be fruitless in view of his past rulings in the case, which are themselves, in part, the subject matter of the appeal.

On May 17, 1972 the Immigration Judge accorded the undersigned only until July 1, 1972 to file a brief on extremely complicated issues, including issues under the law of England which required consultation with foreign counsel. At the same time, he accorded the government the right to file its brief within two weeks after Respondent's brief was filed, presumably by July 15, 1972. While the Immigration Judge instructed counsel for the Respondent that his brief would not be accepted after July 3, 1972 (July 1st having been a Saturday), he accepted the government's brief four and one half months after Respondent's brief was timely filed. In addition, he made the transcript available to the government for its purpose in preparing its brief and specifically withheld the transcript from counsel for the Respondent for a number of months despite counsel's request that he likewise be furnished with a copy of the transcript. Upon transmitting the government's brief together with the transcript of hearing in the matter under cover of November 13, 1972, the Immigration Judge accorded Respondent's counsel two weeks within which to reply to the brief which the government took four and a half months to prepare. Counsel's request to expand the time to reply to the government's brief, which submittedly misstated important propositions of law was summarily dismissed. Under the circumstances, it is felt that a further request of the Immigration Judge for additional time would be a futile act.

Counsel for the Respondent is involved in a substantial number of other legal matters and in bar association activities which are scheduled to take place within the next several months and has been unavailable for a good part of the period designated by the Immigration Judge for the preparation of a brief due to a holiday. The preparation of the appeal in this case will require a review of a very large administrative file consisting of a substantial number of exhibits, a text book of the expert witness, and a transcript of the proceedings which contains a large number of errors, presumably to be corrected upon stipulation of counsel. The issues of law include those under the law of England, requiring special and time consuming library requisitions and research.

WHEREFORE, Respondent respectfully requests that he be granted until

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October 2, 1973 to file his brief in support of this appeal.

Very truly yours,

LEON WILDES

LW/ts
cc: Hon. Ira Fielsteel, Immigration Judge
Certified Mail, Return receipt requested

P50

Board of Immigration Appeals

Memorandum for the File

In re: John Lennon

File: A17 595 321

Attorney Leon Wildes telephoned from New York concerning this matter. He stated that immigration judge Ira Fieldsteel wrote a 47-page opinion late in March. Mr. Wildes filed a notice of appeal on April 2. Mr. Fieldsteel gave him until May 3 to file his brief. The record is tremendous and Mr. Wildes' trial brief was 80 pages long. A substantial portion of the period between now and May 3 will be taken up by the Passover holidays and Mr. Wildes needs substantially more time to submit his brief. He therefore asked for a six months extension.

I informed Mr. Wildes that his request for an extension was premature, since the record has not yet arrived here and in any event he still has considerable time left. I suggested that if he needs additional time he can seek it from the immigration judge. Mr. Wildes responded that he has also spoken to Mr. Fieldsteel, who has indicated that, because of the great public interest in this case, he feels he cannot grant any extension but must leave that up to the Board.

I informed Mr. Wildes that the Board is not now in a position to pass upon any extension request. Conceivably, some time may elapse before the record is received here. In addition, if he has asked for oral argument (he told me he has), it will be some time after the record is received here before the case is calendared for oral argument. Under the circumstances, a substantial time may elapse before oral argument, and in the interim he may be able to get his brief

under way. I suggested that if he wishes to write the Board requesting an extension, the request will be given consideration once the record is received. He will guide himself accordingly.

mar

Maurice A. Roberts
Chairman

April 10, 1973

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO:

IMMIGRATION AND NATURALIZATION SERVICE

Fee Stamp
INFORMATION
APR 2 - 1973
Immigration and
Naturalization Service
New York, N.Y.

In the Matter of:

John Winston Ono LENNON

File No. A17 595 321

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated March 23, 1973, in the above entitled case.

2. I am (am) ____ (am not) filing a written brief or a written statement with the above Service office within the time allowed for such filing.

3. I do (do) ____ (do not) desire oral argument before the Board of Immigration Appeals in Washington, D.C.

4. Briefly, state reasons for this appeal.

(See Rider Attached)

25.00 PC

NY4 9 3 8AP 2A

No brief received within 30 days allowed for brief

I. J.

Leon Wildes

Signature of Appellant (or attorney or representative)

LEON WILDES, ESQ.

(Print or type name)

March 30, 1973

Date

515 Madison Avenue, New York, NY

Address (Number, Street, City, State, Zip Code)

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev. 4-1-70)

INSTRUCTIONS

1. **Fees.** This notice of appeal must be accompanied by a fee of $25. (Only a single fee need be paid if two or more persons are covered by a single decision.) Attach money order or check, payable to the "Immigration and Naturalization Service, Department of Justice." Do NOT send cash. If this form is filed in Guam, make remittance payable to the "Treasurer, Guam;" if filed in the Virgin Islands, make remittance payable to "Commissioner of Finance of the Virgin Islands." The fee is required for filing the appeal and is not returnable regardless of the action taken thereon.

2. **Counsel.** In presenting and prosecuting this appeal the appellant may, if he desires, be represented at no expense to the Government by counsel or other duly authorized representatives. No interpreters are furnished by the Government for the argument before the Board.

3. **Briefs.** A brief in support of or in opposition to an appeal is not required, but if a brief is filed it shall be in triplicate and submitted *to the officer of the Immigration and Naturalization Service having administrative jurisdiction over the case* within the time fixed for the appeal or within any other additional period designated by the special inquiry officer or other Service officer who made the decision. Such officer, or the Board for good cause, may extend the time for filing a brief or reply brief. The Board in its discretion may authorize the filing of briefs directly with it, in which event the opposing party shall be allowed a specified time to respond.

4. **Oral argument.** Oral argument is optional; no personal appearance by the appellant or counsel is required. The Board will consider every case on the record submitted, whether or not oral representations are made. Oral argument in any one case should not extend beyond fifteen (15) minutes, unless arrangements for additional time are made with the Board in advance of the hearing.

   An appellant will not be released from detention or permitted to enter the United States to present oral argument to the Board but may make arrangements to have someone represent him before the Board, and unless such arrangements are made at the time the appeal is taken, the Board will not calendar the case for argument.

5. **Summary dismissal of appeals.** The Board may deny oral argument and summarily dismiss any appeal in any deportation proceeding in which (i) the party concerned fails to specify the reason for his appeal on the reverse side of this form, (ii) the only reason specified by the party concerned for his Appeal involves a finding of fact or conclusion of law which was conceded by him at the hearing, or (iii) the appeal is from an order that grants the party concerned the relief which he requested.

