50 Wash.2d 809, 314 P.2d 645 (1957)(citied in Opinion, p.22), where the Court interpreted the deletion of the words "with intent to sell" from the statute as dictating an intent to dispense with any knowledge requirement (314 P.2d 645, at 647). However, a careful examination of Henker, supra, will disclose that the lower court had instructed the jury

> "that the state must prove beyond a reasonable doubt that Henker knew he possessed marijuana and knew he had it under his control."

Therfore, even in Henker, often cited in Washington decisions for the proposition that knowledge is not a requirement, the Court instructed the jury thatknowledge was necessary to a conviction.

Nevertheless, the doctrine developed that:

> "It is true thatonce possession of drugs is established, the burden shifts to the defendant to explain away the possession as unwitting, lawful, or otherwise excusable." State v. Callahan, 77 Wash.2d 27, 32, 459 P.2d 400 (1969)(Cited in Opinion, p.23).

However, even the Court therein stated that "such rule... cannot be used to furnish theelement which the state first must prove, namely, that the defendant was in possession of the proscribed goods."

State v. Boggs, 57 Wash.2d 484, 358 P.2d 124 (1961), (cited by the Immigration Judge, Opinion. p.22) is in accord, but there the central question was awareness of the narcotic character of the article possessed:

> "In essence, it is the appellant's contention that awareness by the accused of the narcotic character of the article possessed is an essential element of this offense. The appellant bases this contention upon the assumption that an intent to possess a narcotic drug is required to be proved under a charge of unlawful possession of a narcotic drug. This assumption is erroneous. The legislature, by its enactment of controls against the vils of the narcotic traffic through the adoption of the Uniform Narcotic Drug Act has made mere possession of a narcotic drug a crime, unless the possession is authorized in the act." 358 P.2d 124, at 125. (See also State v. Walcott, 74 Wash.2d 359, 435 P.2d 994, 1000 (1968), and note that the defense of unwitting possession was always avilable to the defendant.)

However, two developments in recent Washington cases not cited by the Immigration Judge have since undercut the Washington doctrine, which itself was always in doubt, since Henker, although cited for the poroposition thatknowledge was not necessary for conviction of posession of drugs, was in reality merely a decision which eliminated the requirement of intent to sell as a necessary element for conviction. Although not referred to by the Immigration Judge, in State v. Hennings, 3 Wash.App. 483, 475 P.2d 926 (1970), Henker was explicitly disapproved:

> "We respectfully disagree with the conclusion in Henker that the legislative objective was to eliminate scienter (wilful guilty knowledge) as an essential ingredient of the crime of trafficking in narcotics. As we discern the legislative purpose, it is to make possession of narcotics a crime without proof of a specific intent to sell. However, the elimination of the requirement of proof of a specific intent to sell does not, we believe, warrant the conclusion that a general intent -- wilful guilty knowledge -- need not be proven." 475 P.2ed 926, at 930.

This attack at the very foundation of the Washington doctrine calls into question all the cases which relied on Henker, including Boggs (quoted by the Immigration Judge at p.22, Opinion).

Furthermore, in 1969, the Washington Legislature removed cannabis from coverage under the Narcotic Drug Act, Laws of 1969, First. Ex. Sess., Ch. 256, s. 7. This action received the imprimatur of the Washington Supreme Court in State v. Zornes, 78 Wash.2d 788, 475 P.2d 109 (1970) which stated that "the concensus is that cannabis is not a narcotic but rather a mild hallucigenic." Id., at p.115. Thus, the law which was interpreted in the above cases -- R.C.W. 69.33.230 -- no longer applies to cannabis. This change is crucial because the public safety underpinnings of the no-knowledge standard do not necessarily apply to the re-defined status of cannabis (as a mild hallucinogenic, rather than a narcotic). The cases which continue to speak in terms of the old test have not dealt with cannabis, but with heroin. State v. Edwards, 5 Wash. App. 852, 490 P.2d 1337 (1971).

Any implication by earlier cases that knowledge was not an essential element of possession in Florida has since been overruled.

> "The Reynolds case and the cases referred to in the annotation, supra, require the state to prove that the defendant had physical or constructive possession of the object or thing possessed, coupled with his knowledge of its presence." [Emphasis supplied]. Spataro v. State, 179 So.2d 873, at 877 (1965).

And recently this proposition was affirmed in Florida. Briggs v. State, 262 So.2d 451 (1972)(evidence in a criminal prosecution for possession of marijuana must show that the defendant had knowledge that the contrabnad was in his possession and control.)

In Massachusetts, the doctrine was established by Commonwealth v. Lee, 331 Mass. 166, 117 N.E.2d 830 (1954), which relied heavily on the public safety doctrine discussed by the Immigration Judge (See Opinion, pp. 24-26), and which has received little elaboration in the last 19 years. However, in Commonwealth v. Buckley, 354 Mass. 508, 283 N.E.2d 335 (1968), the Supreme Judicial Court read in a knowledge requirement to a law making it an offense to be present where a narcotic drug is illegally kept. This knowledge requirement was seen as necessary to thwart an attack on the constitutionality of the law...

> "The legislature may determine what shall be deemed a 'public welfare offense' punishable notwithstanding innocent intent... But an intention to create such an offense should appear in clear and unambiguous language... In view of the seriousness of the penalty which may be imposed...we are unwilling to regard the omission from the first clause [of some word having an effect similar to that of 'knowing'] as sufficiently indicating the Legislatuer's 'clear and unambiguous' intention to require no proof of knowledge in a prosecution..."

Accordingly, absent a clear legislative pronouncement that possession of cannabis is a public welfare offense, Massachusetts now requires knowledge as an element of possession. At a time when the State Legislature is seriously deliberating a bill which would decriminalize possession of marijuana, it is not likely that such a pronouncement will be forthcoming.

Finally, Maryland itself, a state with little case law on the subject, requires a showing by the Government that the defendant at least having knowledge of the presence of the object, if not requiring the Government to prove that the defendant knew the particular quality of the narcotic drug, relying somewhat on the public safety doctrine to justify the policy. Jenkins v. State, 215 Md. 70, 137 A.2d 115 (1957).

A later Maryland case, Davis v. State, 9 Md.App. 48, 262 A.2d 578 (1970), indicates that it is knowledge of the narcotic character "...it isnot necessary for the State to allege or prove scienter. ...In other words, the State is not required to show that the accused's control of the narcotic drug was knowing and willful; it is no excuse that the accused does not know that what he con-

trols is a prohibited narcotic drug." (p. 581). This seems to leave the door open for an interpretation which would require a showing that the defendant at least had knowledge of the presence of the object.

