same thing apply where it is not charged that the government evidence which establishes deportability, is the fruit of the poisonous tree, or is derivative from some illegal act? Does this same charge apply where we have a simple case of an overstayed non-immigrant visitor, and the evidence doesn't flow or there is no claim that it flows from any overreaching on the part of the government? Now that again is a double question, and you may answer it in any way you see fit.

Attorney: As I say, there are other issues, this case is not on all fours with Accardi because we didn't ask for the same relief Accardi did. But there are other areas of discretionary relief we have asked for, and other things that came up during the extensive hearings in this case that we have asked for, which on a discretionary basis were denied, and therefore I believe the principle of Accardi is equally applicable, but how much more so?

If a claim may be made at some future date, and this is what I am here to avoid, if a claim may be made at some future date that this Board may be pressured into reaching a decision, how much more important that they had a legal issue to decide and there was no discretion involved in their decision, because all they had to do was affirm whether or not one of 30 little legal issues, I don't mean little, but I spent a lot of time studying them, whether or not cannabis resin as used under the statute, whether such and such happened. The main difference between Accardi and this case is the fact I found out that I have gotten leads on information earlier than perhaps counsel did in Accardi, and I believe I stand in a position to ask this Board not to involve itself in this.

And I think as I stated before, that this would involve no prejudice, no real prejudice to the government. I believe there is no real adverse effect on the U.S. if John Lennon publishes a few more songs.

Mr. Maniatis: Assuming that you succeeded in your injunction and in your prayer, we still are faced with the one simple thing that he is here in an illegal status, and that there is a conviction. How do we go behind that conviction?

Attorney: I am not here to advise the Board as to how these matters are handled, but the government could, and their representative of the government here who is much more knowledgeable. The government could defer its action in this case on one of a number of established legal principles. For instance, there is a Bill now before the Congress, introduced in the House by Representative Koch, and in the Senate by Senator Cranston, which would affect this case.

Basically it would exempt those with one conviction for marijuana from the operation of this section of the law and commit to the Attorney General discretion in admitting them. The Immigration Service has already expressed its acceptance of the Bill. The State Department already has done so. The Department of Health, Education & Welfare has, and it has, to my understanding of the legislative processes, been adopted as an administrative proposal.

This Board knows there is a long-standing procedure whereby when there is a pending legislation which will affect beneficially cases under consideration, those cases are put in abeyance to await the outcome of the legislation.

Chairman: That is not an invariable practice, is it?

Attorney: No, but I would say in general, and I am not the best expert on the legislative process, but in cases where this has come up in recent years that I am familiar with, it has been applied rather generally when, especially when the administration was behind the Bill.

Now I am just pointing this out not because I am asking the Board to have any part of it. I don't think that is within your jurisdiction, but what I am saying is if the government wants to make a determination to resolve the issue in this case, there are many avenues of approach. And I would be the first one to be willing to sit down with them and try to explore them.

Mr. Torrington: I have a couple of questions concerning the claim of electronic surveillance. You cited to us the statute, if I remember right it is Title 18, USC , Section 3504, and is it your claim that as to electronic surveillance your client has nothing to show there was such an electronic surveillance?

The government on this mere claim has to proceed and inquire all over whether such electronic surveillance has taken place. Or should in such a case the person making that contention come forward with something, perhaps not establishing a prima facie case, but something in the nature of a prima facie case?

Attorney: I am not the world's best expert on 3504, but the way the statute reads, and I understand from reading the articles on it, that it is badly drafted. That would appear to be the intent of Congress, that in any proceeding including an administrative proceeding, when a claim is made by an aggrieved party, the burden shifts to the government to affirm or deny. I would say that in this case you may rest assured after all of this time I would not be proceeding based only upon supposition.

Mr. Torrington: What then do you have, beside supposition? You are here to argue just the preliminary questions?

Attorney: Permit me to say that I will not answer the question, not on the ground that it will incriminate my client or me, but it is an integral part of a court proceeding, and I think it would be inappropriate for me to raise that issue now and discuss it. However, I will say that if that is the case, a court can very easily on a motion to dismiss, resolve that issue. And it wouldn't take very long at all for that very question to be determined. Put up or shut up, do we have something or don't we? Does the government have to admit or deny what is the law, on one motion it can be disposed of.

Mr. Torrington: I am going by what you, Mr. Wildes, have told us up to now, and that is that the court has done nothing.

Attorney: That is because it hasn't had time yet, and because the government has not had an opportunity to respond.

Mr. Torrington: In what way would it prejudice your case by telling us whether there is anything

at all you have with regard to the electronic surveillance?

Attorney: I will say that is a part of the court's proof, and I will also say that it is not a part of the court's proof,and my understanding of the statute is that I need not even show it. However, if necessary there will be more than adequate prima facie evidence of what has occurred.

Mr.Torrington: I assume you are familiar with the various ways in which that section has been construed by the courts?

Attorney: Somewhat.

Mr. Torrington: Not all courts have held your construction is correct.

Attorney: That is correct.

Mr. Torrington: You read to us partly from 18 USC 3504, and you mentioned that the party who makes such a claim must be aggrieved. In what respect could respondent possibly be aggrieved by any suspected electronic surveillance? Would you comment on that? In what respect, on the basis of the facts shown here, could respondent John Lennon have been aggrieved by what you now claim?

Attorney: Perhaps I ought to answer by an understatement, because I believe that, well in my opinion my client's interrogation has resulted from a conspiracy of certain high government officials who have chosen for their own purposes, to conduct illegal wiretaps, and to conduct a proceeding to remove him from the U.S. Because they felt, as perhaps better

expressed by the memorandum, "that his presence here was adverse to the present administration."

