

“The question is not whether the confidentiality of...proceedings serves legitimate state interests, but whether those interests are sufficient to justify encroaching on First Amendment guarantees... Injury to the reputation of judges or the institutional reputation of courts is not sufficient.”³⁷

In *Mills v. Alabama*, the United States Supreme Court observed: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of

³⁵ Letter from Senator Florence Shapiro to Bob Pemberton, Rules Attorney for the Texas Supreme Court, October 12, 1999.

³⁶ Hearing of State Affairs Committee of the Texas House of Representatives, August 9th, 2004, 2:30. Broadcast archive available online at www.house.state.tx.us.

³⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 -273. Pp. 839-842.

governmental affairs."³⁸ The Court has also acknowledged that although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives "[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions."³⁹ The operations of the courts and the judicial conduct of judges are matters of "utmost public concern."⁴⁰

It is also important to note that the Texas Supreme Court itself has chosen not to extend the broad confidentiality provisions for trial and appellate courts to its own judicial bypass cases and decisions. Instead, the Texas Supreme Court has chosen to release the full text of its decisions, with the minor's name replaced with a surname such as "Jane Doe" in order to maintain her anonymity. Unlike trial and appellate courts, the Texas Supreme Court makes the identity of the judges who issue its judicial bypass decisions, and the identity of the court itself, freely available to the public. Moreover, the full text and outcome of the case are made available rather than being kept sealed and available only to the minor herself.

³⁸ *Mills v. Alabama*, [384 U.S. 214, 218](#) (1966)

³⁹ *Bridges v. California*, [314 U.S. 252, 289](#) (1941) (Frankfurter, J., dissenting).

⁴⁰ *Id.*

In explaining this practice, the Texas Supreme Court observed that while Chapter 33 contained strict, explicit confidentiality requirements applicable to trial courts and courts of appeals, the statute required only that an “expedited and confidential appeal” be made available from the court of appeals. “The requirement of a ‘confidential appeal,’” the court reasoned, “is not an impediment to publishing our opinions. We can do so without disclosing the identity of the minor.”⁴¹

The Court then added that its role and responsibility in the tripartite constitutional scheme compelled it to issue opinions in Chapter 33 proceedings to give guidance to lower courts:

“As the head of the third branch of government with regard to civil matters, this Court has an obligation to provide guidance to lower courts through its published opinions. There would be no means of insuring consistency, uniformity, and predictability of the law if the court of last resort could not commit its analyses, reasoning, and decisions to writing in opinions and disseminate those opinions to the public. Without some explication from this Court of the meaning of “mature and sufficiently well informed,” different courts around the state at both the trial and appellate level would surely arrive at very different constructions of what the statute requires. This result would undermine the rule of law that undergirds our whole system of justice....By publicly announcing our construction of this statute, the Legislature and the public will know the meaning that we have ascribed to it, and can order their behavior accordingly. In particular, the people, through their elected representatives, will have full opportunity to change the law, if they so desire, in light of the way the judiciary is interpreting and applying it.”⁴²

Thus the Texas Supreme Court has offered a precedent for using a system that maintains the minor’s anonymity, but does *not* make confidential information about the disposition of the case or the reasoning behind that decision, and that does not make confidential the identity of the judges or the court issuing the decision, when releasing that information is necessary to achieve a compelling purpose. It follows that if the legislature likewise has a compelling reason to study the disposition of certain cases, it should not be barred from using a similar system to obtain that information so long as the identity of the minor is not disclosed. Assuring that the due process

⁴¹19 S.W.3d 249 (Tex. 2000) at 252.

⁴²*Id.*

rights of minors are not being violated certainly qualifies as a compelling reason.

STATISTICAL REPORTING IN OTHER STATES

Although a majority of states are like Texas in that they do not compile and make public statistics regarding judicial bypass, there are currently six states which do report the number of abortions obtained by minors with parental involvement and the number obtained after judicial bypass. The states that engage in this practice are Alabama, Idaho, Michigan, North Carolina, South Dakota, and Wisconsin. An analysis of the practices in these states is helpful in determining the potential impact of gathering such information in Texas.

In Alabama, 852 girls received abortions in the year 2002 with a parent's approval, and 12 did so with a judge's approval, according to state department of health records.⁴³ Alabama also compiles and provides statistical information regarding the nature of consent for abortions performed upon minors.⁴⁴ It should be noted, however, that the Alabama system reports data for all induced terminations of pregnancy that occurred in Alabama, meaning the women may have lived in Alabama or some other state or province.

Idaho reports less than five percent of minors obtaining abortions as using the judicial bypass mechanism to avoid that state's parental consent law.⁴⁵ In 2002, 64 minors obtained abortions with parental consent in that state as opposed to 3 with the judicial bypass.⁴⁶ The state also reported 1 emancipated minor and 2 cases in which the parental consent status was simply unknown. While this latter figure suggests there can still be some uncertainty regarding the data even when a reporting requirement is implemented, the volume of such instances of uncertainty is obviously much lower.

South Dakota reports fourteen of seventy-six minors having obtained judicial bypasses, rather than obtaining parental consent.⁴⁷ South Dakota reported these statistics through the use of expanded abortion forms by physicians, who submitted the abortion data to the South Dakota Department of Health. A similar option for Texas abortion providers was discussed at length and received favorable consideration from witnesses on both sides of the issue at the House State Affairs Committee hearing on August 9th, 2004. The South Dakota system requires physicians to

43 Alabama Center for Health Statistics, INDUCED TERMINATIONS OF PREGNANCY OCCURRING IN ALABAMA, 2002 available at

<http://ph.state.al.us/chs/HealthStatistics/Tables/2002/OCCURRENCE,%202002%INDUS...>

44 Alabama Dept. of Vital Statistics, *Induced Terminations of Pregnancy Occurring in Alabama, 2002*, available at <http://ph.state.al.us/chs/HealthStatistics/Tables/2002/OCCURRENCE,%202002%20INDUCED%20TERM.htm>.

45 Letter from Teneale Chaption, Idaho Dept. of Health and Welfare to Professor Teresa Stanton Collett (May 26, 2004).

46 *Id.*

47 2002 SOUTH DAKOTA VITAL STATISTICS REPORT: A STATE AND COUNTY COMPARISON OF LEADING HEALTH INDICATORS at 62.

complete both a Voluntary and Informed Consent Form for all abortions and a Parental Notice Form where applicable. Unlike Alabama, South Dakota's reporting system does keep track of the residence of the person who received the abortion procedure, so that the number of abortions performed on South Dakota residents by South Dakota physicians can be tracked.