A trend among the State Court cases on the subject is therefore discernable. California, often viewed as the trend-setter in marijuana laws because it was the first state to experience wide-spread use, 58 Virginia Law Review 754-755, as far back as 1946, clearly stated what knowledge was necessary:

> "...the law makes the matter of knowledge in relation to defendant's awareness of the presence of the object a basic element of the offense of possession." People v. Gory, 28 Cal.2d 450, 170 P.2d 433, at 436 (1946) emphasis in original.

The A.L.R.2d Later Case Service indicates that in recent years Alabama, Connecticut, Florida, Missouri, Nebraska and Virginia have joined the jurisdictions requiring knowledge as an element of possession. No new jurisdictions have joined the opposite position.

The Immigration Judge, in his opinion, calls attention to the fact that "Possession of narcotics for personal use does not prevent it from being 'possession' in violation of paragraph 2 of the Uniform Narcotics Drug Act.", and we take no issue, since the requirement of knowledge is still necessary as an element of proof to be supplied by the Government in its prosecution. See 91 A.L.R.2d 810, et seq.

Constructive possession, called to attention by the Immigration Judge, is no different in its requirement of the element of knowledge, although the possession need not be actually with the defendant. Therefore, for

constructive possession to be shown, it must be proven that although the defendant did not have actual possession of the narcotic, he did have sufficient knowledge of its existence to have dominion and control over it; see, for example, "Constructive Possession in Narcotics Cases: To Have and Have Not," 58 Vir. Law Rev. 751 (1972, May).

The Immigration Judge cites State of New Jersey v. Reed, 34 N.J. 554 (1961) (at p. 24 of this Opinion) for the proposition that if the "legislature had intended to limit the illegality to possession with intent to sell, administer, compound, and etc., it could have so provided. By failing to so state, it made 'possession' on the ground of the illegality." However, this proposition is inaccurate as applied to the facts of the case at Bar and to the circumstances of possession itself. Respondent herein, once again, is not alleging that in order to have sufficient control or dominion of narcotics in Great Britain, it is necessary that such possession be combined with or coupled with the "intent to sell, administer, compound, and etc." Respondent admits that such an element is not required in England not even perhaps in some jurisdictions in the United States. However, what the Immigration Judge misconstrues in his citations and discussion is that Reed, supra, and the other cases cited in the Opinion, require that if there is to be "possession", although the element of intent to sell may not be necessary, it is absolutely necessary that the defendant know, that is, be aware of and in control of the prescribed substance in order for him to be in possession of it. As stated so

aptly in Reed, at p. 557, "'possess', as used in criminal statutes, ordinarily signified an intentional control of a designated thing accompanied by a knowledge of its character. (Citing cases)." Therefore Reed, normally cited for the proposition that in most cases, such statutes also proscribe possession for personal use, could never be cited for the proposition that possession could be had of a narcotic when the defendant did not even know he was in "control" or exercising "dominion" over the narcotic.

Basic to the Maryland postition and implicit in similar approaches is the notion that possession of controlled drugs falls within the "public safety" or "public welfare" crimes, as referred to by the Immigration Judge in his Opinion (See Opinion, pp. 24-27). For a discussion of this doctrine, see Morissette v. United States, 342 U.S. 246, 72 Sup.Ct. 240 (1952). Thus, narcotics are lumped together with adulterated milk and other food and prescription drugs, etc., as substances so inherently dangerous as to require departure from common law notions of mens rea in order to protect the public. Exemplifying this attitude is Jenkins, supra, at page 117;

> "We thing the fact is so generally accepted that repeated doses of narcotic drugs are extremely deleterious to the moral qualities and the physical structures of human beings, it is unnecessary to discuss the point further."

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Jenkins deals with a marijuana charge. Its basic premise (that cannabis is a narcotic drug) is no longer valid; there is a large and generally accepted body of opinion which denies that cannabis is a narcotic

or that its impact upon human beings is "extremely deleterious." See, for example, the discussion, infra, as to the legislative reports discussing the amendment to the Act in adding marijuana. Since marijuana was clearly held not to be a narcotic drug, as defined by the Courts, even in 1958, and through 1960, when the Act was amended to include marijuana in addition to narcotics. Mendoza & Rivera v. Del Guercia, infra, see also, Grinspoon, Marijuana Reconsidered (in evidence), and the Report of the National Commission on Marijuana and Drug Abuse.

In light of the contemporary state of knowledge about marijuana, it is highly doubtful that a viable case can be made for defining canabis-possession as a "public safety" crime, which was the foundation for the holdings outlined by the Immigration Judge in such other, non-marijuana cases as Shevlin-Carpenter Company v. Minnesota, 218 U.S. 57 (1910), and U.S. v. Greenbaum, 138 F.2d 437 (3rd Cir. 1943).

In this connection, it should be noted that both Buckley and Morisette, supra, state that legislative silence regarding knowledge implies that knowledge continues to be a requisite element of the crime of possession. The current status of marijuana possession in the United States, therefore requires that knowledge is a necessity for possession:

> "The law makes the matter of knowledge in relation to defendant's awarenenss of the presence of the object a basic element of the offense of possession." People v. Cory, 28 Cal.2d 450 (1946).

What the Immigration Judge has done, here as well as with the adulterated food and drug cases, is attempt to equate public safety and mala prohibita statutes with possession statutes, and to claim, in effect, that since public safety and mala prohibita statutes do not require the mental element of intent or knowledge, that it would follow that a possession statute not requiring such elements is not inherently violative of due process in the United States. The Immigration Judge would argue that since Congress felt that the selling of poisonous eggs or milk need not require knowledge that the same were poisonous to be a crime, Congress would also feel that criminal possession of marijuana could be had without knowledge of such possession. Such an equasion is clearly untrue and misleading. In fact, it would call for a gross misreading of the decisional law of the United States, in both Federal and State Courts. The purpose behind the adulterated food and drug statutes is to protect an innocent public, and this apparently, in the eyes of Congress, outweighs the apparent "innocence" of the seller. Marijuana possession statutes have long been held <u>not</u> to be in the realm of "public safety" and have long been distinguished from the "adulterated food" cases. In fact, as has been pointed out, <u>supra</u>, no state in the United States, nor the Federal jurisdictions, allows for prosecution of possession

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of marijuana without the required proof of the element that the defendant knew that he was in such dominion and control of the drug that would warrant his conviction.