Mr. Torrington: Didn't it say anything about the illegal wiretap? I don't remember the memorandum talking about illegal wiretap.

Attorney: It instructs a government official to conduct surveillance.

Mr. Torrington: Electronic surveillance?

Attorney: I have no way of knowing what that government official intended by surveillance. They said surveillance of his apartment, and we have information to the effect that there were both kinds of surveillance, both electronic and physical surveillance.

Mr. Torrington: I realize you are not testifying here. You are counsel but you are not willing in any way to make available any information which you may have.

Attorney: That may be the issue. Unless and until there is a sworn statement of testimony on this we are never going to hear the whole story, and that is why I believe this Board, which has jurisdiction to hear a part of my client's problem, should withhold its determination. We are really not doing anything improper, and the U.S. is not really going to suffer if given our day in court.

Mr. Torrington: We are in the role of adjudicating questions of law, so I repeat my question to you again. In what respect could respondent be aggrieved by the adjudication by the Board of this type of questions?

Attorney: Do I understand your question to be that

if the Board reaches a decision tomorrow, holding either my client is deportable or not deportable, entitled to residence or not entitled to residence, my client still has his problems with the Federal Government wiretaps and such, and it doesn't make much difference.

I just con't conceive that is the orderly search for the truth. I believe that the ultimate issue in this case is whether or not the procedures of law have been misused, and whether this proceeding and all the issues which this Board has before it are unnecessary.

Mr. Torrington: You maintain although you have already filed two actions inthe Southern District of New York,that you are aware of the fact an appeal to the Circuit Court of Appeals lies from the decision of this Board?

Attorney: Yes, because I believe that the Circuit Court of Appeals in reviewing a direct appeal under the Immigration statutes, the outcome of the legal issues, which will be determined by this Board, is limited to the four corners of the record as determined by the Board and considered by the Board.

And I believe I have much more fundamental issues which have to be considered, and I would like them to be considered, if any court actions do not result in the complete dismissal or vacating of this deportation case, I would like any result, whichever way it comes out, to be considered by this Board as a matter of record. And I ask today that the complaint and summons be made a part of the official record of the Board, regardless of the outcome.

Mr. Torrington: Whatever information you claim to have as to electronic surveillance you are not willing to be made a part of this record? So that in your opinion on review the Circuit Court would not have the complete information?

Attorney: A lot of things we read about, a lot of things these days about what happens to record files and what have you when they are disclosed finally, and I am not willing to take that chance with my client.

Mr.Torrington: I still don't know in what respect your client would be aggrieved by adjudication of questions of law by this Board. You have not answered.

Attorney: I believe the adjudication of questions of law by this Board doesn't answer the entire question, and if the Board is going to determine only a part of the question, it is not fulfilling what I believe to be its complete purpose. And I think that it should take notice of the fact that these allegations are being made, and not involve itself in a determination until they are resolved.

My questions also include a part that stated that the period should be either until we have completed proceedings, or in view of the conceivable possibility that the matter might go beyond the District Court, until such time as the Board felt there was not being exhibited good faith from both sides. This Board can always consider and reach a decision and I don't know why it must necessarily be reached at this time, in the face of these allegations.

Mr. Torrington: Thank you.

Chairman: I gather your thesis is this, that a claim under 18 USC, 3504 can be presented not only at the hearing before the Immigration Judge, but also as here, while the matter is on appeal before this Board. And conceivably in a proper case, even after the Board has come out with a decision, and the deportation order is about to be executed. Am I correct in that?

Attorney: The statute says it may be, it is very broad, in any body before any officer, administrative agency, court, etc., etc. It was intended obviously to cover a multitude of tribunals.

Chairman: Did I correctly state your position?

Attorney: Forgive me?

Chairman: That this claim could be raised not only during the course of the hearing but also during an appeal before this Board, or even after we have made an adjudication and the alien is in custody for deportation?

Attorney: Yes, I presume that would be so. I don't think the statute, it doesn't delineate the period of time when it may be made either.

Chairman: You stated previously in answer to Mr. Torrington's question, that you are a reputable attorney and would not advance such a claim without some basis, and we all agree you are a reputable attorney.

Attorney: I gave it a great deal of thought before I went to court on it.

Chairman: At least, on this theory an attorney not so reputable, could advance this claim without any supporting evidence at any stage, either before the Immigration Judge, while the matter is on appeal before us, or

when his client is in Service custody awaiting deportation. If we accept your thesis, any attorney could advance that claim and would be entitled to have the wheels of the government grind to a halt insofar as that alien is concerned, and put this processing operation, that is making inquiry and so on, to a........

Attorney: Presumably, subject to Mr. Torrington's comment perhaps, that all judges would not agree with that.

Chairman: We are not speaking about judges but about administrative process.

Attorney: I would assume it would cover us at any stage of the administrative process, and I think Congress, I agree strongly with the purposes of Congress, and that is if someone discovers information at _any_ stage of a proceeding, he should never be precluded from raising that issue.

Chairman: If there are no further questions on the part of the Board we will recess for 10 minutes and then we will hear from Mr. Schiano.

(A short recess is held)

Chairman: Mr. Schiano, we will hear from you, and if you don't mind, we will limit ourselves first to the question of remand, so don't get into the merits except to the degree necessary for your argument on that issue.

Mr. Schiano: That was going to be my first question, and I will address myself to the questions raised by counsel. First of all I am certainly grateful to the Chairman and the other Members of the Board for articulating the government's misgivings concerning counsel's position on that score. We are concerned for instance, in referring to Title 18 of 3504. He talks about a general claim,

whereas the statute is much more specific and talks about a party aggrieved, that evidence is inadmissible. We must take that section in the context of the case, and I wish your indulgence in a slight recitation in that regard.