In Wisconsin, less than ten percent of the minors obtaining abortions did so with the use of an order obtained through judicial bypass – 727 with parental involvement and 63 with judicial bypass.⁴⁸

With the exception of South Dakota, each of the states that currently report statistical information concerning judicial bypass procedures for a minor's abortion elects their judges. Alabama elects their judges in partisan elections similar to Texas. South Dakota's unified judicial system consists of the supreme court, the circuit court, and magistrate courts. Supreme court justices are appointed by the governor from a list of candidates submitted by the judicial qualifications commission, and circuit court judges are chosen in nonpartisan elections. In 2004, South Dakota voters will be asked to decide whether circuit court judges, like supreme court justices, should be selected through a merit process. If the proposed constitutional amendment is ratified, circuit court judges would be selected and retained in the same manner as supreme court justices. They would be appointed by the governor from a list of qualified candidates. After at least three years in office, they would stand for retention and would serve subsequent eight-year terms.⁴⁹

PUBLIC HEARING FINDINGS

Testimony on Interim Charge 3 was taken at a public hearing held August 9th, 2004 in Austin, Texas. Various interests testified at this hearing, including representatives of both pro-life and pro-choice advocacy groups, as well as resource witnesses from the Texas Department of Health, the Texas Supreme Court, the Office of Court Administration, and the Texas District and County Clerks' Association.

⁴⁸ Wisc. Dept. Health & Fam. Serv., Div. Health Care Financing, Bureau of Health Info., REPORT OF INDUCED ABORTIONS IN WISCONSIN, 2002 (PHC 5360). (July 2003) at 9.

⁴⁹ American Judicature Society, *Judicial Section in the States* available at www.ajs.org/js/JudicialSelectionCharts.pdf.

Fouad Berrahou, Bureau Chief of Community Services for the Texas Department of Health (TDH), testified concerning the statistical information on judicial bypass proceedings that is currently collected by TDH. Mr. Berrahou explained to the committee that the data on judicial bypass proceedings presented to them represented the court costs and attorneys fees for such proceedings for Fiscal Years 2002 and 2003, as well as for Fiscal Year 2004 up to the beginning of August.

Lisa Hobbes, the rules attorney for the Texas Supreme Court, spoke about the Court's process of adopting the Parental Notification rules. She noted that the Court formed a special subcommittee that put together a draft based on the statute itself and the legislative history of the Parental Notification Act. The subcommittee was made up of judges and attorneys from across the state of Texas, and included persons on both sides of the abortion issue. The report that the subcommittee submitted was given to the Supreme Court Advisory committee, a standing committee made up of judges and practitioners that stands to advise the Court on all of its rule making functions. The Advisory Committee debated the issues and made recommendations to the Supreme Court. The Supreme Court made some minor, generally non-substantive changes, and issued the order enacting the Parental Notification Rules.

Ms. Hobbes stated that at the present time there seems to be, in her opinion, an equilibrium to the process. She noted that the Supreme Court has had eleven proceedings come up to the Supreme Court for review, and the Court has issued opinions on six of those. She noted that seven of those cases were followed in the year when the Act was passed, and that since that time there have been no more than three cases appealed to the Supreme Court in a single year.

In response to questions about the role of confidentiality in the drafting of the Parental Notification Rules, Ms. Hobbes stated that both the Legislature in enacting Chapter 33, and the Court in promulgating rules, were very concerned with confidentiality. She stated that protecting the anonymity of the minor was the first and foremost concern throughout the process, since that was clearly a constitutionally protected requirement under United States Supreme Court precedent. Ms. Hobbes also acknowledged that the Subcommittee, the Advisory Committee, and ultimately the Court felt that the confidentiality of the entire proceeding was important, and that that issue was rigorously debated in all of the arenas. Ms. Hobbes stated that the Court felt that the legislative history and intent of the drafters of the Parental Notification Act was to protect the confidentiality of the entire proceeding. She noted that while confidentiality is required at the trial court and appellate court levels, the Supreme Court is permitted (though not required) to issue opinions on bypass cases that come before it, so long as the opinions do not do not reveal information such as the minor's identity, the trial court, or the trial court judge. The Court determined in *Jane Doe 1* that nothing in the Rules forbade the Court from issuing opinions in such a manner.

Alicia Key, administrative director of the State Office of Court Administration (OCA), spoke about the type of statistics that her Office maintains about judicial bypass actions. She noted that although the Parental Notification Act itself does not mention the OCA at all, the Texas Supreme Court rules did require that TDH transmit to OCA the fee payments that they receive. She noted that OCA therefore knows the number of cases, by county, in which the state was required to pay fees, and that OCA simply keeps those records in a locked cabinet in their office. She noted that the rule also provides that the Rules do provide that OCA can release summary information about those orders, but that up to this point OCA has never been requested to release such summary information.

Ms. Key noted that her office also collects information from courts around the state about which kinds of legal actions are filed in each month of each year. She noted that in looking at OCA's Annual Report, she found that Family Law matters are reported as a group, including adoption, child support enforcement, as well as judicial bypass proceedings for parental notification of a minor's abortion. Because these actions are lumped together, OCA cannot identify how many bypass proceedings are filed in any particular county. The only court that reports specifically how many of these cases they get is the Supreme Court, which reports how many appeals they get each year. In response to concerns about what could be done to make this information more meaningful, Ms. Key suggested that the family cases could be broken out and reported independently rather than being lumped together. She explained that the Judicial Council determines the criteria for what kind of data is reported to OCA, and that this requirement is found in a specific statute in the Government Code. She explained that the Judicial Council has 22 total members and is made up of members of the Supreme Court, legislative appointees (including two members of the House and two members of the Senate) and governor appointees

Both Ms. Hobbes and Ms. Key spoke about a revision of the rules enacted by the Texas Supreme Court in 2001. Ms. Hobbes noted that the Parental Notification Rules were amended once in 2001, based upon statements from the Texas Department of Health that they needed claims for payments to be submitted by a certain time. This request was the impetus for the rule change which provided that people have 90 days in which to submit their claim. Under this rule change, TDH was able to close the books on their reporting and their payment. Ms. Key of OCA explained that prior to the rule change, the counties were charged with sending up the costs to OCA, and noted that not all counties were fully reporting. She states that OCA was only getting "a handful" of data until the rule change. She noted that once the rules changed, TDH went back and retroactively sent them everything they had, so that OCA has copies of all of the data from 2000 onward.

In response to concern expressed by Representative Gattis that the current statistical reporting would not account for cases in which there are no expenditures for reimbursement in the case, Ms. Key noted that the Parental Notification Act specifically requires the court to appoint a guardian ad litem for the minor in each case. She acknowledged, however, that

presumably there may be some persons appointed who do not ask for payment, or who work pro bono, etc. Representative Gattis mentioned that although he could not think of many instances in which guardian ad litem worked pro bono, he realized that in political issues such as this one, people might be willing to do so for various reasons.

Mark Hamlin, past president of the Texas District and County Clerks' Association and the current clerk of Brazos County, spoke about the role that clerks play in the process. He explained that the clerks hand walk the information to the court, and that once it comes back from the court, the information is sealed and put in a separate file. He testified that clerks throughout the state adhere to this process. He also acknowledged that in the clerks' offices he is familiar with, there is no other type of court case that is currently given this level of emergency status.