6. **FILING OF NOTICE OF APPEAL. THE NOTICE OF APPEAL, IN TRIPLICATE, WITH THE REQUIRED FEE, *MUST* BE SUBMITTED TO THE IMMIGRATION AND NATURALIZATION SERVICE OFFICE WHERE THE CASE IS PENDING. THE NOTICE OF APPEAL IS *NOT* TO BE FORWARDED DIRECTLY TO THE BOARD OF IMMIGRATION APPEALS.**

GPO 947-269

U.S. DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

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--------------------------------X
                                X
In the Matter of :              X
                                X
JOHN WINSTON ONO LENNON         X File No. A17 595 321
                                X
--------------------------------X
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RIDER TO NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

The dedision should be reversed because:

Deportation proceedings were improperly and discriminatorily instituted and should have been terminated; their institution and continuance were an abuse of administrative discretion; maintenance of deportation proceedings which prevent compliance with U.S. Court orders is improper.

As to the sole ground for deportability sustained by the Immigration Judge, the government failed to prove that the disputed allegations of fact were true by clear, unequivocal and convincing evidence.

The Immigration Judge committed error and denied Respondent due process in refusing to terminate the proceedings, in refusing to permit Respondent to depose a knowledgeable representative of the Immigration Service, in refusing to grant adequate time for submission of rebuttal briefs, and in refusing to defer his decision to await the outcome of proceedings in England relating to the Respondent.

Respondent's application for adjustment of status should not have been denied and he should not have been held excludable under Section 212(a)(23) of the Immigration and Nationality Act as his conviction is not included in Section 212 (a)(23); the Immigration and Nationality Act contains no definition of the term "marijuana" and since deportation visits great hardship upon an alien, the language used by Congress should be strictly construed and any doubt as to its meaning resolved in favor of the alien; the statute under which Respondent was convicted permitted a conviction to be entered without proof of "mens rea and punished a type of possession not contemplated by Section 212 (a)(23) of the Immigration and Nationality Act; only convictions for possessing marijuana under certain circumstances which would enable the accused to traffic in the forbidden substance are included in Section 212 (a)(23); the use of the British conviction as a bar to residency would deny Respondent due process; the legislative history of Section 212(a)(23) confirms that Respondent's conviction is not therein included.

Respondent's conviction should have been considered a petty offense under Section 212(a)(9) and his application for permanent residence should therefore have been granted.

Section 212(a)(23) of the Immigration and Nationality Act is unconstitutional insofar as it relates to the "illicit possession of marijuana"; its application to the Respondent effectively denies him due process of law and the equal protection of the law and violates the right to privacy.

In view of the novelty of the factual and legal issues and the complexity of the proceedings as well as of the decision rendered herein, Respondent respectfully requests that he be granted until October 2, 1973 to file his brief in support of this appeal.

Respectfully submitted,

LEON WILDES, ESQ.
Attorney for Respondent,
JOHN WINSTON ONO LENNON
515 Madison Avenue
New York, New York 10022

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UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

20 West Broadway
New York, N.Y. 10007

Date: March 23, 1973

File: A17 595 321 [redacted] (b)(6)

Leon Wildes, Esq.
515 Madison Avenue
New York, N. Y.
and
Vincent A. Schiano, Esq.
Trial Attorney

NOTICE OF DECISION

MATTER OF JOHN WINSTON ONO LENNON and YOKO ONO LENNON

Dear Sirs:

☐ Attached is a copy of the written decision of the ~~Special Inquiry Officer~~ Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals by returning to this office on or before April 2, 1973 the enclosed copies of Form I-290A, Notice of Appeal, properly executed, together with a fee of twenty-five dollars ($25.00).

☐ Attached is an information copy of the oral decision of the Special Inquiry Officer made on ____________

☐ Attached, as requested, is a transcript of the testimony of record, pages ____ to ______ which is being loaned to you on condition that no copy thereof will be made, that it will be retained in your possession and control, and that it will be surrendered upon final disposition of the case or upon demand by the Service.

☐ You are advised that on __________ the Special Inquiry Officer entered an order, which is final, granting the application for adjustment of status to that of a permanent resident under Section ____ of the Immigration and Nationality Act. A Form I-151, Alien Registration Receipt Card will be delivered in due course.

Very truly yours,

Loretta Barfer
~~Special Inquiry Aide~~
Special Inquiry Section

IF:sk

Form I-295
(Rev. 11-15-65)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MAR 23 1973

File: A17 595 321 - New York (1)
(b)(6) [redacted] " " (2)

In the Matter of)
JOHN WINSTON ONO LENNON (1))
and
YOKO ONO LENNON (2))
Respondents)

IN DEPORTATION PROCEEDINGS

CHARGES: (Both) Section 241(a)(2) - I & N Act
nonimmigrant - remained longer than permitted

APPLICATION: (Both) Adjustment of Status
Section 245 - I & N Act

In Behalf of Respondents:
Leon Wildes, Esq.
515 Madison Avenue
New York, N. Y. 10022

In Behalf of Service:
Vincent Schiano, Esq.
Trial Attorney

DECISION OF THE IMMIGRATION JUDGE

DISCUSSION: The respondents are respectively a 32-year-old married male alien, a native and citizen of England and his 40-year-old alien wife, a native and citizen of Japan, who last entered the United States together at New York, N. Y. on August 13, 1971. At the time of their arrival they were admitted as nonimmigrant visitors for pleasure who were authorized to remain in the United States until February 29, 1972.

On March 1, 1972 the respondents were advised that their temporary stay in the United States as visitors had expired on February 29, 1972 and

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that it was expected that they would effect their departure from the United States on or before March 15, 1972. They were advised that failure to do so would result in the institution of deportation proceedings.

On March 6, 1972 a further communication was addressed to the respondents advising them that the District Director for the New York District understood that they had no intention of effecting their departure by March 15, 1972 as previously authorized and that he was therefore revoking the privilege of voluntary departure as provided by existing regulations, Title 8, Code of Federal Regulations 242.5(c). That section provides for the revocation of a previous grant of voluntary departure prior to the commencement of deportation proceedings, where the District Director ascertains that the original application should not have been granted. The record before me does not reflect by what means the District Director acquired the understanding that the respondents had no intention of effecting their departure by March 15, 1972 but he might well have reached such a conclusion from the submission on March 3, 1972 of petitions to have the respondents recognized as entitled to a third preference under their respective quotas, a step which is normally taken as a preliminary to requesting permanent residence in the United States either through the obtaining of a visa outside the United States or through the medium of an application under Section 245 of the Immigration and Nationality Act. In any event the conclusion by the District Director that the respondents did not have the intention of leaving the United States on or before March 15, 1972

appeared to have been a correct one in the light of testimony by Mr. Lennon at page 24 of the record that he had no intention either way prior to March 15, 1972, that he and his wife were looking for her child and that they had not made up their mind either way about it but that they had no exact intention of departing. Furthermore, as of the date of their testimony on May 12, 1972 they were still unable to make up their minds, and stated that if an opportunity were given to them to depart perhaps within the next five or ten days they would not be willing to depart because they still did not know where the child was.