What we have here is a visitor to our shores who came here after many supplications and much exhortation to the government to waive a ground of inadmissibility. That waiver was granted with certain stipulations, that his conduct be of a certain type, that he engage in activities which he specified, the order was so written.

He remained here as a visitor until Feb. 29, 1972, as noted by the Chairman. He remained thereafter unauthorized,as claimed by the government. Now, the evidence in supporting the application for a waiver, was furnished by the alien, the record of conviction and the British law. The evidence and the deportation matter surrounding deportability was present in the record, not obtainable from any other source.

The alien is not charged with being here illegally by reason of the conviction for marijuana. That had to do with the issue of an application under Section 245, and I think the record should be clear on this. We have an overstayed visitor and an application for some relief. Now, what item of evidence does counsel complain was tainted?

The item presented by counsel? The record of conviction presented by the alien? There is no other evidence here in this record, and that brings us to other questions surrounding

that question of prejudgment, which apparently is hooked onto this. Can there be prejudgment unless there is an exercise of discretion? What discretion was exercised here? There was some, yes, the granting of status to Mrs. Lennon, the granting of voluntary departure to Mr. Lennon. Now there are some serious misgivings concerning that eligibility.

We chose not to contest it at that time, nor do we raise it now. I think counsel must do more under 3504 than make a generalized complaint; and not necessarily answering his argument in the same order in which he gave it, concerning that document, memorandum, whatever you want to call it, on the face of it there is no identifying matter.

On the very face of it, it could be considered spurious, and I can say, in order to ease the conscience of anyone here, the inquiry was made and not such a document has been found in the government of any agency inquired of. Now, assuming for the moment, as the Chairman pointed out, all this were true, prejudgment, what would this effect? A judgment of a hearing officer? Counsel addressed himself to the hearing officer in the motion, saying please Mr. Fieldsteel, reopen this case, which I wish to demonstrate has some bearing on it.

I am sure he is not seriously contending Mr. Fieldsteel was influenced by this memorandum, or he had even seen it, if it were authentic. Is he now complaining perhaps the District Director was influenced by some memorandum or some similar instruction? Is he asking the Board to monitor the motives of the District Director? Rather than act as an appellate body, to review the legal sufficiency of the order to show cause, rather than monitoring to see whether or not there is a case here, of deportability; whether or not there is eligibility as claimed by counsel.

Without eligibility there can be no discretion and no judgment within the terms of a prejudgment concept. Prejudge what? The record of conviction as to the meaning of marijuana? I don't understand counsel's argument in that respect insofar as it is addressed to this Board for remand, and I don't propose to answer the court action by that tribunal.

Chairman: May I interrupt to raise a question germane to that. I think counsel asserted in answer to a question, that discretion was exercised by the Immigration Judge in various stages of the proceedings. And I think he was using the term discretion not in reference to discretionary relief from deportation, but discretion in the sense that a Judge exercises discretion in issuing or denying subpoenas, in granting or refusing a continuance, and such.

Mr. Schiano: I think he was referring to rulings of hearing officers upon requests which are reviewable by this Board, and this Board may review such regulations, and if the Board feels that he erred in overruling counsel's request, could order such remand if it feels it is germane to the issues. What issues do we get back to again? The subpoenas? What would the subpoenas demonstrate? The District Director's action? What administrative action could be taken in the field of enforcement?

This Board has rejected those claims before. I don't think we should be permitted an excursion into that area, and we would be navigating rather murky waters when we considered those undefined standards. I don't understand counsel's request as far as the context of this case is concerned. As a matter of fact the

hearing officer's decision said he denied the request because it appeared, even on the merits of it, with regard to the evidence which was not equal to the case at bar---in other words is he saying that his non-priority is a matter of right? His forbearance a matter of right? This Board has answered that question before in other cases and the courts have answered it in cases also. Where the government appears generous it cannot be held to its generosity all the time.

There was the Lumarque case. Counsel referred to legislative concern over convictions for marijuana and wanted the government to forbear pending legislative action on such a bill. Assuming such a bill were passed for the moment, that those convicted of marijuana only once are to be forgiven or some other course of action contemplated. Then counsel may have to reverse his position and argue that his client benefits from such a decision in that he was once convicted of marijuana as distinguished from what he claims is cannabis resin.

We cannot in deciding appeals, contemplate all the possibilities of what the legislature may do. Counsel wrote a learned article for the Wall Street Journal where he correctly stated what the law was in the case, and it was a matter for legislative concern, and the state of the law was that the government claim, however unfortunately it consequenced his client, the Freedom of Information Act is independent of this. It was never intended of any proof of discovery, only the method of the truth in any case. How it would affect this appeal I don't know; as a matter of fact

I would imagine counsel should urge a prompt action by this Board on the merits. It may be he would be successful, I don't know, and if unfavorable, the right of review under 350å is requested. He could go to the Court of Appeals in review in this matter.

Chairman: I think counsel's position, and he will have an opportunity to respond, but I think his position is that this action should not have been brought in the first place; that the District Director took into consideration things that he should not have taken, and he acted discriminatorily in starting this deportation proceeding under circumstances where if they involved another alien, would not result in the institution of deportation proceedings.

Now, I gather this is one of the bases on which he urges that we defer our decision in order that he can prove these allegations.

Mr. Schiano: I don't think there is a single reported case anywhere which holds that you can or may govern the motives of the District Director in the issuance of a legal document which initiates a deportation hearing. It is the adjudication of the legal sufficiency of that document which is before the tribunal known as the Immigration Judge. The prejudgment concept must go to that adjudication, and must go to the adjudication on appeal of that record.

There has never been a prejudgment argument made anywhere in any case as to the action. They hold the hearing as to the initiating action or the motive of the District Director.