In regard to the potential problem of forum shopping, Mr. Hamlin stated that many clerks have expressed to him a concern that many of the applicants have been coming to them from other counties. In response to a question from a legislator, Mr. Hamlin stated that it was entirely possible that the minors coming to clerks from other counties were doing so either because of the predisposition of the courts in those counties to grant or deny their application, or, alternatively, that it could be that the minors are simply seeking to further ensure the confidentiality of the proceeding by moving from a smaller county to a larger one.

Mr. Hamlin, in response to a question by Representative Gattis, stated that it would be possible to gather the information on the county residence of applicants, without getting their names or other identifying information. He stated that it would be within the nucleus of confidentiality, and would be relatively easy for the clerk to report. Moreover, he stated it was the only type of case for which his office did not record that type of information. However, Susan Hays countered that in her experience, the district clerks she worked with did not want to "touch this information with a ten foot pole," and that they would not be receptive to a requirement that they report such information. She also stated that in her opinion, many district clerks would feel that it would be a problem or burden for them to collect such information. Rita Lucido offered her own anecdotal information that in her experience, the district clerks she has dealt with are generally not comfortable handling these types of documents, and stated her belief that they would be uncomfortable collecting such data.

Professor Teresa Stanton Collett, a law professor, spoke in her personal capacity as an expert in the area of parental notification laws. She noted that the Texas Supreme Court acknowledged in its rules that the confidentiality requirement's constitutionality may be suspect. She noted that although adoption proceedings serve as precedent for keeping opinions secret, it is also the case that in appellate proceedings for adoption proceedings they use pseudonyms for the minor's name. This protects the anonymity of the minor.

Representative Gattis asked her what the purpose of the confidentiality requirement was, since it is a “whole lot bigger hammer” than anonymity. Professor Collett stated she felt the legislative intent was that there were concerns on both sides about judicial accountability on the issue - i.e. that they didn’t want for there to be any judicial accountability on the issue.

Rita Lucido offered her opinions on the benefits of the confidentiality provisions. She stated that the legislature and the Supreme Court, in enacting the Parental Notification Act in 1999, went to great lengths to exceed the anonymity requirements in *Bellotti v. Baird* and to enact confidentiality requirements that gave the greatest possible amount of due process protections. She stressed her belief that the reason these provisions were considered important was not merely to ensure the anonymity and confidentiality of the minor, but also to ensure that the minor received a fair hearing, and that no one would be pressured due to the politically charged atmosphere surrounding the issue. Ms. Lucido related that every court before which she has appeared in these cases consider their duty very seriously and try to follow the law closely, in spite of, at times, great personal angst. She stated that to reveal information about the number and manner of the granting of cases would only jeopardize the delicate system that was enacted to ensure due process for minors and likened it to putting a target on the back of members of the judiciary that simply followed the law and their oath of office. Hannah Riddering, appearing on her own behalf, cautioned that the issue was politically charged enough that it has caused abortion providers to be murdered, and further cautioned that this threat existed for judges and lawyers as well. The Committee acknowledged that point, but Representative Lewis noted that other similarly politically charged issues such as the death penalty were ruled on by judges without the confidentiality protections provided for judicial bypass proceedings under the Parental Notification Act. Michelle Chelvum, appearing on her own behalf and on behalf of Phillips & Akers P.C., offered the counter-argument that to say that it is a politically charged issue and therefore the judges should not be held accountable is a non-sequiter, since there are many politically charged issues that judges rule on for which they are currently held accountable.

Ms. Lucido stressed that the Office of Court Administration does not report the results of other cases, so in her opinion there should be no reason to report the outcomes of judicial bypass cases, i.e. whether they were granted or denied. Representative Lewis noted that although the state is not required to report outcomes in civil or criminal cases, that information is also not kept confidential, so that nothing would prevent a person who was interested from going and studying the outcomes by county. Ms. Lucido reiterated the distinction that this information was not mandated by the Legislature to be collected and reported. However, Christopher Maska, president of the board of Texas Alliance for Life, countered that contention with the Annual Report of the Texas Judicial System, which is published by the Office of Court Administration. Mr. Maska noted that the publication does report, by court by county, whether a decision was a jury verdict or directed verdict on the civil side, and on the criminal side breaks down cases into

convictions and acquittals.⁵⁰ He noted that convictions are even further broken down into guilty pleas or not guilty pleas, and that acquittals are broken down into jury verdicts or directed jury verdicts. Additionally, Michelle Chelvum noted that every state and county law enforcement jurisdiction has to report its aggregate convictions and statistics to the FBI, a collection of data referred to as the Uniform Crime Reporting Statistics.

Ms. Lucido stated that she did not believe that collecting and reporting the number of cases filed in particular counties, even without reporting outcomes, would be necessary or useful for any particular purpose other than to target judges who grant the applications. Chairman Madden pointed out that the information could be used in certain jurisdictions to target members of the judiciary that did not grant the applications, as could conceivably be the case in Travis County. Members of the Committee indicated to Ms. Lucido that the purpose of collecting and reporting this data would simply be informational - that the Legislature and the Courts simply need to know what is going on. Michelle Chelvum testified that in her opinion, such information would in fact be useful to help shed light on the potential for forum shopping, give the public more information about the performance of the elected judiciary, and give the legislature and the public more information about the way in which the judicial bypass mechanism is working in Texas.

Ms. Lucido expressed the concern that reporting the cases filed by county could be utilized to defeat the open venue requirements in Chapter 33, which she believed to be another important due process protection for minors. Committee members responded that the argument about venue was likely to take place regardless of whether such statistical information was made available, simply because there were such strong feelings on both sides of the issue.

Ms. Lucido also opposed the idea of reporting the county of residence of the minor at the time the bypass application is filed with the court. Ms. Lucido offered her opinion that reporting the number of cases filed by county would compromise the confidentiality of the proceedings, although members of the Committee disagreed with her on that point. She worried that in small rural counties with one high school, it would erode confidentiality to report the number of judicial bypasses heard by count. Susan Hays offered anecdotal evidence of an instance in which a county had seen only one judicial bypass application in a given year, and a reporter in that county was actively trying to discover the identity of the minor. She gave a similar anecdotal story about her involvement in Jane Doe 11, a judicial bypass proceeding before the Texas Supreme Court, after which she stated that she talked to a lawyer from the rural county who was not the attorney ad litem or guardian ad litem, but who knew the facts and outcome of

⁵⁰Annual Report of the Texas Judicial System, Fiscal Year 2003 Report, Page 170.

the case. For those reasons, Ms. Hays argued, reporting information by county would pose great danger to the anonymity of the minor. Ms. Chelsum countered that she did not see any logical connection between reporting the outcome of a bypass application and revealing the identity of the minor. Brent Haynes suggested that one possible solution to situations like those alluded to by Ms. Hays would be to impose sanctions on judges and other parties for leaking confidential information.