In citing United States v. Balint, 258 U.S. 50 (1922) for the porposition that the "public safety doctrine" is applied to opium and coca leaves (but not to marijuana or hashish), it should be noted that the Immigration Judge omitted reference to the following language of the opinion:

> "Its [the statute provided for a tax on narcotic (not marijuana) traffic] manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to the penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferable to be avoided." (At page 254)

Needless to say, these cases do not stand for the proposition that there could be possession of marijuana or dominion and control exercised in a due process context, without knowledge that some substance, at least, was in the possession of the defendant, as is true in the British cases at the time of Mr. Lennon's conviction. Similarly would be Greenbaum, supra, in which it was held that the defendant, selling rotten eggs, did not have to know that the eggs were rotten in order to be subject to a conviction. This again emphasizes the public safety, and that,

rather than subject the innocent purchaser to disease, it is better to punish the "innocent" seller of the bad food. As was stated by the Immigration Judge, in quoting from Greenbaum, "Notable among such offenses are dealings in adulterated foods and drugs." The article in American Law Reports, cited by the Immigration Judge, is to the same effect. See "Penal offense predicated upon violation of food law as affected by ignorance or mistake of fact, lack of criminal intent, or presence of good faith." 152 A.L.R. 755.

Considering, then, the Immigration Judge's conclusion, at page 26, of the Opinion, that the absence of a mens rea requirement is permitted in a ~~majority~~ minority of the jurisdictions in the United States and that therefore Respondent's conviction is not repugnant to our principle of jurisprudence, the conclusion seems not only improper, but not in line with the law of the United States, as shown in the desicions of the 50 states and the federal laws cited, supra. The requirements for conviction in 1968 under British law, did not include, as a bare minimum, the proof of possession, dominion and control, etc. What they did include, as a bare minimum, was that the substance be in close enough proximity to the defendant that he could exercise dominion and control over it, whether the defendant knew of the presence of the drug or not! This is an entirely different proposition, and would never, in a marijuana or hashish case, in the United States, whether under state or federal law, be sufficient

to support a conviction under any penal statute. The Immigration Judge's statement that the "absence of a requirement for scienter or mens rea is followed by the majority of courts of the United States in other types of convictions [adulterated food, etc.]" is therefore misleading, and plainly erroneous, as applied to the case at Bar. Respondent insists that the British statute is so repugnant to the principles of jurisprudence of this country, that his conviction should not be recognized as a conviction relating to the possession of marijuana.

To prove the proposition that courts have refused to consider the mental state of the defendant or the legality of his original conviction, the Immigration Judge also refers to Matter of Romandia-Herreros, 11 I. & N. Dec. 772 (August 22, 1966), and Matter of Adamo, 10 I. & N. Dec. 593 (June 4, 1964). These cases deal with the more limited issue of whether the convictions could be challenged because the acts which constituted the crime were performed elsewhere and do not hold that the court does not have power to look into the facts to determine whether they will support a deportation order in our system. Although the contentions of the respondents in those matters were overruled by the Board of Immigration Appeals, it is clear that in discussing its powers to explore "the delicate nuances of the state of mind required for convictions", the B.I.A. does in fact explore the comparable statutes in the United States and at least in Adamo, found that the respondent would have been convicted in the United States of the same crime that the Respondent had been convicted

in Italy. Similarly, in Ramandia, the Respondent had been indicted in California, and if the same facts were found true as were found in Mexico, the Respondent would have been convicted in California. These cases are distinguishable in that Respondent herein would not have been convicted in any Federal or State jurisdiction in the United States, of the statute which is the basis for the conviction herein. And this separates and distinguishes the instant case from all those cited by the Immigration Judge.

Our courts have clearly considered the nature of the foreign or other proceedings in determining whether they met United States due process requirements for fairness. In Gubbels v. Hoy, supra, the Ninth Circuit held that a court martial conviction for the crimes of larceny and robbery would not suffice as a ground for deportation because the military tribunal did not have the same safeguards deemed essential to fair trials of civilians in federal courts, although a conviction in a federal court of the same crimes would clearly suffice to support deportation.

In final support of his determination that the use of Mr. Lennon's British conviction was not a denial of due process, the Immigration Judge refers (Opinion, page 27) to the "somewhat analogous" relationsip with the body of cases involving prosecutions under 18 U.S.C. 1407. Reference to this statute is grossly misleading for a number of reasons, not the least of which is the failure to note that the statute was repealed on October 27, 1970.

Public Law 91-513, Title III, Section 1101 (b)(1)(A), 84 Stat.1292. While in effect, that statute required a registration upon the crossing of a border of the United States by a narcotic addict or a convicted narcotic offender. It was distinguishable on a due process basis on several distinct grounds. First, it refers only to citizens of the United States who are already either narcotic addicts or convicted narcotic or marijuana offenders; (whose convictions had ~~personally~~ previously been obtained with due process protection) second, the constitutionality of the provision itself had come under serious questions prior to its repeal based upon the holdings in several United States Supreme Court decisions, e.g., that the privilege against self-incrimination was violated by a statutory requirement that a person register and pay a tax in the business of accepting wagers, Marchetti v. United States, 390 U.S. 39, 19 L.Ed.2d 889, 88 S.Ct. 697 (1968) and that the privilege against self-incrimination provides a complete defense to prosecutions under the Federal Marijuana Tax Act for transporting or obtaining marijuana without having paid the transfer tax thereof, United States v. Leary 395 U.S. 6, 26 L.Ed.2d 57, 89 S.Ct. 1532 (1969). See Lambert v. California, 355 U.S. 255, 2 L.Ed.2d 228, 78 S.Ct. 240 (1957) which held that a similar statute was unconstitutional in that it violated the due process requirement of the 14th Amendment. See also "Validity and construction of Federal Statute (18 U.S.C. Section 1407) Requiring Registration, On Crossing Border, of Narcotics Addict, User or Violator" by John D. Perovich, J.D., 4 A.L.R.(Fed.)

616 et seq. Likewise, the cases cited by the Immigration Judge relating to 18 U.S.C. 1407, such as Adams v. United States and Smith v. United States are therefore inapposite for these reasons and for the additional reason that they deal with persons who, already having been convicted of narcotic offenses, such as possession,have had the benefit of due process protections. These cases are not analogous to those dealing with the due process requirements in proving possession or other element of the substantive crime involved and therefore not proper authority for the proposition that the lack of a requirement of mens rea in a criminal statute would not procude a denial of due process under the circumstances ofthe instant case.

In sum, the use of the British statute to deny respondent the benefits of residence is a denial of due process.

D. There is no administrative judicial or regulatory authority that hashish(Cannabis Resin) and marijuana are the same or interchangeable.

The respondent pleaded guilty to having "in his possession a dangerous drug, to wit, cannabis resin, without being duly authorized" contrary to the regulations under the Dangerous Drug Act of 1965, a British statute (see conviction, Exhibit 10). This conviction was his only offense, for which a fine was imposed.

The British statute involved (see Statutes Referred To, supra) contained a separate definition for the term "cannabis resin" as distinguished from the term "cannabis", the former referring to what is commonly known as hashish, and the latter to what is commonly known as marijuana.