Chairman: You mean the District Director's motive may not be inquired into at all, or that it may not be inquired into by us?

Mr. Schiano: On the basis of the claim.

Chairman: Suppose a District Director who happened to be, shall we say a racist, determined that he will start deportation proceedings against people who have a, who are of a certain race or religion. And he does not start proceedings against other aliens equally deportable, but who happened not to fit his prejudice?

Mr.Schiano: He may be subject to some discipline, but that doesn't derogate from the legal sufficiency of the action initiated against those people who become the subject of the order to show cause.

Chairman: You mean <u>we</u> can't inquire into them?

Mr. Schiano: Yes, and you have held so in the past. This Board has so held. To do that you would have to monitor his every action. You would have to tell him when to argue and when not to argue, not as a matter of legal sufficiency, but as a matter of wisdom.

Now, we do not even tell Congress whether a law is wise or unwise. We administer it and interpret it in light of its administrative history, regardless of the consequences. We may not be happy with the actions of some officials, if those actions call for disciplinary action that doesn't have anything to do with the legal sufficiency of an order to show cause in a deportation hearing.

That order alleged he was an overstayed visitor, it is as simple as that. The legal sufficiency in question is the only thing in question. Counsel did not

see fit to seek a restraining order in his court actions. The reasons are best known to himself. He is asking this tribunal restrain its own handling of the matter of which it does have admittedly, jurisdiction. You may review the record, the same requests were made in the record that were made in the court action concerning the Freedom of Information Act, made there, concerning subpoenas and so on.

As far as any illegal action, just addressing myself briefly to that, again to ease the conscience of all concerned, there has been no illegal wiretap, but that is not relevant to the issue here, because there is no item of evidence.

Chairman: When you say that, to the degree it may be germane, I would like to pin you down, because it is my recollection that in the Bufalino case you made a similar assertion.

Mr. Schiano: I made a broader showing in that case, I said there was no wiretap and there was a specific agency involved that made that assertion, based upon advice from that agency.

Chairman: Your assertion was based on the examination of the Service records, and it was true insofar as concerned those Service records.

Mr. Schiano: Beyond that too, from advice of that agency I made that representation.

Chairman: It later turned out there had indeed been a bug planted by another.........

Mr. Schiano: Not by Bufalino, but one elsewhere, Bufalino became a party to a conversation and how it was reported in the files of that agency was not disclosed to me.

Chairman: That case had to be reopened and a full hearing held with respect to the wiretap and whether the government evidence stemmed from that.

Mr. Schiano: There was the question of whether or not the questioning of Bufalino on the request of discretionary relief was affected by knowledge obtained through possible electronic surveillance, and I believe the evidentiary hearing put that at rest.

Chairman: I just wanted to pin you down.

Mr. Schiano: We don't have that in this case.

Chairman: I am trying to pin down what you are now telling us. Are you telling us that you are responding to counsel's inquiry as to whether there has in fact been unlawful electronic surveillance?

Mr. Schiano: I am making that assertion here so there will be no misapprehension by a failure to respond that there may have been such surveillance. An inquiry made of the appropriate agency discloses there was not. Now, I don't wish that assertion to be the basis of an issue for trial. That remains within the District Court's province, that such an assertion will be made at that time in a different form. I don't want this tribunal or anyone else to go with the idea that because the government failed to respond, that it assumed there was some truth to the mere general assertion.

This is to the document in question, or as to the wiretap or electronic surveillance and anything else, but I did want to put all the questions in the context of

the case and the subject matter. An overstayed visitor who applies to become a resident but appears to be barred on the ground he is ineligible, not for the discretionary relief, not for an exercise of that discretion, but on the basis of a record of conviction furnished by the alien. No other evidence in the record except that introduced by counsel in support of the application.

Mrs. Lennon received favorable exercise of discretion, was granted relief. Mr.Lennon was granted voluntary departure under 244, and there is some serious misgiving if he was entitled to that.

Chairman: But you stated a little while ago you were not pressing that point, then don't press it.

Mr. Schiano: No, counsel's argument really demonstrated the need for a speedy action by the Board rather than a deferring of the action pending court proceedings, which may or may not have any value. And if it did, counsel would not be prejudiced by it. If we were to have enforcement of any order counsel cannot again request a delay merely by saying the government in a large sense is not prejudiced by a deferring of action.

If that were the case it could be made in every case, do not take any action until I exhaust all side remedies, then come back to you and then go back to the Circuit Court of Appeals, and so on, and you would have this yo-yo juridical process back and forth.

I think it would be far more in the interests of justice to adjudicate this matter as expeditiously as possible on the merits. If Counsel feels aggrieved by a decision, but then he may not be, we don't know, but he has his remedies prescribed by law for reviewing in the Court of Appeals on all issues possible, including some which the Board doesn't have jurisdiction over, that constitutes the constitutional ones raised by counsel in his brief. That is it.

Chairman: Mr.Schiano, I assume that you are familiar with the papers which counsel has forwarded to us and which are not part of the record on appeal as forwarded by the Service?

Mr. Schiano: I would join with counsel in having them considered part of the Board papers.

Chairman: They are before us and I assume they underly the motion he has now made?

Attorney: I have no objection to the inclusion of any of these records of our telephone conversations and such. We expect my request for a continuance to be included in the record.

Chairman: I am addressing myself primarily to the copies of the pleadings and your correspondence with the Immigration Judge and various officials of the Immigration Service.

Attorney: I have asked that it be admitted into evidence, and I don't know whether Mr. Schiano has expressed himself on that, With respect to whether you have any objection to the inclusion in the record before this Board of the summons and complaint?

Mr. Schiano: No objection.

Chairman: And the other material?

Mr. Schiano: No objection.