In view of this testimony, although the Immigration and Naturalization Service may have been somewhat precipitous in issuing the Order to Show Cause and beginning deportation proceedings on March 6, 1972 simultaneously with the revocation of the previously authorized permission to remain until March 15, 1972, I cannot see that the respondents were harmed since they were neither prevented from leaving pursuant to that original authorization, nor were they prevented from leaving voluntarily at any subsequent date. Technically speaking the Order to Show Cause would have been more accurate to state that they remained in the United States after March 6, 1972 without authority since that was the date on which their privilege of voluntary departure was revoked, but in the light of their continuing unwillingness to depart from the United States even as late as May 12, 1972, I find that the respondents are deportable under Section 241(a)(2) of the Immigration and Nationality Act as aliens who after admission as nonimmigrants remained in the United States for a longer time than permitted.

Counsel for the respondents devoted a considerable portion of his oral argument during the hearings in this matter, as well as in his extensive briefs to the issue that the Immigration and Naturalization Service did not permit the respondents to file an application for adjustment of status under Section 245 of the Immigration and Nationality Act prior to the commencement of deportation proceedings by service of an Order to Show Cause. Counsel's position is that this is contrary to the official position of the Immigration and Naturalization Service as stated in its published Operations Instructions.

An examination of 8 CFR 245.2 and 8 CFR 242.17 shows that the jurisdiction to consider applications for adjustment of status to that of a permanent resident of the United States under Section 245 of the Immigration and Nationality Act is divided between the District Director having jurisdiction over the aliens place of residence and the Immigration Judge, the former having exclusive jurisdiction prior to the issuance of an Order to Show Cause and the latter having exclusive jurisdiction either for an original application or after the District Director has denied an application, but only after the issuance of an Order to Show Cause. The nature of the Immigration Judge's jurisdiction is thus not only an original jurisdiction but also in the nature of an Appellate jurisdiction where a previous application has been denied by the District Director. The relevant Operations Instruction, Section 245.1 provides as follows: "an otherwise eligible alien who is unlawfully in the United States and who has not heretofore filed a Section 245 application shall normally be afforded an opportunity to file such an application prior to the institution of deportation proceedings". (underlining supplied)

Obviously, the District Director who believes that the prospective applicant for adjustment of status under Section 245 is not a "eligible alien" has no obligation to permit such alien to go through the empty gesture of submitting such an application to him when the inevitable result of such application will be a denial. Accordingly, the Operations Instructions gives the District Director the option of issuing the Order to Show Cause, commencing the deportation proceedings and relegating the alien to submitting his application for such relief to the Immigration Judge for adjudication. The only conceivable advantage to the alien in presenting his application to the District Director prior to the commencement of proceedings would be the one of delay since no appeal lies from the denial of such application by the District Director. On the contrary if such application is denied by the Immigration Judge, an appeal can be taken from such denial to the Board of Immigration Appeals and thereafter to the Courts.

A somewhat similar contention was made in the case of Lumarque v. USINS, C. A. 7, No. 71-1886, Decided June 12, 1972, as yet unreported, where the alien's petition for a third preference visa had been approved. The court noted that as a matter of grace, the United States often grants such a person an opportunity to depart voluntarily and leaves the time for such departure indefinite. Thus, as a matter of practice, beneficiaries of a third preference petition are often permitted to remain in the United States until a visa becomes available. The alien contended that the initial grant of such permission to remain coupled

with a subsequent revocation was discriminatory. The court stated however, that "a grace normally afforded does not become an enforceable right merely because it is described as a normal practice in an internal operating instruction."

The same principle is directly applicable to the instant proceedings. It was for this reason that I refused to issue a subpoena to Officials of the Immigration and Naturalization Service for the purpose of having them testify as to actions they might have taken in other cases involving approved third preferences, particularly since the request for the subpoenas did not request information on cases where the facts were substantially identical with the present one.

See also the decision by the Board of Immigration Appeals in Matter of Geronimo, Int. Dec. 2077 where the Board pointed out that the assertion that the District Director abused his discretion in refusing to permit the respondent to remain in the United States after approval of her visa petition presents no defense cognizable in deportation proceedings. It is within the District Director's prosecutive discretion whether to institute deportation proceedings against a deportable alien or temporarily to withhold such proceeding. Where such proceedings have been begun, it is not the province of the Immigration Judge or of the Board on Appeal to review the wisdom of the District Director's action starting the proceedings, but to determine whether the deportation charge is sustained by the requisite evidence.

It may well be that if these two cases had arisen separately, it would have been appropriate to permit the female respondent to file an application for adjustment of status under Section 245 prior to the commencement of deportation proceedings.

However, in view of the issues which the two cases have in common, and the stated objection by counsel for the respondents to have the two cases severed, it certainly was within the discretion of the District Director, who felt that the case of the male respondent should be heard by an Immigration Judge, to treat the case of the female respondent similarly.

One further circumstance requires attention, before proceeding to a consideration of the application for permanent residence, because it relates not only to that application but also to the deportability of the female respondent.

In the course of the hearing on May 12, 1972 (on page 18 of record) it was disclosed for the first time that the female respondent had been admitted to the United States for permanent residence at San Francisco, California on September 13, 1964. This fact was apparently as great a surprise to the Immigration authorities as it was to counsel for the respondent. The status of permanent residence in the United States once acquired is retained until lost by abandonment or deportation proceedings. If the female respondent had not lost her status as a permanent resident, her action in returning to the

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United States as a visitor could have been remedied by granting her a waiver of the documents normally required for such return. An effort was made in the course of the hearing to explore the dates of all absences of this respondent from the United States since 1964, her purpose in leaving and all of the other factors which go to the question of relinquishment of her residence, but without noticeable success. Counsel for the respondent adopted a practical approach to this aspect of the case and agreed that he had no particular concern whether the female respondent were considered a person who had never relinquished her original lawful permanent residence in the United States or whether she was granted the privilege of permanent residence again under Section 245 of the Immigration and Nationality Act, as long as the final result was a grant of permanent residence in the United States.

As already indicated above, counsel for the respondent submitted applications in behalf of each of these respondents on or about March 3, 1972 to have them accorded a third preference under the quotas for their respective countries as persons who are of exceptional ability in the sciences or the arts and who by reason of that ability would substantially benefit the national economy, cultural interests or welfare of the United States. No final action was taken by the immigration authorities on such applications until May 2, 1972 when counsel for the respondent was notified of such approval when he appeared for argument before the Federal Court for the Southern District of New York in connection with his request for a temporary

restraining order against the immigration authorities from proceeding with the deportation hearings until a decision had been made on the application for a third preference. Copies of the notices containing such approval are contained in the record as Exhibits 8 and 9.

Although the reluctance of the respondents to the possible reaching of a different conclusion in their respective applications is understandable, their matrimonial unity can no more force a joint approval than it could compel a joint denial. The applications must be considered on their separate merits and counsel for the respondents so consented (page 20 of the record).

Directing myself to the application of Mrs. Lennon, it seems clear that the record contains no evidence indicating her ineligibility for adjustment. She has been examined by the United States Public Health Service and found to be medically admissible to the United States. A nonpreference quota number has been assigned for her use by the Visa Office of the Department of State, pursuant to the instructions contained in the current quota bulletins covering situations where the priority date under the third preference is such that visa numbers are not presently available under that preference.