The government introduced no testimony or evidence as to the meaning of the term " cannabis resin" at the deportation proceedings but claimed generally in its brief that it was synonymous with the term "marijuana" as used in the Immigration and Nationality Act in Section 212 (a) (23) which is relevant here. The respondent, on the other hand, introduced the testimony and textbook of an acknowledged expert in the field, Dr. Lester Grinspoon, whose outstanding qualifications were conceded by the Trial Attorney.

Dr. Grinspoon testified (transcript, page 37 et seq.) as follows:

Q. Do you consider that Cannabis Resin is hashish?

A. Yes.

Q. Is Cannabis Resin marijuana?

A. Cannabis Resin is not marijuana.

Q. Is Cannabis Resin a narcotic drug?

A. Cannabis Resin is not a narcotic drug.

* * *

Q. Based upon your knowledge and experience and research in this field, would I be correct in saying that it is your opinion that Cannabis Resin is not marijuana?

A. Cannabis Resin is not marijuana. Marijuana is not Cannabis Resin.

The testimony was neither controverted nor qualified under cross-examination. It remains, therefore, the only record evidence on the subject, and it may be said that the expert testimony offered by the respondent adequately sustained any burden of proof on respondent's part that his conviction did not render him statutorily ineligible for adjustment of status.

It is acknowledged that cannabis resin is hashish, and that it is not a narcotic drug. What is disputed is whether cannabis resin is "marijuana" within the statutory scheme of the immigration law.

The government, citing no authority, has argued generally in its brief that it was the intention of Congress to include cannabis resin within the term "marijuana" quoting the generally broad language of the legislative reports as the sole foundation for the otherwise remote thesis that the substance was necessarily included within the statutory term "marijuana". At the time, both parties acknowledged that the issue was one of first instance and that there had been no determination by an Immigration Judge, the Board of Immigration Appeals, nor any court on the issue of whether cannabis resin or hashish was necessarily included within the statutory term marijuana. The Immigration Judge so held (See finding of fact at p.36, Opinion). Based on this supposed unavailability of authority, the Immigration Judge accepted the government's thesis upon the basis that hashish is notoriously a stronger substance than marijuana and that Congress

had it considered the matter specifically, would most likely have desired to exclude aliens convicted of possessing hashish.

There is authority, however, unknown both to the parties and to the Immigration Judge until after the entry of the Immigration Judge's decision in the matter, that clearly holds to the contrary. In the Matter of Basil F. Gray, file # A30 310 271, the Immigration Judge held that an alien convicted of a violation of law relating to the illicit possession of hashish was not excludable under Section 212 (a)(23). (An unpublished decision dated September 23, 1971, Boston District, copy of which is annexed as Brief Exhibit D).

In that case, an alien who was previously admitted for permanent residence applied for re-admission to the United States on August 18, 1971 and was paroled "to Maine State Police for conviction of narcotic laws (sic)", where he was convicted in the District Court of Maine on August 19, 1971 for having on August 18, 1971 been illegally in possession of hashish, upon a plea of guilty. The examining Immigration Officer found him to be not admissible to the United States because it appeared that he was excludable under Section 212 (a)(23). The alien was referred to an Immigration Judge for a hearing as to his excludability. The Immigration Judge clearly delineated the issue and stated that

> "if the hashish which was involved in the applicant's conviction is a narcotic drug or marijuana, he is excludable on the basis of the conviction for possession thereof. Even is he were admitted, he would immediately become deportable under the provisions of Section 241 (a)(11) of the Immigration and Nationality Act because of the same conviction."

The Immigration Judge in Gray had no difficulty in finding that the respondent was not excludable. He states:

"Hashish is not referred to in Immigration statutes by name. No attempt was made to establish that hashish is a narcotic drug. However, evidence in the form of a pamphlet of the Bureau of Narcotics and Dangerous Drugs, U.S. Department of Justice, and a pamphlet produced jointly by the Department of Defense, Department of Health, Education and Welfare, Department of Justice, Department of Labor, and Office of Economic Opportunity, were introduced into evidence. These pamphlets establish that both marijuana and hashish are included under the generic term "Cannabis Sativa." One of the pamphlets... states that hashish is at "at least five times stronger than crude marijuana."

The statute under consideration here refers to narcotic drugs, and obviously by its term includes all narcotc drugs, and to and to marijuana specifically as a substance. It makes no specific reference to "Cannabis Sativa" or derivatives thereof. It is the government's contention that marijuana and hashish are the same substance and that the words are interchangeable since both are derivatives of Cannabis Sativa. If the framers of the statute intended to include all derivatives of Cannabis Sativa that term might well have been used in the statute as was the broad term "narcotic drugs...."

The statute under which it is alleged that the applicant is excludable refers to "narcotic drugs" and to marijuana". The applicant was convicted of possession of hashish. There is no allegation here that hashish is a narcotic drug. It is urged that hashish should be included in the term"marijuana" because both are derivatives of Cannabis Sativa. However, neither "hashish" nor "Cannabis Sativa? are mentioned in the statute.

On consideration of this entire record and in the absence of any law, regulation or decision of the Board or of any court finding that the words "hashish" and "marijuana" are the same or interchangeable,

> it will be concluded that the applicant has not been convicted in violation of law relating to possession of a "narcotic drug" or marijuana". He appears admissible in all other respects and it will be ordered that he be admitted..."(Emphasis added)

The case is completely analygous to the instant case. Although it involved a returning resident, the issue under Rosenberg v. Fleuti 374 U.S. 449 was ruled to be irrelevant and the holding was clearly on the issue of whether a conviction for possessing hashish was included under the statutory term"marijuana" under Section 212 (a)(23).

The Service should be bound by the ruling in Gray as the decision was accepted by the Immigration Service, demonstrated by the withdrawal of the Service's appeal on October 28, 1971 by the General Counsel to the Immigration and Naturalization Service.(Brief Exhibit E). The holding has not been disturbed or qualified by any subsequent decision, ruling or regulation, to counsel's knowledge. It is clear that the office of General Counsel of the Immigration and Naturalization Service was aware of the government's position taken, as the government's appeal and brief in the matter, dated October 8, 1971, stated substantially its position in the instant case, when it withdrew the appeal and thus acceded to the Immigration Judge's determination as the official position of the Service on the issue. As the Board held in Matter of Sum, supra, when an appeal is not authorized (a fortiori, where it is taken and withdrawn) the rationale of the original decision is adopted as binding.