Chairman: I must state we were taken by surprise because the first that we learned of these other proceedings was when Mr. Wildes called on the telephone last week. It was Tuesday. I would have assumed that material of this nature should have been forwarded to us by the Immigration Service.

Mr. Schiano: I was taken by surprise you did not have them. However I did read in the papers there, which may have been the cause of the error that counsel said he did not wish the Board to consider this matter, but only the Immigration Judge, that might have prompted that area of activity, not to forward the matter, I don't know.

Chairman: Mr. Schiano, do you know what the practice is under 18 USC 3504?

Mr. Schiano: I view.......

Chairman: In a criminal context? Or if you know about any in a deportation?

Mr. Schiano: I view this as another discovery procedure adjunctive to some main action. For instance if this item were discovered, let's say at the latest stage of the proceedings, a motion to reopen, coupled with a recitation of the requirement of the statute to reopen for reconsideration of the complaint, referring to tainted evidence to see whether

or not it would have affected the body of proof necessary in the case. It is not a tribunal reviewing the matter, but it is a discovery type of proceeding.

Chairman: No Board Member has any question at this point. Do you want to respond, Mr. Wildes, only on this question?

Attorney: First of all I am very happy the government has chosen that Mr. Schiano represent them here today, which is quite unusual because he is the Chief Trial Attorney in the New York District. My happiness not only arises from the fact he is the attorney most knowledgeable in the case, having handled it all the time, but also from the fact he was the attorney who handled the Bufalino case. And he was the attorney who I am quite certain, with all sincerity, assured the court in Bufalino that there was no wiretap,and even he was so instructed, and the record showed it.

And of course it was proven after that, it was not quite the whole story. I am pointing this out just to show the government, as the Chairman pointed out, has many different agencies. I spent this morning in a Senate office trying to track down a couple hundred of them, doing a little work on my own, and it is a tremendous job. How the government really has canvassed all the agencies in this short period of time, is beyond me.

I would point out that the commencement of proceedings by a District Director in this case is a little different from the ordinary one because this is an alien who was known to have had a ground for ineligibility for residence prima facie in his background.

He knew that John Lennon had a minor conviction for possessing a substance which the government chose to consider marijuana, in England 5 years earlier. As a result when the government came and started a proceeding in this case, it locked Lennon into a position whereas his only conceivable application was one which could have been denied, as the Board is indicating, on a strictly legal basis. We never touched the issue of discretion.

We have a merely legal ground on which they can refuse this application, and moreover when the government doesn't wait for a reasonable ground of deportability, but actually takes action to create a ground of deportability.......

Chairman: Now you are getting into the merits.

Attorney: I am finishing this and I hope.......

Chairman: We will be very happy to hear you on the merits.

Attorney: I hope you will permit me. I am stating this as a final note, I believe the case is largely distinguishable on that kind of a basis, and that the type of relief that I have asked for, while not the usual type before this Board, ought to be seriously considered. I have nothing further.

Mr. Schiano: I wish to reiterate I think it was demonstrated regardless of his attitude toward wiretap, it appeared to be largely irrelevant to the issues in this case insofar as selecting Mr. Lennon. We are getting into the merits of deportability, it is clear from the record no application for extension was made, as could have been available to him, and perhaps from the

testimony given and even counsel's brief, on Pages 44 and 45, he admits his client was an overstay because of sympathetic reasons, but nevertheless an overstay. We did not lock him in. Perhaps we are trying to lock him out, but we did not lock him into the situation; he remained longer,and action was brought in accordance with the law.

Now again, I don't want to make side excursions into the merits of the case, and will withhold other comments until we get into that area.

Chairman: If there is nothing further then we will simply have to take under advisement your motion that we defer action pending ultimate resolution of your court suits.

Attorney: Or for some lesser period of time which the Board will consider to be appropriate.

Chairman: In that connection and without impinging upon your position with respect to the merits, there was alleged here that the conviction in England upon which this denial rests, had been challenged. Has there been any development in that regard that we should know about?

Attorney: There is a trial going on today which commenced about 2 weeks ago, against 5 officers who were then the complete drug squad in England, and in particular Detective Sergeant Pilcher, who are all charged with the, with perverting the course of justice as it is called there, and submitting false evidence in drug conviction cases. And there has been, I am getting reports on it from counsel in England, and there has been some testimony in which John Lennon's name has been mentioned linking the case to some extent.

I believe that Pilcher recently testified that one of the reasons he regularly entered false information in court and police records was since he had occasion to arrest a number of rock stars, and appeared to specialize in that, he was met by reporters who seemed to know he was coming; and where this will take us, I am not quite certain, but what we have done is we have retained counsel overseas to look into the possibility of reopening the original conviction overseas, on the basis of some new evidence.

It is more difficult in England to do this, contrary to my earlier beliefs, than it is in the U.S. I thought they were more liberal about it but counsel is very conservative about it over there, and that is where the matter stands at this point. If there is evidence developed which would give us a ground to move to reopen, before the original magistrate in England, we would by all means do that.

Mr. Torrington: Let me ask you this question. Isn't it a fact that respondent, Mr. Lennon, with advice of counsel, pleaded guilty to the charge?

Attorney: Yes, of course, I am being drawn into the merits, and I spent, I would say, 50 pages of legal argument as to the status of the law in England, which required such a plea at the time, and I can only commend that to your consideration.

Mr. Torrington: Thank you.

Chairman: The only point I wanted to clarify was whether or not this judgment of conviction, which is very material in this proceeding, was still outstanding, and from what you tell us, it still is.

Attorney: Another relevant point to my application

is the fact I had originally requested a certain period of time to prepare and file my brief before this Board, and it was 6 months, and I was granted 4 months. Thereafter the government requested an adjournment and by that means an additional period of 2 months was granted. The government has not filed a brief, and I would hope that you would consider that as well in terms of the time gone and my request for additional time.