Although she did not support reporting minor's residences at the county level, Ms. Lucido acknowledged that she might be able to agree with a reporting requirement that encompassed larger regions than counties, such as the sixteen Administrative Judicial Regions currently in Texas, so that the confidentiality of the minor would be more certain to be protected. She stated that such a system would be less intolerable to her than reporting these statistics by county. Susan Hays likewise stated that reporting by judicial regions would in her opinion be a “reasonable” method of gathering such data.

Ms. Lucido offered her opinion that the Legislature would be able to obtain the most complete statistical information from abortion providers rather than from the courts. Moreover, she argued that using this procedure as an alternative would “leave the judges alone to do their jobs” and therefore ensure due process for the minors. Peggy Romberg of the Women's Health and Family Planning Association of Texas also offered her opinion that this would be a good idea. Committee members acknowledged that it could be valuable to collect statistical information on judicial bypasses at the provider level as well. However, Chairman Madden later cautioned that data gathered from providers would not take into account cases in which a judicial bypass application had been denied by a judge, but only those which had been granted, and therefore accumulating data from the courts would still be helpful even if information were gathered from providers. Christopher Maska made a similar argument that the information is best gathered at both the judicial level and the provider level. Mr. Maska noted that although a judicial bypass might be granted, a girl might not wind up obtaining the abortion, and those cases would not be reported at the provider level. He also argued that receiving data from both sources would be important because if the providers reported a larger number of abortions performed with judicial bypasses granted than the courts did, the Legislature would know there was a problem with the application of the statute that it needed to look into. Brent Haynes also argued that it should be collected at both places, because it won't report how many applications for judicial bypass are turned down.

Ms. Lucido stated that she was not concerned at all that the judicial bypass process was a “rubber stamp” for minors. She acknowledged that her evidence was all anecdotal, but stated that she believed it was a very difficult process for minors. The Committee reiterated that they believed her testimony, but because her evidence was all anecdotal, they had no accurate method of assessing the situation.

Christopher Maska, representing Texas Alliance for Life, brought up the point that because the Parental Notification statute does not explicitly require that the minor seeking a judicial bypass actually be physically present before the judge at the bypass hearing, it is possible that many minors are being granted bypasses in other counties without actually traveling to the hearing and appearing before the judge. Mr. Maska expressed his belief that this was a problem because the judge cannot adequately determine what would be in the child's best interests without being able to ask questions directly to the minor and observe her responses personally. Members of the committee expressed concern about this possibility. Brent Haynes acknowledged that the Legislature has no way of knowing whether or not minors are attending these hearings since there is no strict requirement for them to be.

Mr. Maska also stressed that he felt it important that the public be able to review the work of the judges with respect to judicial bypass proceedings. Susan Hays countered that it is impossible to review a judge's work in a given proceeding without also knowing the underlying facts of the case, and that the facts of a given case could not be known without obtaining court transcripts that would give identifying information as to the minor involved.

Susan Hays noted that the information concerning these proceedings is not only currently required to be kept confidential, but is also privileged information that only the minor herself may choose to release. She stressed that the privilege is something that must be taken into account in determining whether or not the legislature should collect statistical information concerning such proceedings.

Ms. Hays stated that the instances in which she does counsel the minor to seek an alternative venue typically have to do with protecting confidentiality, because the minor might have relatives or acquaintances who work in the courthouse in her county of residence. She also argued that often times it was a matter of convenience, and used that argument to try to refute the concerns about minors avoiding Harris County courts, noting that driving into downtown Houston can be difficult. Ms. Lucido also reported that in many instances the courthouse of an adjoining county may be closer and more accessible than the Harris County courthouse in downtown Houston, given the enormous size of Harris County.

Hannah Riddering, appearing on her own behalf, expressed her belief that the true purpose behind inquiring into the use of the judicial bypass mechanism was that it was a way for the Texas legislature to keep pregnant teenagers from having a fair day in court. Chairman Madden replied that the legislature's only goal was to gather statistics so that it can properly study the issue, and that that was the purpose of the hearing.

Beverly Nuckols, a physician and member of the Texas Alliance for Life, offered her concern that nobody in the state knows what the law is doing because of the lack of availability of statistical data.

Peggy Romberg with the Women’s Health and Family Planning Association of Texas, also offered testimony. She cautioned that a county-of-residence requirement would negate anonymity for many minors. She expressed her concern about protecting the confidentiality of judges and their findings. She stressed that judges have to make their decisions based on the fact that one or more of those factors apply. She offered her opinion that the statute was written so that judges would make decisions based on those three statutory standards rather than responding to political pressures. She stated that her main fear was for the minor’s right to due process.

Molly White, an abortion recovery counselor and educator with the Living the Redeemed Life Ministries, urged that the information be collected from the courts in addition to the providers. She offered anecdotal evidence of a case she said had been described as a “rubber stamp.” When questioned by Chairman Madden on the point, she stated she did not know whether or not the judge had granted a hearing or if by “rubber stamp” it was meant that the 48 hour period had simply lapsed without a hearing taking place and the bypass was deemed automatically granted.

Brent Haynes, a civil litigator representing the Texas Alliance for Life, offered his own anecdotal evidence of a case in which a sixteen year old minor seeking an abortion without parental notification, was taken by an abortion clinic’s lawyer to a courthouse, rehearsed their testimony, went to the judicial bypass proceeding where, according to the minor, “the judge did not ask any hard questions at all.” He noted that judges are not entitled to confidentiality, calling the secrecy “repugnant to our entire judicial history.” He stated that collecting data that said whether the bypass was applied for, granted, and her age doesn’t compromise the minor’s anonymity or confidentiality in any way. He argued that collecting the information in such a manner is not only consistent with the supreme court’s ruling, but also that it is information that the citizens of Texas are entitled to. He stressed that voters in judicial districts are entitled to know whether judges are granting or denying large numbers of bypass applications. He stressed that they are elected officials who need to be held accountable to voters in the same manner that legislators are. He acknowledged that while the results of bypass cases turn on the specific facts of each case, that is an issue that the judge would be free to remind voters of if they did question him about the number of bypasses he had granted or denied.

Dee Dee Alonzo spoke to the Committee about her own personal experiences in having an abortion as a minor, and some of the regrets she felt.

The Committee would like to thank the following individuals who testified on August 9th, 2004: Dee Dee Alonzo, Fouad Berrahou, Michelle Chelvam, Teresa Collett, Mark Hamlin, Brent Haynes, Susan Hays, Lisa Hobbes, Alicia Key, Rita Lucido, Christopher Maska, Beverly Nuckols, Hannah Riddering, Peggy Romberg, Susan Steeg, and Molly White.

RECOMMENDATIONS TO THE 79th THE LEGISLATURE

Require trial and appellate courts to report to the Office of Court Administration all judicial bypass cases for which are granted by operation of law because the court failed to rule within the required time period.