Indeed, the government should be estopped from claiming that marijuana and hashish are the same or interchangeable terms. As noted in the line of cases cited by the Immigration Judge,(at p.35 et seq. of his Opinion) the government has uniformly taken the position, when it served its purpose, that marijuana and hashish were different substances and that rulings as to the invalidity of statutory presumptions arising out of the possession of marijuana, Leary v. U.S. 395 U.S. 6, 89 Sup.Ct.1532 (1969), would not

invalidate convictions for possession of hashish. In U.S. v. Piercefeld 437 F.2d 1188 (1971) the government indeed offered the testimony of a U.S. Customs Laboratory chemist, whose qualifications were likewise conceded, to that effect. In this respect, respondent would agree with the court in Kent Homes Inc. v. U.S. 279 F.Supp. 650 (1967) at page 659, in a tax case, that:

> ...the Court does not believe the Department of Justice should be permitted to take one position in a condemnation case when it seems appropriate for it to do so and then jump to an opposite position in a later tax proceeding when such position supports the government's claim....

The United States government, under proper circumstances, may be estopped of record by its attorneys and officers representing it. First Nat. Bank in St. Louis v. U.S. 2 F.Supp.107 (1932). A governmental agency is not immune from estoppal, Gestuvo v. I&NS 337 F. Supp.1093(1971) and the Immigration Service has been estopped from shifting its position in subsequent proceedings U.S.ex rel Hadrosek et al v. Shaughnessy, 101 F.Supp. 432(1951).

Respondent need not strain to demonstrate all of the conditions of a technical estoppal against the government. It should suffice that the government has chosen, when it suited its purpose, to claim the opposite of what it has claimed in numerous other legal proceedings. There is nothing more antithetical to due process of law than the uneven and, hence, unfair application of a law or its use in a manner which is, or may be interpreted to be, a tool to be occasionally used against individual parties through discriminatory application. Under other circumstances, an Immigration Judge had no difficulty in a substantially similar situation to hold, consistent with government policy, that hashish was not marijuana and hence that Section 212 (a)(23) did not preclude admission of an alien convicted of possession hashish. Matter of Gray, supra.

The government cannot avoid the clear import

of the decision in Matter of Gray upon the instant case, particularly in view of the testimony of Dr. Grinspoon, whose qualifications were conceded and whose testimony clearly and unqualifiedly established that cannabis resin is hashish. When coupled with the principle that the government ought not be permitted to argue that marijuana and hashish are the same substance because of positions to the contrary taken in so many other cases, the result is unavoidable that the decision below must be reversed.

E. THE LEGISLATIVE HISTORY OF THE IMMIGRATION ACT SUPPORTS THE VIEW THAT MR. LENNON'S CONVICTION IS NOT INCLUDED IN SECTION 212(a)(23)

There is no definition of marijuana in the Immigration Act, nor is there any reference to a definition with the exception of the Gray decision, supra, no decision has been rendered defining it. The term is therefore ambiguous and reference to Congressional history may shed light on its meaning.

The Immigration Judge has presented, commencing at page 32 of his decision, a completely erroneous and misleading explanation of the legislative history of the term "marijuana" in the immigration law. The thrust of his ruling is that the term first appeared in the 1952 Act, that it is undefined, that the definition of the term as contained in the 1954 Internal Revenue Code was incorporated into the Immigration and Nationality Act by the Narcotics Control Act of 1956, and that the amendments of the 1960 Act were required to correct the congressional misconception that the term "narcotics" included the term "marijuana".

The legislative history belies this simplistic and misleading explanation. The term "marijuana" appeared in the immigration laws long before 1952. In fact, the Act of Februray 18, 1931, 46 Stat. 1171, which remained the law until the enactment of the 1952 Walter-McCarran Act, provided:

> that any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this Act) who, after the enactment of this Act, shall be convicted for violation of or conspiracy to violate any statute of the United States or of any state, Territory, possession, or in the District of Columbia, taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marijuana, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and deported in manner provdide in Section 19 and 20 of the Act of February 5, 1917...(underlining added).

Indeed, the Act of May 26, 1922, 42 Stat. 596, was the first law which provided that aliens convicted after their entry of fraudulently or knowingly importing narcotic drugs should be taken into custody and deported in accordance with the 1917 Immigration Act. The 1922 Act already dealt with the subject of possession, as it provided that whenever a defendant is:

> "shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury" (Section 2f).

Thus, the term marijuana appeared in the predecessor statute to Section 241 (a)(11), but likewise with no stated definition.

The innovation of the Immigration Act of 1952 was that it was the first statute to make narcotics violators excludable. See Gordon and Rosenfield, Immigration Law and Procedure, Section 2.45. As originally enacted, the 1952 Act barred any alien who had been convicted of a violation relating to the illicit traffic

in narcotics and any alien who a consular or immigration officer had reason to believe was or had been an illegal trafficker in such narcotic drugs. Section 212(a)(23) Act of 1952, 8 U.S.C. 1182(a)(23).

The amendment of the Narcotic Control Act of 1956 to Section 212(a)(23) and 241(a)(11) were to (a) include conspiracy to violate a narcotic law and to (b) include the illicit possession of narcotics as additional grounds for excluding an alien from this country and (c) to amend Section 241 (b) of the Immigration Act to clearly state that judicial recommendations against deportation could not be permitted in cases of aliens convicted of narcotics offenses. [The 1956 House Bill contained no amendments to the Immigration and Nationality Act at all; the provisions adopted to amend the Act were in substance those contained in the Senate amendment and made no mention of marijuana whatsoever.] In short, the 1956 Act did not in any way affect the term "marijuana" in the Immigration and Naionality Act.

The 1960 legislation added the terms "or marijuana" to the first part of Section 212(a)(23) and 241(a)(11), in order to bring it in line, according to the legislative history,with the second part of each of the same sections which had previously specified that a conviction for possession of marijuana in certain special circumstances was, respectively, an excludable and a deportable offense.

A proper understanding of the statute may be arrived at through the legislative history and an analysis of the statute itself. Section 212(a)(23), like Section 241(a)(11), as they relate to possession convictions, may be divided roughly into two parts: the first part deals with a "simple" possession convictions, those not requiring proof of possession for a specific purpose such as sale, exchange, giving away, importation, exportation, et cetera; and the second part of each of the respective sections, in which the possession must be for the stated purpose.

It is the holding of the Immigration Judge that the term "marijuana" as used in the first or simple possession portion of the exclusion statute derives its meaning from the broad terms of the 1954 Internal Revenue Code definition as a result of the passage of the 1956 Narcotics Control Act. The holding is plainly untenable and lacking in logic. It cannot be seriously maintained that the meaning of the term "marijuana" is different in the first part of Section 212(a)(23) from its meaning in the second part of the same section; nor can it be argued that its meaning in the exclusion section can be different from its meaning in the deportation section 241(a)(11). In view of the fact that the term "marijuana" was first used in the exclusion section in 1952, and therefore antedates the 1954 Internal Revenue Code, and further, in view of the use of the same, term, likewise undefined, in the deportation section as early as 1931, the argument

that it must derive its meaning from the 1954 Internal Revenue Code is plainly fallacious.