Although this respondent does not appear to have regular employment in the United States, the problem of her support does not appear to be a serious one in view of the fact that the testimony of Mr. Lennon's business manager is to the effect that he is the owner of one quarter of a business enterprise which grosses in excess of fifty million dollars per year in the United States.

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I find therefore that Mrs. Lennon has met the statutory requirements for adjustment of status in the United States and such relief will be granted as a matter of administrative discretion.

Turning now to a consideration of Mr. Lennon's application, we are confronted by Exhibit 10 which is a record of conviction on November 28, 1968 in the Marylebone Magistrates Court in London. The nature of the offense for which the respondent was found guilty is described as follows:

> "Having in his possession a dangerous drug to wit: Cannabis Resin without being duly authorized, at 34 Montague Square W. 1. on 18-10-68 Con to Regs. 3 Dangerous Drugs (2) Regs; Dangerous Drugs Act 1965."

The respondent has admitted that this record of conviction relates to him and it has also been admitted that the respondent pleaded guilty to this offense and was fined 150 pounds with 20 guineas as costs. The record of conviction also shows that he was charged with wilfully obstructing one Norman Pilcher, a constable of the Metropolitan Police Force who was exercising his powers under the Dangerous Drugs Act, but was found not guilty of this charge.

At the commencement to these proceedings in March 1972 counsel for the respondents requested an adjournment because action was contemplated in England directed to setting aside this conviction of the respondent on the ground that Constable Pilcher had acted improperly in connection with the respondent's arrest. Apparently some criminal proceedings are pending in England against Constable Pilcher in connection with his

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activities relating to another defendant. See communication of December 1, 1972 and March 14, 1973 from respondents' attorney. However, almost a year has passed since these proceedings were commenced before me and there apparently has been no further progress towards setting aside the conviction described above, no any indication that the pending criminal proceedings are related to the conviction of this respondent, or will result in any modification of that conviction.

An alien who applies for adjustment of his status to that of a permanent resident of the United States under Section 245 of the Immigration and Nationality Act is required to establish that he is eligible to receive an immigrant visa and is admissible to the United States for residence. Section 212(a) of the Immigration and Nationality Act provides in part, as follows:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission to the United States:
> (23) - any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana, ...

It is the contention of the Immigration and Naturalization Service that the conviction referred to above on November 28, 1968 for having in his possession Cannabis Resin without being duly authorized is a conviction of a violation of law or regulation relating to the illicit possession of marijuana which renders this respondent ineligible to

receive a visa and excludable from admission to the United States and accordingly ineligible for adjustment of his status to that of a permanent resident of the United States.

It may be noted in passing that this claim by the immigration authorities was not unknown to the respondent who had sought admission to the United States on several prior occasions after his conviction and before his appearance before me and in order to be admitted to the United States for a temporary visit asked for and received a waiver from the immigration authorities under Section 212(d)(3)(A) of the Immigration and Nationality Act. Exhibit 14 is the original of such a waiver dated August 11, 1971 which was granted the respondent in connection with his last entry into the United States. It also shows clearly the limited terms under which the respondent was admitted to the United States pursuant to this waiver, namely to edit film, to consult with business associates, and to attend a custody hearing in the Virgin Islands on September 16, 1971. The waiver stated further that the period of temporary stay was to be six weeks on condition that the activities and itinerary of the applicant should be limited to those set forth in the waiver and that no extension of stay or change in activities or deviation of itinerary should be authorized without prior approval of the District Director in Washington, D. C.

It should be noted further that although such a waiver is possible under Section 212(d)(3) of the Act in connection with a temporary admission as a nonimmigrant, no such provision exists for a waiver in the case of a person who is seeking admission to the United States as a permanent resident.

Although Congress has provided for a waiver of excludability for persons seeking admission to the United States for permanent residence who may be excludable under Section 212(a)(9), (10), or (12) of the Act, where their exclusion would result in hardship to a citizen or lawful resident spouse or child, it has not seen fit to include excludability under Section 212(a)(23) of the Act among those grounds eligible for such a waiver.

It may be noted further that this difference of attitude towards, on the one hand those convicted of ordinary crimes and on the other those convicted of crimes relating to drugs and narcotics is also reflected in Section 241(b) of the Act. That provision of law provides that those persons who might be deportable by reason of their conviction for crimes may be excused from such consequences if they have been granted a full and unconditional pardon for such crimes or if the court sentencing such alien for such crimes makes at the time of first imposing sentence a recommendation to the Attorney General that such alien not be deported. The Section states specifically however, that these two provisions relieving the alien from deportability despite his conviction of a crime shall not apply in the case of any alien who is charged with being deportable from the United States under Section 241(a)(11), the deportation section which corresponds to Section 212(a)(23) governing exclusion from the United States, for narcotics offenses.

Before proceeding to the principle question at issue, namely whether the male respondent's conviction in England brings him within the ambit

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of Section 212(a)(23) of the Act, one preliminary contention must be disposed of. Counsel for the respondent (at page 55 of his brief) states that it has never been very clear that a foreign conviction was intended by Congress to be included under Section 212(a)(23) of the Act. This contention has no merit whatsoever. Section 212 of the Act sets forth the grounds on which aliens shall be excluded from admission into the United States. Obviously it contemplates aliens who are coming from some country outside of the United States. The convictions that such persons would have, would, in the vast majority of cases, have occurred outside the United States. It is only in the unusual situation where an alien who has previously been in the United States has been convicted in the United States and departed and thereafter applied for a visa that the ground of excludability would be based on a conviction in the United States. Moreover, the Congressional history relating to Section 212(a)(23) shows clearly that it was the intention of Congress in enacting the original 212(a)(23) and 241(a)(11) to encompass foreign convictions relating to narcotics within the scope of those sections.

In Senate report #1515, 81st Congress, Second Session, (1950) at page 410 the following recommendation of the sub committee on the judiciary is to be found:

> "the sub committee recommends that the immigration laws contain specific provision for the deportation of aliens who have been convicted of any law pertaining to narcotics. Such aliens should

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> be deportable whether the conviction occurred prior to or after entry into the United States. The deportable class will include those convicted under any law in this country pertaining to narcotics <u>or under any such law of a foreign country.</u>"

The same page shows clearly that it was the intention of Congress to make deportable those who had been convicted merely of illegal possession of a narcotic drug, though it erroneously concluded that under the decided cases mere possession would result in deportability under the statute as originally drawn. The Congressional expectation was erroneous and necessitated the subsequent amendment of the statute to be described below.

The respondents' brief likewise states (page 55) that a thorough review of all the reported court decisions fails to disclose even one where a prior foreign conviction was used as a ground for exclusion under Section 212(a)(23). A more diligent search would have disclosed the decision in <u>Matter of Gardos</u>, 10 I&N Dec. 261, affirmed in <u>Gardos</u> v. <u>Immigration and Naturalization Service</u>, 324 F. 2d 179 (C. A. 2, 1963).