Collecting this data is necessary to achieve the compelling state interest of determining whether the due process rights of minors are being violated by judges failing to grant them full hearings on judicial bypass proceedings. Both pro-choice and pro-life advocates have offered testimony agreeing that minors are entitled to have a judge grant a hearing on their judicial bypass application so as to properly determine whether the minor is mature and sufficiently well-informed, whether the bypass would be in the minor's best interests, or whether parental notification would put the minor at serious risk of abuse. A judge cannot fairly or adequately make this determination without a proper hearing on the issue.

Without a mechanism to report judicial bypass cases that are being deemed automatically granted because courts are either not conducting a hearing or are refusing to rule and make findings after a hearing, the Legislature is left to rely solely on anecdotal evidence in trying to ascertain whether this is a widespread problem. The statistics provided by the Texas Department of Health show a disproportionately low number of reported expenditures related to judicial bypass proceedings in the largest metropolitan areas of the state. If this low number is shown to be the result of courts failing to rule within the statutory time period, it would constitute a widespread violation of the fundamental due process right of minors to receive a proper determination by the state about their maturity, their best interests, and the threat of abuse they may face.

To shed light on this potential problem, the State Affairs Committee recommends that all courts be required to report to the Office of Court Administration those bypass applications that are deemed automatically granted due to failure by the court to take action during the designated forty eight hour time period. These reports should be absolutely prohibited from disclosing the name of the minor, her parents, her legal guardian, conservator, or sexual partner so as to ensure that the anonymity of the minor is protected. The Committee recommends that the reporting mechanism include additional safeguards for courts located in small counties, which would be defined as counties with a population of fewer than 100,000, to take into account the possibility that the relatively small number of bypass cases in such counties might cause this type of reporting to erode the minor's anonymity in spite of the other safeguards. Small counties would be allowed to merge their reports with neighboring counties until the total population of the reporting counties reaches a threshold - over 100,000 - that would not compromise the anonymity of the minor. Once collected, the data should be made available to the Legislature and to the public exactly as it is reported.

The anonymity protections for minors are essential both because they are constitutionally required and because they are central to the purpose of the judicial bypass provision. The United States Supreme Court's standard of review for anonymity affords states a degree of latitude in crafting these requirements, requiring only that parental notification statutes take "reasonable steps to prevent the public from learning of the minor's identity." The court has explained that "even if the Bellotti principal opinion is taken as setting the standard, we do not find complete

anonymity critical.” Thus the legislature must determine for itself, from a policy standpoint, what reasonable steps are needed to protect the minor’s anonymity. Most significantly at the state level, the Texas Supreme Court has determined that releasing opinions that use a surname in place of the minor’s name is a permissible practice because of the Court’s compelling interest in giving guidance to trial and appellate courts. Thus there is precedent in this state for releasing some information about the minor’s judicial bypass case, with appropriate safeguards, when there is a compelling state interest in making that information available. As discussed above, that compelling interest test is clearly satisfied here. Thus, the legislature should only be required to implement anonymity protections similar to those used in the Texas Supreme Court cases. In fact, the anonymity protections that the House State Affairs Committee recommends for this reporting mechanism are broader than those utilized in the release of Texas Supreme Court cases, as they include additional safeguards for minors who are residents of small counties. Such protections would clearly meet and exceed the United States Supreme Court’s mandate that the state take “reasonable steps” toward protecting the anonymity of the minor.

It should be noted that although the House State Affairs Committee’s goal in making this recommendation is not to erode the existing confidentiality provisions in the Parental Notification Rules, the Committee is also not concerned with maintaining broad confidentiality provisions solely for the purpose of protecting the identities of judges and courts. As noted previously, the confidentiality of the judge and the court proceeding itself is not required to be protected by leading case law, or by the United States Constitution. Rather, the confidentiality provisions for judges were implemented as part of the parental notification rules by the Texas Supreme Court on the basis of a “legislative intent” that is at best murky. The statement by Senator Shapiro that “only the minor’s confidentiality was discussed” by the legislature would certainly seem to suggest that the confidentiality of judges and the courts was not a central concern at the time of the bill’s passage. Moreover, even to the extent that the legislative intent can be construed to protect the identities of the judges and the courts, this concern is clearly outweighed by the very clear statements from the bill’s authors about the importance of ensuring that parental notification is not easily circumvented. Although the varying statements by legislators with regard to the confidentiality of judges and courts can lead to different interpretations as to their intent, the definitive statements by the bill’s authors about ensuring that the Parental Notification Act not be shifted from “strong, pro-parental rights legislation to a weaker and more easily circumvented law” leave little room for debate. The Texas Supreme Court has acknowledged in its opinions that the legislature clearly intended for the judicial bypass proceeding to be a meaningful one. The legislature’s interest in ensuring that bypass proceedings are meaningful and not circumvented by widespread failure to grant hearings or issue rulings within the statutory time frame is clearly more compelling than whatever interest it had in maintaining the confidentiality of the judges and the courts involved in those proceedings.

Require District Clerks and County Clerks to report to the Office of Court Administration the number of judicial bypass applications granted and denied pursuant to judicial bypass hearings within each judicial district or county, and require the Office of

Court Administration to make this data accessible by Administrative Judicial Region.

Under the current system, it is impossible to determine the exact number of petitions for judicial bypass heard by the Texas courts. While the Texas Parental Notification Rules promulgated by the Texas Supreme Court allow access to statistical summaries of the expenditures related to these proceedings, such summaries do not yield the exact number of applications, nor do they provide any hint of the disposition of those applications. Moreover, because the system only reports expenditures for judicial bypass proceedings for which fees or costs are requested from the Department of Health, there is no way of ascertaining how many, if any, judges are simply not granting bypass hearings or ruling on hearings in a timely manner and thus failing to give a proper ruling on individual cases. All of this information is basic to any legislative or public oversight of the process.

Without official reporting, the Legislature has no choice but to rely upon anecdotal statements of persons on both sides of the abortion issue as to the effectiveness of the Texas Parental Notification Act and the fairness or unfairness of the judicial bypass. Such statements are, by their very nature, prone to bias depending on whether the interested party supports or opposes the provisions of the Act.

Thus while the present system goes to great lengths to protect the confidentiality of judicial bypass proceedings, one byproduct is that it also creates an ineffective method of collecting data on an issue of important public concern. This is one of the only types of cases in the state that are kept completely confidential at the trial court and appellate court level. Although the state is not required to report outcomes in civil or criminal cases, that information is also not kept confidential, so that nothing would prevent a person who was interested from obtaining and studying the outcomes by county.