Furthermore, the Immigration Act does not expressly incorporate by reference any definition of "marijuana" whatsoever. The Immigration Judge holds at page 34 of his decision, that

> it does not seem unreasonable to me that if Congress included the 1956 version of Section 212 (a)(23) in a considerably broader Act and in one portion of that Act defined marijuana, to conclude that the same definition of marijuana would apply to all uses of the term within the various discreet sections of the larger Act, whether specifically added to such section or not."

The learned Immigration Judge compounds error in asserting that the Narcotic Control Act of 1956 in any way included a definition of the term marijuana. Its only reference to the term disproves the Immigration Judge's thesis. In an amendment to a different federal statute, namely, Section 176(a) of the Food and Drug Act, Congress specifically provided that

> "as used in this section, the term "marijuana" has the meaning given to such term by Section 4761 of the Internal Revenue Code of 1954." Emphasis added.

If it proves anything, the reference to the Internal Revenue Code proves tht Congress did know how to specifically incorporate by reference a difinition of a term used in another body of law when it desired to do so, Its failure to do so in respect to the definition of the term marijuana in the Immigration and Nationality Act is therefore all the

more significant.* Thus, with no support from the statutory history whatsoever, and contrary to the clear import of Congress' action in in corporating by reference a specific definition of a term when it wished to do so, the Immigration Judge decided to incorporate by reference a definition of the term marijuana which did not even exist at the time the word was used in either relevant section of the immigration law condeding that in doing so he includes substances "whether specifically added to such sections or not" (decision p. 34) by the Congress.

The 1960 legislative developments are also helpful in understanding the meaning of the statutory term, "marijuana". It is clear from the congressional history that the intent of the 1960 amendment to the Immigration and Nationality Act was to overcome the effect of two federal court decisions, Hoy v. Rojas Gutierrez , 161 F. Supp. 488 (1958) aff'd. 267 F.2d. 490 (1959) and Mendoza-Rivera v. Del Guercio, 161 F.Supp. 473 (1958) aff'd. 267 F.2d. 451 (1959). In both cases the aliens were Mexican nationals who had been convicted under California law of possession of marijuana. The aliens contended that marijuana was not included in the term "narcotic drugs" as it appears in the portion of the above-mentioned statutes added by the 1956 amendment. The plaintiffs'

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* There is ample reason for Congress to have included hashish in the smuggling section, as hashish is not grown in the United States at all, the expert witness in another case testified that it would take 625 pounds of marijuana to produce any hashish..

contentions were upheld by the U.S. District Court for the Southern District of California in Mendoza-Rivera v. Del Guercio, and Rojas-Guiterrez v. Hoy. In 1959, the Court of Appeals for the Ninth Circuit affirmed the decisions of the lower courts affirming the conclusion that the aliens were not deportable. 267 F.2d 451 (9th Cir., 1959); 267 F.2d 490 (9th Cir., 1959).

The Circuit Court, in discussing the 1956 amendment and the Congressional purpose in passing the provision, stated that if Congress had wished to include marijuana within the definition of narcotic drugs in the first part of the statutes [the "simple possession" parts] as it had in the latter parts [the "possession for the purpose of" parts] it would have doen so. However, it chose not to, and any doubt as to its intent must be resolved in favor of the alien (see discussion, infra).

Thus, in 1960, to remedy the situation created by these two cases, Congress enacted a further amendment to Sections 212(a)(23) and 241(a)(11) by adding the words "or marijuana" to the simple possession part of the statutes. Cf., 1960 U.S. Code, Cong. & Adm News, p. 3124. Again, it did not, however, define the term "marijuana." Its purpose in adding the words to the simple possession part of the statutes is clearly set forth in the legislature history to:

> "bring the opening clause of the two pertinent provisions of the law in line with other clauses thereof which specify marijuana in the enumeration of the various types of drugs which bring the statute now into play in special circumstances" (1961 U.S. Code Cong. & Adm. News, page 3124).

It was clearly intended by the Congress that the term "marijuana" should always have the same meaning in the immigration law as it had been used since 1931 and in the 1952 Acts; it is equally clear that it could not have been the meaning described in the 1954 Internal Revenue Code.

Further, some insight in to the meaning which might have been intended by the Congress is likewise to be gained from the cases themselves, as it is undisputed that the specific purpose of the 1960 legislation was to overcome the effect of these two cited cases. Both cases involved convictions for possession of "flowering tops and leaves of Indian Hemp". If Congress had any specific evil which it intended to remedy in 1960, it was to make convictions for possessing the flowering tops and leaves (cannabis) as distinquished from hashish (cannabis resin, or the resinous part of the species) excludable and deportable offenses where simple possession was involved. No broader purpose can be ascribed to the Congress.

The Immigration Judge reaches the further impermissable conclusion that if

> "the Congressional efforts to define the term outlined above were inadequate to reach the term as used in Section 212(a)(23), the question which has to be answered is what Congress would have intended to cover by the use of the term marijuana, had the matter reached its specific attention." (Decision page 34.) (Underlining added.)

The Immigration Judge misconceives his role if he believes it to require him to second-guess the Congress, and thus speculates that had the Congress thought about it, it would certainly have included cannabis resin or hashish within the meaning of the term "marijuana".*

Respondent neither agrees nor disagrees with this speculation as to what action Congress might have taken had it actually considered the question. Perhaps the ImmigrationJudge's speculation is correct; nevertheless, we are bound only by what Congress has actually done and said. It has stated no definition, nor has it specifically incorpprated any definition from any other body of law. Upon principle firmly established in the law, this clearly does not authorize any administrative or semi-judicial authority to substitute its speculative view for that of the Congress. McBoyle v. United States, 51 Sup.Ct. 340 (1931), discussed infra.

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* Obviously, the statute was not intended to be all inclusive. LSD, for example, a more serious threat than marijuana, was never mentioned in the statute.

Congress apparently never thought of defining the term "marijuana" in the Immigration Act, or it would likely have done so. In all the Congressional debates relating to the various amendments to the Immigration and Nationality Act, no discussion whatsoever was had with respect to defining the term. Indeed, prior to 1960, Congress was apparently under the impression that the term was included within the statutory term "narcotic drug" and it was only the cases decided in 1958 and 1959. Hoy v. Rojas Gutierrez and Mendoza-Rivera v. Del Guercio, supra, holding that marijuana was not a narcotic drug that necessitated the inclusion of the (still undefined) words "or marijuana" in the 1960 Amendment to the Act. It is enlightening to note that despite the fact that Congress obviously was under the impression that it had included marijuana in the 1956 enactment, and despite the aggravated circumstances of the facts of both cases (it was obvious that the aliens were involved in traffic and were the type of aliens contemplated by the statute as noted by the court) the court nevertheless did not speculate as to the "obvious intention" or "general purpose" of the Congress, but noted that it could not legislate meaning into a statute which Congress had not put there.