Chairman: We will simply have to take under advisement your request that we defer action. At the same time we do want to hear oral argument, if you wish to present it, on the merits of the case. You have filed a very comprehensive brief. The government has filed no response to that, and we will hear the government insofar as concerns its position.

Attorney: Unless Mr. Schiano says anything outrageous which I doubt, I will be happy to rely upon my brief, that is my present posture.

Chairman: You do not care to answer questions,because there are some questions at oral argument?

Attorney: Of course relating to the reaching of a determination.

Chairman: On the merits?

Attorney: Yes, on the merits, and that is something I am asking you to defer. Perhaps after Mr. Schiano has presented his argument I may feel there is something I wanted to say in order to balance the record. I believe that I have stated the argument in the brief quite amply.

Chairman: Very well, Mr. Schiano, we will hear from you on the merits.

Mr. Schiano: I don't know where to begin, unless the government in a sense adopts the decision of the special inquiry officer we feel who overstated the legitimacy of the government's position; and this is not a Peter Stuyvesant type of judgment, where the weight of counsel's papers are put against the government's papers here.

The hearing officer considered all of the issues, all of them, factual and legal, raised by counsel. The question of alienage was conceded and information conceded. The question of the overstay I think we discussed at length already. I don't know if there are any further explorations.

Chairman: I am not so sure that is conceded.

Mr. Schiano: Not conceded, that is correct, it refers to his overstayed client in his brief and the question if they did remain beyond Feb. 29, 1972, which was their authorized period; and the Board has ruled in other cases thereafter the aliens were here at sufferance of the government, in illegal status.

Chairman: I didn't understand that to be counsel's position. As I recall the facts, this respondent, because there is only one before us, was authorized to remain here as a non-immigrant until Feb. 29; and several days thereafter the District Director wrote him a letter calling his attention to the fact he was no longer in a non-immigrant status, and giving him until March 15 I believe, to depart.

Now, apparently it is counsel's position

and I judge this in his brief, that during the period between March 1 and March 15, or at least after he had received this dispensation from the District Director, he was in the position of an alien who has been granted voluntary departure, without the institution of a deportation proceeding, which is authorized by Section 242.7 I believe, before March 15 was reached in fact.

Mr. Schiano: The letter went out on March 15.

Chairman: The District Director revoked the privilege, whatever it was, and started deportation proceedings. Now, you take the position that during the period between March 1 and March 15 the alien gained nothing. He no longer was in status and......

Mr. Schiano: At the sufferance of the government.

Chairman: I gather from his brief counsel takes the position that the alien was here in the status of a person who had been granted a privilege, the privilege of voluntary departure, and that this was arbitrarily revoked without any showing of proper cause.

Now, again I don't want to ask counsel if I state his position correctly, because he has insisted he doesn't want to get into the merits, but assuming that is a correct statement of counsel's position, you have a response to that?

Mr. Schiano: On March 1 no doubt the government could have issued the order to show cause and not extend a privilege to Mr. Lennon. It chose not to do so perhaps for reasons

it might have been a good faith statement to have additional time granted, and we learned from a source that he did not intend to depart, and revoked the privilege. Counsel complained the reasons were not stated in the order to show cause. We do not allege evidentiary matters in an order to show cause.

At the hearing Mr. Lennon himself testified neither at that time nor at the time of the hearing nor any time did he have any intention of departing. He would not formulate any intention because of personal problems such as Mrs. Lennon's concern over the child, so he did not have any intention to depart.

The privilege of voluntary departure under such circumstances is a sovereign sufferance based upon good faith. It was no extension of his lawful status, merely a recognition or an extension of charity, saying we may permit you to leave without institution of proceedings if you in good faith intend to depart, and that was revoked when he did not have any intention of departing; and that was demonstrated in the record by the questioning of Mr. Lennon.

The fact that, as counsel points out, that Mr. Lennon might have been less than equivocal, or might have been equivocal in answers, doesn't invalidate the premise of the government that he was an overstayed visitor as of March 1st.

Chairman: You don't have to answer this question, but what was the rush? I mean the District Director had given him until March 15. Wouldn't it have been a lot simpler, and wouldn't it have made the case a lot easier from the Service point of view if he had simply waited for that period to expire and then issued an order to show cause, which presumably would be invulnerable?

Mr. Schiano: I agree it would have been a wiser course of action.

Chairman: You don't have to answer, but I wondered.

Mr. Schiano: It might have been a matter of wisdom but not a matter of error.

Mr. Torrington: Isn't it correct, as I recall the record, the reason the District Director did that was because an application for 3rd-preference........

Mr. Schiano: Was filed on March 3, two days after the letter of voluntary departure and thee days before the revocation.

Mr. Torrington: And isn't it also correct that the revocation proceedings were exactly in accordance with the provisions of 8 CFR 242.5(c), which deals with revocation and provides that if subsequent to the granting of an application for voluntary departure under Section 242.5 it is ascertained the application should not have been granted, the grant may be revoked without notice by any District Director?

Mr. Schiano: We relied on that.

Chairman: Counsel in his brief has referred to a decision by an Immigration Judge in Boston in which he terminated proceedings where the charge had been based on a marijuana conviction, but the actual conviction involved hashish. And the Service had taken an appeal from that decision and then the General Counsel

had withdrawn the appeal. Now counsel has argued that this establishes a legal policy, and if he were to argue the merits I would ask him about that; but is there any established policy in a decision of an Immigration Judge, if the Service withdraws appeal or simply doesn't take an appeal?