Therefore, the House State Affairs Committee recommends that all courts be required to report to the Office of Court Administration the number of judicial bypass applications granted and denied pursuant to judicial bypass hearings before the court, and that the Office of Court Administration be required to make this data accessible to the legislature and the public by judicial region. Requiring that this data be made public at the level of judicial regions will provide sufficient protection for the anonymity of the minor to meet constitutional standards and to fulfill the purpose of the judicial bypass provision. All reports submitted to the Office of Court Administration should also be absolutely prohibited from disclosing the name of the minor, her parents, her legal guardian, conservator, or sexual partner so as to ensure that the anonymity of the minor is protected.

Limit permissible venues for judicial bypass proceedings to those counties that are either the minor's county of residence or are adjacent to the minor's county of residence.

The issue of whether or not forum shopping by minors seeking a judicial bypass is taking

place was a concern voiced repeatedly by legislators at the August 9th hearing of the House State Affairs committee. Because the current statistical reporting system does not allow the State to ascertain whether the judicial bypass proceedings involve residents of the county in which the court is located or residents of other counties, the Committee once again is forced to rely on anecdotal evidence in grappling with this issue.

The statistics that are available through the Texas Department of Health show a disproportionately low number of requests for fees related to judicial bypass proceedings in Dallas and Harris Counties, which might mean that minors seeking judicial bypasses who reside in those counties are avoiding the court systems there. Yet there is no correspondingly high number of requests for fees relating to judicial bypass cases in the counties adjacent to these large metropolitan areas, raising the possibility that minors are traveling long distances from their homes to find their venue of choice for judicial bypass proceedings.

Although some witnesses at the August 9th hearing of the State Affairs Committee offered anecdotal evidence that this is not a common practice, they also, in so doing, offered a number of very legitimate reasons why long distance travel would be detrimental to minors under these circumstances. Traveling long distances, in addition to being costly to minors, would also be difficult due to the time constraints imposed on them that the ruling on the judicial bypass must be issued within forty eight hours of the application.

Moreover, the practice of traveling to venues far from the minor's home undermines the very purpose of including a bypass provision for instances in which parental notification is not in the child's best interests. It is intuitive that a minor would have a difficult time explaining her whereabouts to her parents after a minimum six hour absence to make a round trip from, for example, Dallas to Austin. The longer the minor is absent, the more likely that her parents will begin to investigate her activities and discover that the minor is attempting to obtain an abortion. This is particularly problematic for minors who come from abusive households. One of the central purposes of the judicial bypass proceeding is for the judge to determine whether parental notification would subject the minor to a significant threat of abuse. Yet if the practice of traveling a long distance to obtain a hearing on that issue alerts the minor's abusive parents to her activities, the threat of the minor being subjected to further abuse is heightened, and the very reason for obtaining the judicial bypass is thwarted.

Lastly, the open venue requirement should not be the default mechanism by which minors can locate judges who will follow the law. If too many judges are not properly enforcing this law, then it is the responsibility of the legislature through its judicial oversight function to act to correct the problem. Minors should not be burdened with the responsibility of traveling long distances just to receive a fair hearing on their applications. It is the intent of the House State Affairs Committee to address the potential problem of judges not following the law through the reporting requirements in the other recommendations concerning this interim charge. The burden of dealing with that problem should be lifted from the minors themselves.

Therefore, the House State Affairs Committee recommends that the permissible venues for judicial bypass proceedings be limited to those counties that are the minor's county of residence or that are immediately adjacent to the minor's county of residence. An open venue provision that allows minors to traverse the state is impractical and detrimental to the minor's best interests. Moreover, the open venue provision is unnecessary if assurances can be made that the minors receive fair hearings from judges who follow the law in venues closer to their homes. Allowing minors to forum shop only in adjacent counties will still provide them with enough flexibility to deal with those rare instances in which going before the court in their home county might threaten the minor's anonymity, but will simultaneously prevent the minors from incurring the unnecessary and impractical expenses of traveling halfway across the state just to obtain a judicial bypass.

Require abortion providers to report to the Texas Department of Health the number of minors who obtain abortions through judicial bypasses.

The House State Affairs Committee expressed support for the idea of reporting statistical information concerning judicial bypass proceedings through abortion providers, either as an additional reporting mechanism, or, at minimum, as an alternative reporting procedure if the Legislature determines that reporting this data through the courts is not feasible. Notably, this idea drew support from both pro-life and pro-choice advocates at the August 9th public hearing of the State Affairs Committee. Such reporting would not be any more burdensome to providers than the requirements that are already currently imposed on them. Abortion providers are required to report various statistical information to the Texas Department of Health by age, gestational period, type of procedure performed, etc. Reporting judicial bypass information and the county of residence of the minor in addition to this data would seem to be a very practical and logical addition to the current reporting requirements.

However, reporting at the provider level will not, by itself, supply the Legislature with sufficient information to properly oversee the system. Specifically, information obtained by providers will not reveal whether or not certain judges are simply not granting hearings or otherwise failing to issue a ruling within the forty eight hour time period. Nor would it reveal any information about bypass applications that are denied by judges. Monitoring these types of situations was one of the greatest concerns expressed by the State Affairs Committee members, and therefore the Committee recommends that the Legislature not limit any new reporting requirements to the provider level. By establishing a concurrent system of reporting by courts and abortion providers, however, the legislature would have a method of confirming compliance by courts in hearing the applications within the statutory time periods, and ensuring that the orders are used to authorize abortions only for the minor for whom the order was issued.

Appendix A:
Dissenting Statement of Representative Toby Goodman

The following is my dissent statement to the State Affairs Committee Report. I agree generally with the recommendations of the Committee and certainly, the Committed heard testimony on all of the issues and recommendations contained in the Interim Committee Report during the last regular session of the legislature. However, I do disagree with the required reporting of minors who obtain a judicial bypass in order that the Department of Health can accumulate statistics tied to the county of residence of the minor and I disagree with the Committee's recommendations concerning

venue limitations limiting the venue for purpose of judicial bypass proceedings to the minor's county of residence or the adjacent county thereto.

If a reporting is to be required relating to judicial decisions, it is my belief that reportings should be to the Office of Court Administration which is a judicial agency and not an executive branch agency. It is also my opinion that the reporting, if required, should be by the Court granting or denying the application for judicial bypass and should be of all cases in which either the application was granted or denied. It is my opinion that it is the judicial decision that is being reported and should not be a requirement placed on the provider of abortion services.