It is hornbook law that where the legislature has not considered a problem, even where it appears quite obvious what their attitude would have been had they considered the problem, the gap may not be filled judicially.

In the landmark case of McBoyle v. United States, 51 Sup. Ct. 340 (1931) the petitioner was convicted of transporting an airplane which he knew to have been stolen. The statute involved made it a crime to transport in interstate commerce a "motor vehicle" which was defined as including "an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails." The Supreme Court, by Mr. Justice Holmes, reversed the conviction and held that although it was obvious that the government's policy regulating the interstate transport of motor vehicles applied to airplanes and that had the legislature thought of it, it would very likely have used broader terms to include airplanes. Nevertheless, the court held that it was not authorized to do so in Congress' behalf.

> When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies upon the speculation that if the legislature had thought of it, very likely broader words would have been used." (Id. at page 341 [Emphasis added])

It has long been held that the refashioning of a statute is an undertaking more consonant with the task of a congressional committee than with judicial construction. Federal Trade Commission v. Mandel Brothers, Inc. 359 U.S. 385, 79 S.Ct. 818 (1959). It is the province, in other words, of the Congress, not of the judiciary, to

make appropriate adjustment in its rules and regulations for enforcement of its statutes. Bingler v. Johnson, 394 U.S. 741, 89 S.Ct. 1439 (1969).

To highlight this point, we have Matter of Basil F. Gray, supra, in which it was held that a conviction of possession of hashish was not a conviction which came within the realm of excludability pursuant to § 212(a)(23). There the Immigration Judge used the following language:

> "The statute under consideration §212(a)(23) here refers to narcotic drugs, and obviously by its term includes all narcotic drugs, and to marijuana specifically as a substance, It makes no specific reference to "Cannabis Sativa" or derivatives thereof. It is the Government's contention that marijuana and hashish are the same substance [also the contention of the government in the case at Bar] and that the words are interchangeable since both are derivatives of Cannabis Sativa. If the statute intended to include all derivatives of Cannabis Sativa, that term might well have been used in the statute as was the broad term "narcotic drugs."

Not having been so used, therefore, the Immigration Judge therein concluded that the respondent was not excludable for having been convicted of the crime of possession of hashish. The administrative body had thus ruled on the meaning of the statute it was called upon to enforce.

It is clear that at least some weight must be given to the consistent interpretation of the statute by the agency itself, which is entrusted with the administration of the statute. Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States, 377 U.S. 235, 84 S.Ct. 1236 (1964). Therefore, it is respondent's contention that since the Immigration and Naturalization Service had already given such an interpretation to the statute, acceded to

by its General Counsel, and has held that hashish is not included within the part of the statute herein concerned, the decision below must be reversed to be consistent with the Gray decision, supra.

Finally, the Government has argued with respect to the legislative history, the alleged necessity that through logic alone we must conclude that Congress must have intended to use the term marijuana in the popular sense and that this is the broad, Internal Revenue Code definition. If this be so, the Government's argument must fail. No teenager would be fooled by an attempt to claim that marijuana ("pot") and hashish ("hash") are one and the same, or that one might obtain hashish by asking for marijuana. The argument that the 'street-use' of the term renders all drugs acceptable as marijuana is fallacious. Its error is shown in the testimony of Dr.Grinspoon, who speaks of the distinct technical as well as the street use of the term" marijuana".

In conclusion, the lack of a definition of the word "marijuana" in the Immigration and Nationality Act leaves its meaning uncertain. The un-rebutted evidence is that respondent John Lennon was convicted of possession of "cannabis resin". It is clear from all competent scientific evidence, that under common usage (and since Congress failed to indicate otherwise, common usage must be assumed) marijuana does not include, nor did it include, "cannabis resin", and it is equally clear that "cannabis resin" is not a narcotic drug. In line with the rationale of the Court in Mendoza-

Rivera and Pojas-Guiterrez, supra, and established principle of statutory construction, if Congress had wished to include within the definition of marijuana the words "cannabis resin", etc., it would have so stated. However, it did not, and any doubt as to the Congressional purpose must be resolved in favor of the alien.

F. Since deportation visits great hardship upon an alien, language used by Congress should be strictly construed, and any doubt resolved in favor of the alien.

The United States Supreme Court has held that deportation may be as severe a punishment as loss of livelihood. Delgadillo v. Carmichael, 332 U.S. 388, 391, 68 S.Ct. 10, 12, 92 L.Ed. 17.

> "[I]t must be remembered that although deportation technically is not criminal punishment (Johannessen v. United States, 225 U.S. 227, 242, 32 S.Ct. 613, 617, 56 L.Ed. 1066; Gagajewitz v. Adams, 228 U.S.585, 591, 33 S.Ct. 607, 608, 57 L.Ed. 978; Mahler v. Eby, 264 U.S. 32, 39, 44 S.Ct. 283, 286, 68 L.Ed. 549), it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling. Cf. Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356; Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366. As stated by Mr. Justice Brandeis speaking for the [U.S. Supreme] Court in Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938, 'deportation may result in the loss of all that makes life worth living.'" Bridges v. Wixon, 326 U.S. 135, 148, 65 S.Ct. 1443, 1449 (1945).

It is well-settled, therefore, that although deportation statutes are not considered criminal, since they may inflict the equivalent of banishment or exile they should be strictly construed. Barber v. Gonzales, 347 U.S. 637, 642, 74 S.Ct. 882, 98 L.Ed. 1009. In cases where language of Congress is susceptible to several possible meanings, because of the "dire consequences which may result, the language used by Congress should be given the narrowest of several possible meanings (Fong Haw Tan v. Phelan,333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433; United States ex rel

Brancato v. Lehmann, 6 Cir., 239 F.2d 663, 666." Tutrone v. Shaughnessy, 160 F.Supp. 433, 437 (S.D.N.Y. 1958).

If there is any doubt as to the interpretation of a provision in the Immigration and Nationality Act, that doubt must be resolved in favor of the alien. Wood v. Hoy, 266 F.2d 825 (9th Cir., 1959).

As one Court said a long time ago, "The immigration statutes are very drastic, deal arbitrarily with human liberty, and I consider they should be strictly construed." Redfern v. Halpert, 186 F. 150 (5th Cir., 1911).