In that case, which bears a close resemblance to the instant proceeding, the alien there concerned had been convicted in 1956 in Canada of the crime of unlawfully possessing marijuana in violation of Section 4, paragraph 1 of the Opium and Narcotic Drug Act and had been sentenced to imprisonment for six months. He did not enter the United States till August 4, 1959.

The Board of Immigration Appeals set forth the legislative history of the amendment to Section 212(a)(23) and 241(a)(11) which took effect

on July 14, 1960 and reached the conclusion that the purpose of amending Section 212(a)(23) and Section 241(a)(11) was to make it certain that a conviction of an alien for violation of any law relating to illicit possession of marijuana should render him excludable or deportable. It may be noted that since this amendment took place on July 14, 1960, the alien in Matter of Gardos was not even excludable from the United States at the time of his entry in 1959. Nevertheless, the Board of Immigration Appeals and the Court of Appeals for the Second Circuit found him deportable in 1963 under the statute as amended in 1960.

The additional legislative history relating to the amendment of Section 212(a)(23) and 241(a)(11) of the Act in 1956 and again in 1960 to specifically include "possession" in addition to offenses relating to the "traffic" in narcotic drugs is set forth by the Board of Immigration Appeals in Matter of M/V -, 7 I&N Dec. 571, as well as in the briefs of the attorney for the respondents and the Trial Attorney for the government.

The conclusion is inescapable from that legislative history that Congress intended to and succeeded in making it a ground for exclusion and deportation that the alien was convicted of "possession" of marijuana or other enumerated drugs and that such "possession" did not have to be possession for purposes of sale or any purpose other than mere use to make the alien excludable or deportable. This is clear from the fact that the statute now reads specifically "illicit possession of or traffic in narcotic drugs or marijuana". The specific contrast by the statute of possession on the one hand and traffic on the other makes it clear that the possession which is penalized does not require any intent to engage in traffic or other activity.

The brief for the respondents contends at page 40 and thereafter that only those convictions for possession of marijuana which occur under circumstances which would enable the accused to traffic in the substance are included in Section 212(a)(23) of the Act. In reaching this conclusion counsel relies heavily on the decision of the Court in Varga v. Rosenberg, 237 F. Supp. 282 (S. D. Cal. 1964). In that case the government was seeking to deport an alien who had been convicted under a California statute of use or being under the influence of narcotics. As the Court pointed out, the narcotics in question were in the system of the alien.

The court stated as follows:

> "While Congress undoubtedly intended to close "every possible loophole where a person had been convicted of a crime relating to the possession of narcotics", the legislative history indicates that the Committee's aim was to eliminate traffic in narcotics as distinguished from use. . .
>
> Congress undoubtedly has aimed its attack upon possession which would give the possessor "such dominion and control as would have given him the power of disposal". . .
>
> Petitioner in the case at bar was convicted for use or being under the influence of narcotics. In other words, the narcotics were in his system. At this point the defendant was hardly in a position to traffic in the drug and can hardly be said to have possession which would give him such dominion and control as to include the power of disposition.
>
> Prior to amendment of 8 USCA 1251(a)(11), the statute referred only to possession "for the purpose of the manufacture, production, compounding, transportation, giving away, importation or exportation" of the narcotic.

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It is consonant with the aforementioned purpose of Congress to include a provision relating to possession alone to obviate the burden of proving possession for a specific purpose. Any disposable narcotic in the possession of anyone is potentially in the narcotic traffic. The object was to accomplish by the best means possible the elimination of the illicit traffic" (emphasis supplied).

In substance therefore, what the court was saying was that Congress was trying to reach the traffic in drugs, that it facilitated such object by making mere possession a deportable offense, but that possession implies such a dominion and control as would give the possessor of the power of disposal. Consequently it was reluctant to say that an alien who merely had the narcotics within his bloodstream where it might have been injected by some other person, had such dominion and control as would give him power of disposal. It is perfectly clear from the decision however that a mere possession without intent to traffic in drugs would be sufficient to bring the alien within the statute since he would have such dominion and control as would give him the power of disposal.

What then did Mr. Lennon admit by his plea of guilty? The provisions of the Dangerous Drug Act of 1965 and the regulations which were promulgated under the 1964 Act and continued in effect under the 1965 Act are included in the record herein and are set forth also in the brief of the respondent at pages 5 and 6. Section 3 of the regulations provides that a person shall not be in possession of a drug which is prohibited by the Act unless he is authorized or licensed to have such possession.

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Section 20 of the regulations provides as follows:

> "For the purposes of these regulations a person shall be deemed to be in possession of a drug if it is in his actual custody or is held by some other person subject to his control or for him and on his behalf".

By pleading guilty to the charge set forth in Exhibit 10, the respondent conceded that he was "in possession" of a stated amount of cannabis resin, that such possession was not legally authorized, and what is more important that the drug was either in his actual custody or was held by some other person subject to his control or for him and on his behalf.

These are precisely the elements of dominion and control which the court in Varga (supra) emphasized.

I find therefore that even the court in Varga would find that a person who was convicted of possession under the Dangerous Drugs Act of 1965 would fall within the scope of Section 241(a)(11) of the Act by reason of the necessary finding of dominion and control.

As a kind of corollary to this argument the counsel for the respondent advances another thesis which is to the effect that under the cases decided in England relating to the criminality of the possession of narcotics, it was the established law that the guilt of the defendant could be established without reference to the proof of any particular mental state or so-called "Mens Rea".

I have carefully examined all of the English cases referred to by counsel for the respondent in his brief from pages 26 to 39 and the cited Law Review Articles as well. In addition, I have referred to the somewhat more recent article in The New Law Journal, September 28, 1972, page 844, entitled "Dangerous Drugs - Possession, by O. A. S. Owen, and the more recent cases of Regina v. Irving,(1970) Crim. L. R. 642, Regina v. Marriott (1971) Crim. L. R. 172, and Regina v. Buswell, (1972) Crim. L. R. 50.

The one element which all of the cases and authorities agree upon is the statement of Lord Parker C. J. in Lockyer v. Gibb (1967) 2 Q. B. 243 as follows:

> "in my judgement 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".

In other words, completely innocent and unknowing custody or potential control over a drug is not possession within the meaning of the act and regulations.

The court in Regina v. Marriott characterized the state of the law as of 1970 as follows:

> "not all members of the House of Lords expressed themselves in precisely the same way, but, for the purposes of this present appeal, the result of Reg v. Warner may, broadly speaking and we hope with accuracy, be stated in this way: If a man is in possession, for example, of a box and he knows there are articles of some sort

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> inside it and it turns out that the contents comprise, for example, cannabis resin, it does not lie in his mouth to say: "I did not know the contents included resin". On the contrary, on those facts he must be regarded as in possession of it and, if not lawfully entitled, would, therefore, be guilty of an offense such as that charged in the present case.