As stated above, I further disagree with the Committee's recommendations concerning the venue limitations. A judge of a court having probate jurisdiction, the judge of a statutory county court, the judge of a district court, including a family district court, or a court of appellate jurisdiction has jurisdiction over decisions either granting or denying applications for judicial bypass. (See Section 33.002 (b) (2) and Section 33.003(b) Texas Family Code.) Most of our smaller non urban counties do not have access to specialized jurisdiction courts. The only courts available in such counties that would have jurisdiction over these applications would be the district courts and the Judges of these courts often are required to travel circuits on which dockets are preset. These courts do not have readily available resources which are found in the more populous urban counties including guardian ad litem with specialized training or meeting the requirements of Section 33.003(e)(f) of the Texas Family Code. Our Family Code requires the almost immediate hearing and appointment of a guardian ad litem and the failure to act by a Court on an application on or before 5:00 p.m. on the second business day after the date the application is filed with the court will result in the constructive authorization of the minor to consent to the abortion. (See Section 33.002(B) (3) of the Texas Family Code). As the Committee is aware, most of these applications for judicial bypass are filed by abortions services providers and these providers are almost exclusively located in large urban counties in Texas and are generally tied to medical services providers also located in these same counties. I have always been concerned about Family Code provisions that do not require an appointment of an attorney ad litem, but only authorize the appointment of a guardian ad litem to act as an attorney provided the guardian is a licensed attorney. I do not believe that a psychologist, psychiatrist, employee of the Department of Family and Protective Services, or a member of the clergy without a license to practice law should be representing a minor in a judicial bypass proceeding. I do agree that a guardian ad litem should be appointed and certainly these individuals could well qualify as guardian ad litem in such cases. I am therefore concerned that limiting venue would further limit effective representation of minors in cases involving the application for judicial bypass and result in the constructive granting of such applications.

Appendix B:
Dissenting Statement of Representative Glenn Lewis

The following is my dissent statement to the State Affairs Committee Report. I agree generally with the recommendations of the Committee, and I agree with the committee's recommendations regarding the collection of data about judicial bypass proceedings for minors' abortions. However, at the present time I do not agree with the Committee's recommendation to limit the venue for purpose of judicial bypass proceedings to the minor's county of residence or the adjacent county thereto. Because we do not yet have sufficient data available to properly oversee the judicial bypass system, we cannot determine whether forum shopping is a widespread practice or whether venue limitations would be necessary. I would therefore

recommend that we first implement the Committee's recommendations to gather data on judicial bypasses, and then when we finally have that data available, we should examine the issue of venue limitations.

Appendix C: Dissenting Statement of Representative Mike Villarreal

Interim Charge Three: Gather and Study Statistical Information Concerning Judicial Proceedings to Bypass Parental Notification of a Minor’s Abortion

The Speaker charged this Committee’s charge to gather and study statistical information concerning judicial bypass proceedings. This Committee has reached the conclusion that the state should gather information on the number and *outcome* of judicial bypass cases. By seeking such detailed and unprecedented information, the Committee proposes legislation that would be nothing more than “a hunting license on judges.” I dissent from the Committee’s interim report because its recommendations violate central tenets in our democracy — the independence of the judiciary and the due process rights of individuals.

While the legislative branch is the political branch, the judicial branch is the branch devised to serve as a check on the political impulses of the other two branches. “An independent and honorable judiciary is indispensable to justice in our society.” CODE OF JUDICIAL CONDUCT, Canon 1. We require and rightfully expect our judges to rule on the law and on the facts of a particular case. The Code of Judicial Conduct condemns judges who “by words or conduct manifest bias or prejudice.” *Id.* Canon 3(B)(6). Likewise judges shall not allow any relationship to influence judicial conduct or judgment. *Id.* Canon 2(B). “Any” relationship includes political relationships. While the Committee’s recommendations are at times cloaked in a guise of concern about the minor’s welfare and due process rights, the real purpose of the proposal to report on the number and outcome of judicial bypass cases is clear: undue pressure on judges to deny cases. It is unethical for a lawyer to use a relationship to pressure a judge to make a particular ruling. It is likewise inadvisable for the Legislature to create a scenario to do the same by requiring the reporting of the number and outcome of judicial bypass proceedings.

Judicial bypass proceedings must ensure a minor’s anonymity. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 512, 110 S. Ct. 2972, 2979 (1990); *Bellotti v. Baird*, 443 U.S. 622, 644, 99 S. Ct. 3035, 3049 (1979). While in *Akron*, the Supreme Court refused to declare a statute facially invalid on the “mere possibility” of an unauthorized disclosure of a minor’s identity, here the Committee heard testimony that the mere rumor that a rural county had hosted a bypass hearing prompted a vigorous search by the media for the identity of Jane Doe. Moreover, in a rural county, facts about a particular case have quickly become part of courthouse lore, again endangering the anonymity of the minor. The Committee is well aware that any change in the statute that heightens the scrutiny on these already politically charged cases will likely endanger the anonymity of minors seeking waivers of parental notification.

Witnesses supporting the reporting requirements presumed that judges must be flagrantly ignoring the intent of the Legislature in enacting Chapter 33 of the Family Code and “wantonly granting” bypasses. However, the facts of judicial bypass cases — uniquely — will not be

revealed under any outcome reporting scheme, and thus the data will not indicate whether the judges in these cases are following the law (and their oath of office), or any other fact by which they *properly* should be held accountable. To reveal the intricate, personal facts supporting a judicial bypass application would violate the constitutional requirements of confidentiality and anonymity. Unlike in death penalty cases, affirmative action cases or any other type of “politically charged” case, the public and press are not allowed to sit in and listen to the testimony of witnesses or to view their demeanor. To argue that information on the number of cases that are granted or deemed granted can properly be used to hold the judiciary “accountable” is fallacious at best.

To arrive at its recommendations, the Committee’s report engages in a convoluted analysis based on facts known to be inaccurate. Despite lengthy testimony that any data from the state on the number of cases only reflects cases where attorneys requested fees from the state, the Committee report presumes that the data accurately reflects the relative frequency of cases in certain counties. To compound its error, the report further fails to fully consider testimony that attorneys in counties with disproportionately fewer cases routinely do not request fees. In addition, the report ignores testimony by witnesses that fluctuations in cases in a particular county and a lack of cases in certain counties is likely the result of minors not knowing that the judicial bypass procedure exists and that they have the option of going to court if they do not have a healthy enough relationship with their parents to involve them in the decision to obtain an abortion (or, as is too often the case, if they do not have parents to involve at all). As the State of Texas has made no effort to publicize the existence of the bypass procedure to minors, this situation is quite likely.