Mr. Schiano: There may be many considerations, the courts have coordinate jurisdiction, binding upon each other. It may make interesting reading. I think jurisdiction was involved in that case. The decision was based on an inadequate understanding of the subject matter, but he had a more sophisticated record, and we do wish a decision on the merits concerning that. We are not bound by the decision of Boston at all, nor is this Board.

Chairman: One thing further, counsel has argued at great length in his brief that the British statute which is here involved, did not require any mens rea or knowledge on the part of the defendant, that is a culpable knowledge, that what he possessed was in fact a forbidden substance. And it is his position that this sort of conviction is not what Congress contemplated when it made a conviction under Section 212(a)(23) a grant of inadmissibility.

Now he has countered the citations in the Immigration Judge's decision with other citations, some later ones, and he has given us a fairly exhaustive development of the law in England. We don't have any brief from you but would you care to comment on that portion of counsel's argument?

Mr. Schiano: I believe the recitation both by counsel and the higher officials might have been very apt before a British court at the time the case was being tried, and what perhaps might have been considered instructions to the jury as to what they should or should not find, but once guilty of, or once guilt has been established by a plea of

guilty or conviction upon the record, I think we are bound by that record of conviction.

Chairman: Regardless of what the statute requires for conviction?

Mr. Schiano: The only recorded matter when we review foreign convictions is when there is a conviction in absentia, a political crime, or some rare, unusual situation. For us to sit now, in an appellate jurisdiction upon the British court, and what is British law, would open up Pandora's Box to almost every foreign conviction,based upon subsequent self-serving declarations as to what the mental status of that defendant might be or might have been.

He could have pleaded this before the British court and if he wished to say the state of the law prevented from pleading innocent, I don't think we should accept that, if he said I had to plead guilty even though innocent. I don't think that creates the issue.

Chairman: I don't think that is what counsel is asserting. I think counsel is asserting it is no basis for a plea of innocence that the defendant did not in fact know the nature of this white powder he possessed.

Mr. Schiano: Is it a question of fact he knew or not?

Chairman: No, it is a question of law he is asserting.

Mr. Schiano: We do have a sort of Freudian slip, in the recitation where Mr. Lennon states he was tipped off as to the raid and cleaned out the apartment, and he may have overlooked the camera case, and this is not in the record of the foreign conviction. It is in the present

recitation; and are we now to accept these recitations and allegations? Because that is what we would be opening the door to. The law says if he was found in possession, and was convicted of possession, of an illegal substance, I don't think we want to sit here on that basis.

Mr. Torrington: I don't think, Mr. Schiano, that you have mentioned the British case of Lockyer v. Gibb, by Judge Parker, which was partly set forth on Page 20 of the Immigration Judge's decision. I noticed that the brief filed by the American Civil Liberties Union as Amicus Curiae also quoted from Judge Parker's opinion in Lockyer v. Gibb, 2 Q. B. 243, a 1967 decision, which is a fairly recent case.

Apparently, and according to the brief of the American Civil Liberties Union, the Judge elaborated on his statement as follows, Page 20, but there is something else added in the brief, and I have not read the decision in the original volume, but it is quoted in the brief and in the Immigration Judge's decision as follows, in interpreting the provisions of the statute with which we are dealing here, interpreting the British statute:

"In my judgment it is quite clear that a person cannot be in possession of some article which he or she does not realize is, for example, in her handbag, in her room, or in some other place over which she has control." Then the Immigration Judge says: ".....completely innocent and unknowing custody or potential control over a drug is not possession within the meaning of the act and regulations."

That, it would seem to me, would refute

the contention that the British or English statute should state this doesn't require mens rea........

Mr. Schiano: It would........

Mr. Torrington: Mens rea for conviction of possession of marijuana.

Mr. Schiano: It would depend upon a finding of guilt, if they found he had a guilty knowledge of what he was in possession of. Once they found him guilty, they determined as an element of truth thereof, of the element of the crime he did have guilty knowledge of, and now he wishes to add an extraneous fact outside the record by his present claim of innocence.

Attorney: Do you have the date of that decision?

Mr. Torrington: It appears on the bottom of Page 20 of the Immigration Judge's decision which you no doubt have with you, it is a 1967 case, and it is also in the brief of the American Civil Liberties Union, stating it was decided in 1967.

Mr. Schiano: The........

Chairman: Mr. Schiano, there is a statement in counsel's brief which I would have questioned him on, but in the absence of that, at Page 17, bottom, he says this, and I quote: "The District Director (and after commencement of deportation proceedings, the Immigration Judge) has the power, in his discretion and on the basis of appealing humanitarian factors, to cancel and terminate deportation

proceedings. The determination whether to withhold or terminate deportation proceedings is clearly discretionary." And then he cites 8 CFR 242.7. That seemed to be overbroadly stated, and I have checked the regulation referred to, and I find in it a reference to the power of a District Director to terminate proceedings, but the reference to an Immigration Judge is as follows, and the Immigration Judge was formerly known as a special inquiry officer, as you know, and I am reading from the latter part of that regulation:

"A special inquiry officer may, in his discretion, terminate deportation proceedings to permit respondent to proceed to a final hearing on a pending application or petition for naturalization when the respondent has established prima facie eligibility for naturalization and the case involves exceptionally appealing or humanitarian factors; in every other case the deportation hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any stage of the proceedings."

Now as I read this regulation the power of an Immigration Judge to terminate the proceedings is limited to these specific instances where there is a possibility of naturalization. And the case of Millan-Garcia v. I&N Service, which is cited at Page 18 of counsel's brief, is just such a case. But do you know of any power or any regulation conferring power on an Immigration Judge or on this Board for that matter, to terminate proceedings without having this sort of a case?

Mr. Schiano: The only practice that I know of was where a legislation was introduced, as in Cuban cases, where there were pending deportation matters, by stipulation with the government,

who remanded for administrative consideration.