In Fong Haw Tan v. Phelan, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433, the Supreme Court stated:

> "We resolve the doubts in favor of that construction [discussing single criminal scheme versus single criminal act] because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." 68 S.Ct. 374, 376, 376 [emphasis supplied].

See also Sawkow v. Immigration and Naturalization Service, 314 F.2d 34 (3rd Cir., 1963) and Zito v. Moutal, 174 F.Supp. 531 (N.D.Ill. 1959).

On the other hand, if Congress never considered the matter, we ought not to imply a meaning which expands the terms used beyond their necessary meaning.

> "Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it. Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 508, 65 S.Ct. 335, 344, 89 L.Ed. 414. We must take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it. 323 U.S. at p. 501, 65 S.Ct. at p. 341." Gubbels v. Hoy, 261 F.2d 952 (C.A.Cal. 1958).

Section 212(a)(23) does not contain a definition of the term "marijuana" nor is any definition to be found elsewhere in the Immigration and Nationality Act. Respondent offered the testimony of an acknowledged expert that the substance which respondent was convicted of possessing was not marijuana, but hashish.

The British statute contains a definition and distinguishes between cannabis (including the flowering or fruiting tops of the plant, but whatever name they may be designated -- marijuana, as explained by Dr. Grinspoon, is one such name); and cannabis resin, the substance which respondent was convicted of possessing. It is apparent from the British statute that cannabis resin was not intended to cover marijuana. A narrow interpretation of our own statute would compel a similar conclusion, that, as asserted by the expert witness, and as concluded by the Immigration Judge in Matter of Gray, supra, "marijuana" does not necessarily include and, indeed, is different from cannabis resin or hashish.

The Immigration Judge would have us believe that the phrase "conviction of violation of the law relating to the possession of marijuana" is so broad that any conviction in any way relating to possession of marijuana or a narcotic drug would be included. He cites as authority for this proposition Matter of T--C--, 7 I. & N. Dec. 100, in which the alien involved was convicted under Section 11502 of the Health and Safety Code of the State of California for having agreed to sell heroin but having in fact furnished another substance in lieu of the narcotic. The Board of Immigration Appeals held that the conviction was one "relating to the sale of narcotics". However, the Immigration Judge makes no mention of Matter of Paulus, 11 I. & N. Dec. 274 in which the alien was convicted for violating Section 11503 of the Health and Safety Code of California for selling and delivering a substance and material in liew of a narcotic after having offered to sell and furnish a narcotic. In that case, decided nine years later than Matter of T--C--, the Board of Immigration Appeals correctly held that the conviction was not one relating to narcotic drugs. "At most, the Service has shown that respondent was convicted of a law which may or may not be related to narcotic drugs." (Id. at page 276) In that case, it was clear that California law included within its definition of narcotic, drugs which were not necessarily considered to be narcotic drugs under Federal law. The Service contended that the conviction was sufficient because the California statute was recognized as

one "relating to" narcotics and stated all the other arguments expressed by the Government in Matter of T--C--. The Board held that since the record of conviction was silent with respect to the specific narcotic involved, and since it was possible that it was not one which was a narcotic under Federal law, a doubt was created and that doubt must be resolved for the benefit of the respondent.

> "The special inquiry officer's reason for terminating proceedings is that the record being silent as to the narcotic involved in the conviction it is possible that the conviction involved a substance (such as peyote) which is a narcotic under California law but is not defined as a narcotic drug under Federal law: since a doubt is thus created, and since the respondent must be given the benefit of the doubt, it cannot be said for immigration purposes, that he has been convicted of a law relating to narcotic drugs." (Id. at page 275. Emphasis added.)

In the instant case, lacking a definition of marijuana, the logic of the Board's decision in Matter of Paulus requires that the doubt created as to whether the substance involved was within the meaning of the undefined statutory term "marijuana" in the Immigration Act, and that doubt should be resolved in favor of the alien. There can be no doubt that the substance involved in the respondent's conviction was hashish, as the British statute specifically defined "cannabis resin" as distinguished from "cannabis", the former referring to hashish and the latter to the various types of marijuana. The very existence of a doubt as to whether hashish is included within the statutory meaning of the term "marijuana" in Section 212(a)(23) must necessarily bind the Board to reverse the decision below. See Matter of Gray, supra.

The conclusion clearly to be drawn from Matter of Paulus and amply supported by judicial and administrative authority, is that in cases of doubt as to whether a conviction falls within the purview of an exclusionary rule, that doubt is to be resolved in favor of the alien, rather than in favor of carrying out an attempted purpose of the Congress which was never actually accomplished.

POINT IV: SECTION 212(a)(23) IS UNCONSTITUTIONAL INSOFAR AS IT RELATES TO "ILLICIT POSSESSION OF MARIJUANA."

Although it is recognized that the Board does not generally deal with issues as to the constitutionality of the provisions it is called upon to construe and apply, the questionable constitutionality of the provision is cited as a further reason not to extend its applicability.

A. An alien is a "person"entitled to the same protection for his life, liberty and property under the due process clause as is afforded to a citizen.

"[A]n alien who legally became part of the American community...is a "person", and has "the same protection for his life, liberty and property under the Due Process Clause [of the Fifth Amendment to the U.S. Constitution] as is afforded to a citizen." Galvan v. Press 347 U.S. 522, 74 S.Ct. 737, 742 (1954).

Although aliens outside the United States cannot complain of a lack of due process or equal protection of the law, "it is clear that aliens residing or present within the United States must be afforded both procedural and substantive due process and equal protection." Cermeno-Cerna v. Farrell, 291 F.Supp. 521 (C.D.Cal. 1968).

As we stated by Mr. Chief Justice Warren,

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint;

> Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling et al. v. Sharpe et al, 347 U.S. 497, 74 S.Ct. 693, 694 (1954).

Although the Fifth Amendment itself contains no equal protection clause, it nevertheless forbids any discrimination that is so unjustifiable as to be violative of due process. Schneider v. Rusk, 377 U.S. 163, 84 S.Ct. 1187 (1964).

It is puzzling to consider the proposition that a conviction for possession of marijuana may be a ground for deportation and exclusion, but that it does not automatically preclude naturalization, a higher status. See Immigration and Naturalization Act. §311 et seq. It must, at first blush, seem more than incongruous that a higher standard is established for admission into the United States than for its coveted citizenship, yet that would clearly appear to be the case. In further viewing this irrational distinction, it clearly appears that under Schneider, supra, this distinction is one which creates such discrimination against the alien seeking admission as to violate a resident alien's rights to due process under the Fifth Amendment with no possible proper governmental objective as a rationale, since there is no question that aliens are entitled to the benefits of due process under the Fifth Amendment, Galvan v. Press, supra.