Statement Prepared For Hearing of the Maine Legislators Committee on Judiciary, March 11, 1976.

Senator Collins, members of the Committee on Judiciary. My name is James Russell Wiggins. I am the publisher of the Ellsworth American. While I belong to the Maine Press Association, and serve on its legislative committee, and am a member of other journalistic groups--the American Society of Newspaper Editors, and Sigma Delta Chi--my testimony on LD 2273 is that of a private citizen, interested in the preservation of our historic and traditional defenses erected against the hazards of secret arrest, secret trial, and secret punishment.

That interest, it must be stated in fairness to the committee and its members who have worked hard on this legislation, prejudices me against any legislation tending to throw the cloak of secrecy over the operation of our system of criminal justice.

It is that interest which has compelled me to say that 16 MRSA,(C. 3 sub-c VI) which LD 2273 would repeal has had the effect of diminishing public scrutiny of the police and the courts. It has impeded and obstructed newspapers (who function as a surrogate of the public) in their efforts to report court proceedings. It has denied accused persons of access to evidence of their acquittal essential in applications for military or governmental service and required in legal proceedings. It has embarrassed the courts and court aides with an added burden of "expunging" records. It has made it difficult to inquire into conduct of law enforcement officials. It has divested persons acquitted of crime of evidence needed to prosecute civil actions.

Such laws as this, beyond their legal imposition of secrecy, give a moral sanction to secrecy in government that law enforcement officials and agencies of criminal justice agencies may extend beyond the strict and literal meaning of the statutes. This tendency was exemplified in both Oregon and in Hawaii. The Oregon case is expecially relevant. Last September 9, the officials of Umatillo County imprisoned at Pendleton 175 citizens accused of various minor offenses at the Pendleton roundup. Under their construction of the Oregon statute, they felt required to conceal the identity of the prisoners. They refused to disclose to relatives and friends the very fact of incarceration. The Oregon Legislature promptly repealed this statute in a special session. Whether the police action was in strict conformity with the law or not, these citizens were the first American in this century to experience the terrors of secret arrest, a daily hazard of life in the Soviet Union and other Communist societies. In Hawaii, prosecutors refused to give out the names of indicted persons, in a similar situation.

If Maine's expungement statutes had been in effect nationally during the watergate trials, much of the evidence there divulged would be expunged from the record. The matters pertaining to President Nixon's impeachment would lie under this concealment as the result of President Ford's pardon. Many other notable

cases in history would be similarly withheld from public view.

The dilemma which confronts a legislative body when it under takes to preserve privacy of accused, convicted, or pardoned persons was very well stated by Harold R. Tyler, Jr. Deputy Attorney General in his statement to the Tunney Subcommittee of the Senate Judiciary Committee last July. He said:

> All legislation designed to protect individual rights of privacy involves a tension between the public's right to know and the individual's right to preserve a certain zone of privacy into which the public cannot intrude. Nowhere is this more evident than in legislation dealing with criminal justice information. If records or arrests, court proceedings, and correctional decisions are not publicly available, then the public is not only generally uninformed about criminal justice process, but individuals risk all of the dangers of secret arrests, star chamber proceedings, and banishment to secret prisons. Yet, if a past error, already paid for, can follow an individual for the rest of his life, threatening his employment opportunities and his acceptance in the community, our hopes of rehabilitating offenders through improved correctional services are impeded".

This is the dilemma of modern legislators.

Many citizens and organizations, like Areyeh Neier, Executive Director of the American Civil Liberties Union, prefer the protection of privacy to the protection that publicity in the criminal justice provess provides to all accused persons.

In his testimony before the Tunney Sub-committee, of the Senate Judiciary Committee, Mr. Neier told the senators that only if the accused persons consent would the government release arrest records to the public. And only "if the individual consents, law enforcement agencies should make the record of convictions available to the press". In his view, "it violates due process for law enforcement agencies to disseminate conviction records absent the individual's consent".

Under this formulation of principle and law, the American people would learn very little about the transactions of their system of criminal justice. It would be extremely unwise to limit information about our system of criminal justice to those accused, convicted, and pardoned. They are not the only ones who have a proper concern with the enforcement of the law and the administration of justice. Chief Justice Taft once pointed out that in every criminal proceedings there are three parties at interest: the accused, whose liberty or property is at stake; the government, which is obliged to see that the laws are enforced; and the public which is concerned that the administration of justice conforms to

the constitutional guarantees of a fair trial.

The accused, the convicted, and the pardoned, are not the sole judges of these matters to whose wishes the whole system of justice must be made to conform. Their interests must be respected and safeguarded by any humane and civilized society, but while we defend the rights of those who have defied or are accused of defying authority, we must remember as well what Woodrow Wilson referred to as "the right of those who submit to authority".