Chairman: I gather you are telling us there is no broad general power either in an Immigration Judge or in this Board to terminate proceedings where deportability has been established by the requisite evidence?

Mr. Schiano: Never granted as a matter of favor, right.

Chairman: I have no further questions, and unless somebody else has, I don't know whether you care to comment on anything that has been said, Mr. Wildes.

Attorney: I have heard nothing so outrageous that I would change my position. I would ask the Board rule upon my request, not as part of a general decision, but in advance of that.

Chairman: Obviously the first thing we have to determine is your motion to suspend proceedings, and if we determine to deny that of course we will proceed to a consideration of the merits. I can't say of course what we will do until we confer on this and come to some decision.

Mr. Torrington: I have a question of Mr. Schiano. The statute under which respondent was convicted in England deals with cannabis resin, and my question to you is, because there was an expert witness who testified I believe, is cannabis resin something quite different from marijuana? Or is it just something derived from marijuana?

I would like you to comment first on cannabis and then on resin, and tell us, as far as you know, what cannabis resin is, and the reason

I am asking that question is that counsel has contended that cannabis resin is something entirely different from marijuana.

Mr. Schiano: I don't think he says it is entirely different. He says it may not be comprehended within the statutory meaning of marijuana even though cannabis resin is an exudation of the marijuana plant. Even in the context of his own expert, and the legislative history, what was Congress getting at here? Marijuana is one of the plants which contains an hallucinogenic agent, which is an evil as determined by Congress, present in different parts of the plant in various intensity, the most intensity being in the resin, the lesser intensity being in the leafy material.

In order not to broaden the argument more, and without getting into what I believe is a statutory definition, are we to assume Congress said marijuana is a bad thing and we want to make sure it is included in the law? We want to make sure we override these--- we want to include them in the law and say any conviction for violation relating to the possession of marijuana comes within 212(a)(23), and we use the word marijuana specifically in that context of the law.

Were they referring merely to the growing of the plant or the plant held as a weapon in the hand of someone? Or were they getting into the hallucinogenic contention of the plant used in different ways? Used for smoking and the resin which may also be injected by smoking, or in any other form? But probably 10 times more intense or with worsening effect of the leafy portion of the plant? They both

contain the hallucinogenic agent. Congress intended to get at the part of the plant that contained this hallucinogenic agent. Assuming it was that part of the plant which does not contain it, there probably would never have been an arrest to begin with. It had to be that part which contained the hallucinogenic agent, but toxically there are certain distinctions made in different parts of the plant and different products of the plant.

There is a part of this plant which has commercial uses, the fiber part which has or is used for the making of rope and what not. I understand in Japan where they were so concerned with the resin of this plant for commercial uses rather than the private, so-called uses, they now developed a so-called marijuana plant which does not contain this agent, and cannot be used to make the cigarettes or hashish or cannabis resin, and can only be used for commercial uses, for the making of fibers. It is marijuana when used in this section of the law.

Mr. Torrington: In a few words you state that the term marijuana as used in our statutes comprehends cannabis resin, is that correct?

Mr. Schiano: Correct.

Attorney: At this point I think something outrageous has been said. Counsel for the government, and I was hoping not to be drawn into this, but counsel for the government has at all times emphasized how narrow this Board's jurisdiction

is, and how I myself keep to that jurisdiction, and he now is interpreting words of Congress that is not in the statute. The statute says marijuana, the word marijuana has existed in the statute since 1931, and I traced that in my presentation. There are 4 parts to that statute, 2 separate sections. It has been moved around but at no time was there ever any indication that it meant anything else.

We have had an expert testify what marijuana is and what cannabis resin is, and he said they are two different substances. The government has had this in other prosecutions where they have taken the opposite view, and they claimed that marijuana and cannabis resin are the same given substances.

We have a history of this which is so replete with contradictions on the part of the government, and this is one point that I cannot conceivably see this Board rule on as a matter of law within its jurisdiction. Cannabis resin is a defined term under the statute that Mr. Lennon was convicted under. It is defined as not being cannabis, one including the hashish and one including the marijuana.

We get over here and we want to know what does the word "marijuana" mean in the exclusion statute? And we trace the history of that, and we find that the government argues that it means what the 1954 Internal Revenue Code said it means, and showed it existed in the law before the Internal Revenue Code came about. And I traced it back to show even in the cases cited, but for the change required in the law, those cases involved marijuana and not hashish.

They involved a certain part of the plant. This is a technical prosecution, and I unfortunately have to be highly technical in its opposition, and it seems to me it is not a function of this Board to guage what Congress should have done. In my opinion Congress, if they hoped to include something, but they never included it. Now we are at a point where we must determine what is the meaning of marijuana? And all the principles of jurisprudence in this field requires interpretation of the meaning of words so that any doubts involved are held in favor of the alien.

If the Immigration Act was one which obviously wanted to include everything, it would have included much more serious threats than marijuana and LSD, but it did not. It stated 2 categories, it stated a general category of narcotic drugs, and a specific substance of marijuana. Now what does marijuana mean?

Mr. Torrington: I want a little more from you because you mentioned the expert's testimony which I read a number of times. He never tells us or tells the Immigration Judge what cannabis resin was, and why it was so different, as I understand it, and I understand it from his testimony, although he never went so far as to say that cannabis resin is a part of marijuana.

Attorney: Not a part of marijuana, it is a part of the species cannabis in a general term.

Mr. Torrington: Isn't it true the name of marijuana in various statutes in science and literature is equivalent to the Latin word "sativa", cannabis sativa?

Attorney: Lucky we are not interpreting one of those statutes but are interpreting only the Immigration Act, which to me has a very clear