By pleading guilty, this respondent must have admitted therefore those elements which the court would have considered necessary to establish to sustain a conviction. The first of course would be that the material which the police discovered was, in fact, cannabis resin, a prohibited drug. The second would be the admission that he was, in fact, in "possession" of such drug by reason of the fact that it was either in his actual custody or held by some other person subject to his control or for him and on his behalf. Finally the plea of guilty would admit that he was aware that there was some extra substance in the Binocular case which was in his home but not necessarily that he knew it was cannabis resin.

Even if the holding of the court in Varga v. Rosenberg (supra) is considered to be definitive and binding on what constitutes possession for purposes of Section 212(a)(23) of the Act, it seems clear that this respondent by his plea of guilty admitted such dominion and control over the drug as would have given him the power of disposal.

The lack of a requirement that the state establish that the defendant, in addition to having the drug under his dominion and control, also knew that it was the particular drug whose identity the government established, is not as foreign and outrageous to the system of jurisprudence

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of the United States as counsel for the respondent would have me believe.

It is true that the large majority of cases involving prosecutions for "possession" under the Uniform Narcotic Drug Act require a knowledge by the defendant of the existence of the narcotics where found, in addition to the elements of immediate and exclusive control or at least joint control or constructive possession. (91 A.L.R.(2) 810). However, it has been held in a minority of jurisdictions that such knowledge is not an element.

For example in State v. Boggs, 57 Wn. (2d) 484 (1961) the court in sustaining the conviction of the defendant for unlawful possession of a narcotic drug stated as follows:

> "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 to 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 evil 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. RCW 69.33.230 provides:
>
> > "it shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this chapter".
>
> In construing this statute in State v. Hinker, 50 Wn.(2d)809, 314 P. (2d) 645 (1957), we stated:
>
> > "whether intent or guilty knowledge is to be made an essential element of this crime is basically a matter to be determined by the Legislature.

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> Had the Legislature intended to retain guilty knowledge or intent as an element of the crime of possession, it would have spelled it out as it did in the previous statute. The omission of the word with intent evidences a desire to make mere possession or control a crime."
>
> Our holding in the Hinker case, that guilty knowledge or intent is not an element of the crime of possession of narcotics under RCW 69.33.230, is controlling in the disposition of appellant's first contention".

See also the discussion by the court in State v. Callahan, 77 Wn. (2d) 27 (1969) for a discussion as to what constitutes"possession" under the laws of the state of Washington. As the court in that decision pointed out, possession of property may be either actual or constructive. Actual possession means that the goods are in the personal custody of the person charged with possession; whereas constructive possession means that the goods are not in actual physical possession, but that the person charged with possession has dominion and control over the goods. As the court there points out, in the previous case of State v. White, it had been held that where the evidence showed that the defendant had been living on the premises for a month, sharing the rent, bringing furniture into the house, inviting others to spend the night, the defendant had sufficient dominion and control over the premises to find him guilty of constructive possession of marijuana found in the living room of the house, although the defendant denied any knowledge of its presence.

See also the article in 58 Virginia Law Review 751 (May 1972), "Constructive Possession in Narcotics Cases, To Have and Have Not".

The note in 91 ALR (2) 810, states also that the fact that possession of narcotics is only for personal use, does not prevent it from being "possession" in violation of paragraph 2 of the Uniform Narcotics Drug Act, this contention having been uniformly rejected by the courts. See for example in State v. Reed (1961) 34 N.J. 554, 170 A (2d) 419, where the court said 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" only the ground of illegality. The court stated the person who possesses, has the power to dispense it to another.

The constitutionality of the lack of a requirement of scienter in criminal cases was discussed by the Supreme Court in U. S. v. Balint, 258 US 50 (1922). That case concerned a conviction for violation of Section 2 of the Narcotics Act, 38 Stat. 786, selling narcotics without a written form issued by the Commissioner of Internal Revenue. The court said as follows:

> "While the general rule of common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crime even where the statutory definition is not in terms included, there has been a modification of this view in respect to prosecution under statutes, the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court.
>
> It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so

> is an absence of due process of law. But that objection is considered and overruled in <u>Shevlin - Carpenter Company</u> v. <u>Minnesota</u>, 218 US 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the State may, in the maintenance of a public policy provide "that he who shall do them shall do them at his peril and will not be heard to plead in defense, good faith or ignorance".

The Court of Appeals for the Third Circuit gave consideration to the general problem of the lack of a requirement of a particular state of mind or intent in a criminal prosecution in <u>U.S</u>. v. <u>Greenbaum</u> which involved a prosecution for unlawfully introducing into interstate commerce cans of adulterated eggs. The court said after quoting <u>U.S.</u> v. <u>Balint</u> (supra) as follows:

> "while the absence of any requirement of mens rea is usually met with in statutes punishing minor or police offenses (for which fines, at least in the first instance, are ordinarily the penalties), we think that interpretation of Legislative intent as dispensing with the knowledge and wilfulness as elements of specified crimes is not to be restricted to offenses differentiable upon their relative lack of turpitude. Where the offenses prohibited and made punishable are capable of inflicting widespread injury, and where the requirements of proof of the offenders guilty knowledge and wrongful intent would render enforcement of the prohibition difficult if not impossible (i.e. in effect tends to nullify the statute), the legislative intent to dispense with mens rea as an element of the offense has justifiable basis. Notable among such offenses are dealings in adulterated foods and drugs."

See also the annotation at 152 ALR 755 for a general discussion of prosecutions for violation of food laws where ignorance, mistake of fact, lack of criminal intent or good faith may be present.

I conclude therefore that the requirements for a conviction in 1968 under the Dangerous Drugs Act of 1965, including as they do as a bare minimum the proof of or admission of possession, dominion and control, although perhaps different from the majority of jurisdictions in the United States, is actually followed in some states of the United States dealing with possession of drugs. 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 leading to a possible sentence to penal servitude, and is not so repugnant to the principles of jurisprudence of this country that Mr. Lennon's conviction should not be recognized as a conviction relating to the possession of marijuana.

It should be noted in this connection that the phrase "conviction of violation of a law relating to the possession of marijuana" is broader than "a conviction for the possession of marijuana". For example, in Matter of P - C -, 7 I&N Dec. 100, the alien involved had been 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. It was argued in the course of that proceeding that the statute, in fact, deals with fraud and false pretenses and is not a statute relating to a narcotic drug since it was entirely clear that no narcotic drug had in fact changed hands, nor was such exchange even contemplated by the alien. The Board of

Immigration Appeals held however that a conviction under the named section was, in fact, a conviction "relating to the sale of narcotics" and that the phrase "relating to" is a term of broad coverage.

A situation somewhat analogous to the relationship between the respondent's conviction and his immigration excludability exists in the body of cases involving prosecutions under 18 USC 1407. That provision of law requires a registration upon the crossing of a border of the United States by a narcotics addict, user or violator, with a possible $1000 fine or up to three years imprisonment as a criminal sanction. The annotation in 4 ALR (Fed) 616 shows that wilfulness is not an ingredient of the statute but that it is mala prohibita.