Those "who submit to authority", the ordinary, law-conforming, unoffending citizens, not only have concern and interest in the day to day administration of justice; they also have a justifiable interest in the public records that constitute the memory of society, which these laws would limit or destroy. No doubt unreasonable and unjustifiable prejudices sometimes militate against innocent persons falsely accused and improperly arrested, and we must seek ways to minimize this hardship. But citizens should not be coerced into a tolerant and humane attitude toward their fellows by using the statutes to put out their eyes and stop up their ears so that the past is a blank to them.

These philosophical considerations, gentlemen, inspire support for the enacting clause of LD 2273 which repeals 16 Maine Revised Statutes Annoted, C 3, Sub C VI. In our view, it is too bad that the enactment clause did not go on to include Chapter 691 of the 1973 statutes (15 MRSA-2161) providing for expungement of records of those pardoned.

It was the ambiguous language of this statute that prompted then Secretary of State Joseph Edgar, on November 18, 1974, to serve notice on many Maine newspapers to search their files and excise from them records of the confinement of prisoners who had been pardoned. While the incidence of pardons is by no means as frequent as the incidence of arrests, the statute is ambiguous. And the very idea of "expungement" is repugnant to our historic respect for official records, which, in many states, are protected by law against any alteration or revision.

Subchapter VI in LD 2273 is a vast improvement upon the statute that it replaces, in that it seems to preserve public access to contemporary records of the criminal justice system, and involves no ambiguous instruction to expunge such records. In listing the situations excepted from restrictions upon disclosure, the proposed statute pursues a policy the opposite of that preferred by those concerned with the public's right to know: i.e. it lists situations in which secrecy may not be invoked, inferentially declaring that it may be properly invoked everywhere else. Notably omitted from these exceptions is "arrest books" which are explicitly exempted from concealment in the model provisions of the Law Enforcement Assistance Administration and even in the Tunney Bill (S. 2008). Certainly the public character of arrest records ought to be explicitly preserved.

This statute, in paragraph 3 of Section 602 limits the applicability of non-disclosure by keeping open access to "reasonably contemporaneous" records. This is contrued by some experts to mean until the time for appeal has been passed. There is no law on this subject to give us precise meaning of this terminology. Even if "time for appeal" is the limit, it is a limit that does not suit or describe the chronological limits of public interest in many criminal cases. The public still is much concerned with such cases as the Sacco-Vanzetti case, the Hiss case, the Rosenberg case, and many others. Why should these records be concealed from the public?

Section 603, fills me with grave doubts. It is not altogether clear to me, from the language of the statute, exactly when "criminal history" record information starts and "contemporary" events end.

May I say that even if this section is construed in a way the most favorable to its limitations upon access, there are some doubts that I feel compelled to express. The general rights and liberties of citizens, it seems to me, would not be as secure in a society where a privileged elite consisting of police agencies and officials enjoy access to great data banks of information concealed from the public. The citizen arrayed against the state is a David facing a Goliath. It seems to me dangerous to take from him one more sling shot that might be useful to his defense--an equal access to the whole evidence in any relevant case that is concealed in the accumulated files of law enforcement agencies.

Where this effort is not a threat to liberty, is it not an exercise in futility? Every proceeding that passes through the courts is reprinted in extenso in this country's excellent law reports where all is available to inspection by lawyers. With all due respect, gentlemen, I submit that it is beyond the power and ingenuity of the Legislature to extinguish entirely the public memory of events lodge in these and other records so that the innocent-accused, the pardoned person and the released felon may confidently resume his place in society in absolute assurance that his past will never confront him, in the pursuit of employment, or the conduct of a subsequently model life.

Moreover, the more tightly such information is held, within the confines of criminal justice files, and legal offices, the more vulnerable the man with a "record" is to the sly insinuatuations and covert disclosures that are the chief weapons of the blackmailer and the extortionist.

Our society has found in the formal and public record, with all its faults and inconveniences, a better security against rumor and scandal and libel, than any that can be provided by an ineffectual restriction upon the fullest availability of the facts. We must have confidence that, in Madison's words, "Knowledge will forever govern ignorance". This privacy legislation, gentlemen, rests upon the assumption that ignorance is more to be desired that knowledge.

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It is our hope, gentlemen that this committee will amend this bill LD 2273, so as to include the repeal of 15 MRSA, 2161, and then defer passage of laws to regulate the storing of criminal history record information until there has been a greater opportunity to study the means of reconciling the interests of privacy with those of our security against secret arrest, secret trial and secret punishment.