The report insists there is an “excessive use” of “automatic” bypass cases with no basis in the testimony given the Committee that any cases are automatic or used excessively. Further, the report quotes very selective excerpts from the legislative history of Chapter 33, ignoring a Texas Supreme Court opinion holding to the contrary. Chapter 33’s enacting legislation, S.B. 30, did not pass on the promise that bypasses would rarely be granted as the report asserts. To the contrary S.B. 30 passed with repeated assurances by its sponsors that bypasses would almost always be granted. *See Jane Doe I(II)*, 19 S.W.3d 346, 351-54 (Tex. 2000). In *Doe I(II)*, the Court rejected assertions by amici that the Legislature meant for bypasses to be rarely granted. The Court noted with interest statements by Senator Shapiro, S.B. 30’s Senate author, and Representative Wolgemuth, the bill’s House author. *Id.* at 353. On the House floor, Rep. Wolgemuth described judicial bypass as “an extremely low bar” and that “obtaining a bypass is not going to be a problem.” *Id.* During the Senate committee hearing, Senator Shapiro, allaying concerns that some legislators voiced that obtaining a bypass would be too onerous, invoked the experience of Nebraska where only *one case* had ever been denied. *Id.* She reiterated the point on the Senate floor, assuring her colleagues that in Nebraska “ninety-nine percent” of bypasses had been granted. *Id.*

Finally, the Committee’s insistence that the state collect data that endangers the confidentiality of judges runs contrary to the lengthy and careful consideration of that issue during the passage of S.B. 30 and the development of the procedural rules that govern bypass proceedings. The legislative history of S.B. 30 demonstrates that the law should ensure the confidentiality of the judge as well as the minor. *See Hon. Ann Crawford McClure, Richard*

Orsinger & Robert H. Pemberton, *A Guide to Proceedings Under the Texas Parental Notification Statute and Rules*, 41 S. TEX. L. REV. 755, 767 & 767 n.48 (2000) (cataloguing legislative history on the confidentiality of judges). In fact, Senator Shapiro, Representative Wohlgemuth, and another House sponsor, Representative Delisi, all represented that the judge's identify would be confidential under S.B. 30. *Id.*

In their exhaustive law review article on judicial bypass proceedings, Justice McClure, Mr. Orsinger, and now Justice Pemberton warned that “disclosure that a proceeding took place in a particular court, particularly in a small locality, may inferentially reveal the identity of the judge and perhaps that of the minor.” *Id.* at 799. This warning is not a mere academic one. The United States Supreme Court has held unconstitutional certain reporting requirements that may endanger the anonymity of a woman seeking an abortion. *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169 (1986). The court did so even though the state statute did not require the reporting of the minor's or the judge's name, because the amount of information about the case may be so detailed that identification is likely. *See* 476 U.S. at 766-67, 106 S.Ct. at 2182. As is the case with the Committee's recommendations, the statute in *Thornburgh* had a transparent purpose. “Identification is the obvious purpose of these extreme reporting requirements.” 476 U.S. at 767, 106 S.Ct. at 2182.

Recommendation No. 1 — Requiring courts to report to the Office of Court Administration all cases for which the district clerk's office issued a deemed granted certificate.

The Committee's report presumes that a large number of cases are being “deemed granted.” *See* TEX. FAM. CODE § 33.003(h). This presumption is based in part on the Committee's perception that cases are unevenly filed around the state, based data from cases where the state has paid fees. The Committee's analysis shows a lack of understanding of the procedures in judicial bypass cases. Fees may still be paid in cases that are deemed granted. The final outcome or method of determination of a case does not foreclose an attorney, guardian ad litem or the county from seeking fees and costs. Thus, collecting information about cases that are deemed granted will do nothing to fill the gap in data of which the Committee complains.

In addition, collecting information about the outcome of cases, whether deemed granted or if a judge makes findings and signs an order, requires personnel in county and district clerks offices to peruse files in parental notification cases. These files contain identifying information about the minor, whether in the hearing transcript itself, or more directly in the Verification Page. *See* Parental Notification Form 2B (requesting the minor's full name and date of birth). This unnecessary expansion of the universe of people with access to identifying information about the minor applicants endangers the anonymity of the minors.

Given the lack of useful information to be obtained by this recommendation and the great danger of a breach of the minor's confidentiality it would cause, I cannot support this recommendation.

Recommendation No. 2 — Require district and county clerks' offices to report the number of cases granted and denied and make this data available by judicial administrative region.

For the reasons already stated above, I cannot support this recommendation. The Office

of Court Administration does not routinely collect data on the outcome of other kinds of cases. The recommendation offers no concrete steps or assurances that the collection process will not lead to breaches of confidentiality. This recommendation is a transparent attempt to determine whether judges are granting cases so that political pressure can be brought to bear on them.

Recommendation No. 3 — Limit venue to the minor’s county of residence or adjacent counties of residence.

First, this item was not part of the Committee’s interim charge. That the Committee reached this recommendation based on an unrelated charge only underscores the attenuated and tortured logic of the Committee’s report. Second, this recommendation is perhaps the cruelest. The Committee has heard ample testimony about the need to maintain the minor’s anonymity and the difficulty doing so in the courthouse where the public and court personnel may recognize the minor or ascertain that a bypass hearing is taking place. This danger is dramatically amplified in rural counties. Minors and their counsel should have the flexibility currently in the law to file the application for a bypass in whatever county provides the most appropriate venue given the facts and circumstances of that case, including the availability of the minor to confidentially get to a courthouse where she and her counsel believe she is least likely to be recognized.

Moreover, as Representative Goodman has noted, many rural counties do not have an adequate number of appropriately trained lawyers to serve as guardians *ad litem*. For the trial court finding ready, willing and able attorneys to serve as the minor’s attorney and as guardian *ad litem* in the short time frame Chapter 33 requires may be difficult in many counties, given the concentration of lawyers in urban areas.

Particularly for minors, abortions are only available in the major urban counties. As the testimony before this Committee pointed out, minors from rural counties already have to travel to an urban county to obtain abortions and often will commence their bypass proceeding in the same county given the higher likelihood for anonymity. Indeed, many minors may not even learn of the existence of the bypass proceeding until they begin counseling at an urban clinic. Having to travel back to their county of residence or an adjacent county for the bypass hearing only serves to endanger the anonymity of the minors and to delay their access to health care.

Recommendation No. 4 — Require abortion providers to report to the Texas Department of Health the number of minors who obtain abortions through judicial bypass.

This recommendation seems innocuous enough, but the fine print of the Committee’s report makes it unacceptable. It is true that abortion providers already report certain information to the state. It is also true, as the testimony before the Committee stated, that the providers can provide even more accurate data than the court system. This is so because in some instances a minor may obtain a bypass then change her mind about obtaining an abortion or simply miscarry.

However the Committee’s report would require the providers to report the minor’s county of residence. Such identifying information may not be collected if the constitutionality of

Chapter 33 is to remain intact. Consequently, I cannot support this recommendation.

* * *

The United States Supreme Court has repeatedly refused to allow the government to chill the exercise of constitutional rights by requiring the disclosure of protected but unpopular activities. *Thornburgh*, 476 U.S. at 767, 106 S.Ct. at 2182. By purposely requiring the disclosure of information about the number and outcome of judicial bypass proceedings, this Committee would chill the exercise of a minor's right to obtain an abortion without suffering any undue burden imposed by the state, and the minor's right to a fair court hearing unfettered by political pressures on the judge. Consequently, I cannot support the recommendations on Interim Charge Three.

As the United States Supreme Court has repeatedly noted, abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. *Thornburgh*, 476 U.S. at 772, 106 S.Ct. at 2184. But these disagreements do not relieve us of our duty to respect the Constitution, the independence of the judiciary, or the due process rights of all Texans — even those of minors facing the difficult circumstance of an unplanned pregnancy without the reliable support of their parents.