For example, in Adams v. US. C.A. 9, 299 F (2) 327 (1962), the individual concerned had been convicted in California for the possession of marijuana and committed to the Youth Authority of that State. He was charged with having crossed the border without reporting his conviction and the court excluded evidence on the effect of the expungement of his record by an honorable discharge from the Youth Authority. The court pointed out that Section 1407 should not depend on all of the peculiarities of the laws of the various states. It was stating in effect that a conviction for the purposes of Section 1407 is a conviction even though it might have been expunged by the operation of the laws of California. In Smith v. U.S. (1963) C.A. 9, 321 Fed. (2) 731, Cert. Den. 375 U.S. 988, the subject had been convicted in Arkansas for a violation of narcotic laws and sentence had been suspended on condition that he leave the State.

The court sustained his conviction under Section 1407 for failing to report this conviction, rejecting the contention that the court imposed condition of leaving the State was an unconstitutional condition and therefore no valid conviction under the Arkansas laws. The court assumed for the purposes of the case that an illegal sentence had been imposed but held that since the defendant would have been entitled to request that he be resentenced, the illegal sentence did not vitiate the conviction under 1407.

In Haserat v. U.S. C.A. 9 321 F (2) 582, (1963), the court was concerned with a conviction under the California Health and Safety Code for agreeing to sell narcotics and selling something else, as was the concern of the Board of Immigration Appeals in Matter of P - C -, 7 I&M 100 (supra). It was held that this was a conviction for a narcotic or marijuana law violation which required registration upon crossing the border and failure to do so was a violation of Section 1407.

There is therefore a considerable volume of law relating to prosecutions for violation of 18 USC 1407 which are based on the existence of an underlying conviction of the defendant for a narcotics or marijuana violation where the courts have refused to consider relevant the mental state of the defendant, the legality of the original conviction or even its expungement under the laws of that state.

The Board of Immigration Appeals in Matter of Romandia-Herreros, 11 I&N Dec. 772 gave consideration to an alien who had engaged in activity relating to the possession of codeine and morphine.

However, after indictment in California and while out on bail, he left for Mexico and the California proceedings were not completed. However, under the laws of Mexico he was prosecuted in Mexico for a crime committed in a foreign territory for a violation of law which would also have been a crime in Mexico, namely the possession of morphine and codeine. The Board of Immigration Appeals held that he was deportable under Section 241(a)(11) of the Immigration and Nationality Act despite his conviction in a foreign state whose only claim to jurisdiction over the crime was the fact that the defendant was a national of that country, all of the alleged criminal acts having taken place in the United States. A somewhat similar decision was reached in Matter of Adamo, 10 I&N Dec. 593, which did not relate to a narcotics conviction but a conviction for embezzlement before an Italian Court for acts which had been committed entirely in the United States. The Board of Immigration Appeals stated that the record of a foreign conviction showing that it was a penal conviction is conclusive evidence of the nature of a conviction. It stated that it could not go behind the record to inquire into the legal status of the tribunal other than in those rare exceptions relating to convictions in absentia or convictions for political offenses. The difficulty the Board of Immigration Appeals refers to is amply exhibited by the instant case when we seek to explore the delicate nuances of the state of mind required for convictions under the Dangerous Drugs Act of 1965.

It will be noted that Section 212(a)(23) refers to the excludability of a person convicted of a crime relating to the possession of marijuana

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whereas the respondent herein stands convicted of possession of cannabis resin. It is urged at some length, that when Congress used the term "marijuana" in the section of the consideration, it did not intend to include "cannabis resin".

The respondent offered in his behalf the testimony of Dr. Lester Grinspoon, Associate Clinical Professor of Psychiatry at Harvard Medical School whose medical qualifications qualify him fully as an expert in this field. A book written by Dr. Grinspoon entitled "Marijuana Reconsidered" (Harvard University Press, 1971) was made part of this record as Exhibit 13. Reference to Exhibit 13, beginning at page 30 thereof, indicates that since 1753 the name Cannabis Sativa has been given to the plant known as Indian Hemp. Cannabis Sativa is one of a relatively small number of so-called hallucinagenic plants. It is an easily grown plant, widely cultivated or growing naturally in many parts of the world. It is a source not only of hallucinagenic material, but also of hemp fibre and a seed oil. Although the plant may differ widely in its appearance depending upon the climate under which it is grown, it is generally agreed that all specimens are of a single species. The plant and its products are referred to by a wide number of different terms, depending upon where it is grown and where it is used. The male and female plant differ markedly in appearance, though both bear flowers. The chemical compounds responsible for the intoxicating effect of cannabis are commonly found in a sticky, golden resin which, during periods of the growing season's greatest heat, is exuded from the female flowers and is found also in the adjacent leaves

and stalks. Although it is generally held that the plants active agents are found solely in the resin produced by the female flower parts there is insufficient evidence to support this hypothesis. It is possible that the other parts of the female and male plants may contain active substances. The resin and resin bearing parts of hemp are prepared for use in a variety of ways. Three grades of the drug are prepared in India and serve as a kind of standard against which preparations produced in other parts of the world are compared for potency. They are bhang, ganja, and charras. The least potent and cheapest preparation, bhang, is derived from hemp, grown in the plains areas and may consist simply of hemp leaves picked from door yard plants, dried, and then crushed into a coarse powder. The resulting drug is of inferior quality and may be smoked or made into a decoction. Ganja, the second strongest preparation, is prepared from the flowering tops of cultivated female plants. The dried tops, with their exuded resin are generally smoked sometimes mixed with tobacco leaves. Ganja is estimated at being two or three times as strong as bhang and is more desirable and costlier.

Pure resin of the pistillate flowers is called charras, and is the most potent of the intoxicants. The resin which is collected from the plants may be treated somewhat before it is sold and consumed but the treatments are largely mechanical in nature. The resin may be sifted to eliminate dirt and impurities, shaped, dried, and sliced into sheets. Charras or cannabis resin is called hashish in Egypt, Asia Minor and Syria.

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The essence of Dr. Grinspoon's testimony is contained on page 41 of his book where he states that most westerners and certainly most Americans who use cannabis take it in a form of cigarettes which are roughly comparable to Indian bhang in content, mode of preparation and potency. As such, such cigarettes are about 1/5 to 1/8 the potency of Indian charras and in general the hand rolled cigarette predominates in the United States.

What Dr. Grinspoon is urging in his testimony is that the common usage in the United States limits the term "marijuana" to ciggrettes composed of the dried leaves and perhaps seeds and miscellaneous parts of the marijuana plant as distinct from cannabis resin which is an exudation of the female plant during its flowering period.

The legislative history of Section 212(a)(23) and 241(a)(11) is not as explicit as one might wish in defining the term marijuana. The term first appeared in the Immigration and Nationality Act of 1952 but only in reference to activities relating to traffic, sale or possession for such related purposes. The statute contains no definition of marijuana. The Narcotics Control Act of 1956 was aimed at various aspects of the narcotics problem. The immigration sections were only one part of the Congressional effort. The immigration modification was aimed directly at specifically including mere possession of narcotics or a conspiracy to violate the narcotic laws as grounds for excludability or deportability. It was the Congressional belief that a conviction for the possession of

marijuana would constitute a conviction for the possession of narcotics and consequently would call the section into operation.

In U.S. Code Congressional and Administrative News, 84th Cong. 2nd Session, (1956) Volume 2, page 3294, footnote #1, is found the following quotation "general references to narcotics in this report includes within the term marijuana which is similarly treated with respect to penalties, etc."

It is clear therefore that in drafting the Narcotics Control Act of 1956, Congress believed that when it used the term narcotics, it was including the term marijuana. Accordingly, there was no need for Congress to define marijuana in a section where it had used the term "narcotics". Congress' misconception as to the inclusion of "marijuana" within the scope of "narcotics" led to the subsequent court decisions and further amendment of the statute in 1960 to specifically include marijuana by name. In connection with the 1960 amendment here again was no definition. However, in the "Narcotic Control Act of 1956" which included a number of different sections relating to different provisions of law, all of which were enacted as a unit, entitled "The Narcotic Control Act of 1956", there occurs title 21, Section 176(a), relating to the smuggling of marijuana, which specifically states "as used in this section, the term "marijuana" has the meaning given to such term by Section 4761 of the Internal Revenue Code of 1964." Section 4761 defines the term "marijuana" as including all parts of the plant including the resin extracted from any part of such plant. It is true that Section 176(a) states "as used in this section," in

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defining the term marijuana. 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 sections or not. It certainly would be a bizarre interpretation of Congressional intent to believe that Congress would define the term for one section within the larger Act and expect a different interpretation for the same term to be applied in Section 212(a)(23) without making a specific reference to the difference in meaning. If we consider the term to have been adequately defined in 1956 by the reference to the Internal Revenue Code, such definition would continue through the 1960 amendment which merely added marijuana disjunctively to the possession section at its beginning.

If we assume however, that 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 received its specific attention. The record is clear in the 1956 and 1960 amendments that Congress was attempting to make excludable and deportable aliens convicted of mere possession of narcotics in general and marijuana in particular. As indicated above, cannabis resin is the direct natural product of the cannabis sativa plant. It is a resin naturally exuded by the plant. It contains in a concentrated form the hallucinagenic agent

which is the very basis for the attitude towards marijuana. To imply that the Congress, intent as it was on reaching for exclusion and deportation persons convicted of possession of marijuana would have rejected a person convicted of the possession of the concentrated natural products of the marijuana plant is to corrupt statutory interpretation into a futile exercise of semantics.

Ironically enough, there have been several recent decisions to which neither the respondent nor the government have referred me, in which the present contentions of the government and respondent have been reversed. In these cases, it is the government which urged that marijuana and hashish were different and the criminal defendant therein concerned that they were identical. These were cases which arose subsequent to the decision by the Supreme Court in Leary v. U.S. 395 US 6, 89 Supreme Court 1532 (1969). In that case the Supreme Court held unconstitutional the presumption in Title 21, Section 176(a) of knowledge of illegal importation of marijuana arising from possession, on the ground that there was widespread cultivation of the plant in the United States and that there was no necessary or reasonable connection between coming into possession of the dried leaves and a presumption of knowledge that the same was illegally imported from another country. In U.S. v. Piercefeld, 437 F (2d) 1188 (1971) the defendant argued that with respect to the irrationality of the presumption of knowledge of importation from the sole fact of possession, there could be no distinction between hashish and marijuana. He was accused of the unlawful importation of hashish and since there was no direct evidence of the unlawful

importation, the court must have relied on the presumption in Section 176(a). The Court of Appeals held however that the Trial Court had not, in fact, utilized the presumption and that there was sufficient evidence to support a finding of unlawful importation of hashish. It referred to the testimony of a chemist for the United States Customs Laboratory who stated that hashish had never been manufactured in the United States and that it would be necessary to have 625 pounds of marijuana with the highest resin quality to make one pound of hashish from marijuana grown within the United States.

In U.S. v. Cepelis, 426 F. 2d 137 (1970) (C.A. 9), the court was confronted with the identical situation. In this case also, the government although arguing that hashish was marijuana within the meaning of 21 USC 176(a), the government contended that hashish was not within the scope of Leary v. U.S., and that by reason of climatic considerations and the difficulty of producing domestic hashish, users would be likely to know that the hashish was illegally imported. The court concluded that the record before it was inadequate for a proper conclusion and remanded the case for a finding by the trial court as to whether it had, in fact, relied on Section 176(a) presumption, and if so to grant a new trial and explore the nature of hashish. On remand the trial court affirmed that it had not relied on the presumption but had relied on the evidence before it and concluded ON A factual basis that the defendant had actual and not merely presumed knowledge of the illegal importation. No case has been found holding that hashish is different from marijuana in the context of a prosecution under a statute specifically mentioning only marijuana.

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A carefully delineated distinction between marijuana and hashish appears to be a more recent product of increased legislative sophistication. In paragraph 54-5.4.101 of the Virginia Code annotated, effective April 5, 1970 the maximum punishment for the possession of marijuana is $1000 fine and imprisonment not exceeding 12 months. However, for drugs other than marijuana the punishment can be considerably more, even for a first offender. The statute specifically defines marijuana as meaning any part of the plant cannabis sativa but not including resin extracted from any part of such plant and defines hashish as distinct from marijuana as including the resin extracted from any part of the plant cannabis sativa.

After a careful consideration of all the relevant material, I reach the conclusion that whether considered from the point of view of expressed Congressional intent as evidenced by the specific definition referred to by Congress in amending Section 212(a)(23) in 1956, or by inferring that intent of Congress with regard to the definition of marijuana which most effectively would give expression to the general intent of Congress in enacting that section, I reach the conclusion that a conviction for the possession of cannabis resin is a conviction for a crime relating to the possession of marijuana and consequently within the scope of Section 212(a)(23) of the Act.

The next contention of counsel for the respondent is one which is basically set forth in his letter of August 14, 1972 to the Wall Street Journal entitled "The Cultural Lag in Immigration Laws".

Since the letter presents the legal situation so accurately, it may be quoted verbatim, where relevant.

> "If John Lennon's desirability as an artist is acknowledged by the Immigration Service itself, what at the same time makes him so undesirable an alien, allegedly unable to become a permanent resident, is a little known provision of the immigration law barring from admission any alien convicted of any offense, no matter how trivial, relating to the possession of marijuana. A similar provision exists requiring deportation of aliens who are already here.
>
> Court decisions have held that this absolute bar applies regardless of whether any punishment was imposed, whether the offense is technically considered a crime under local law, irrespective of the amount of marijuana possessed or other circumstances of the case, or even whether the offense was actually the subject of an executive pardon. Moreover, no extenuating circumstances, such as hardship to American dependants, may be considered. . .
>
> The Immigration and Nationality Act provision which absolutely bars from admission and mandates the deportation of persons convicted of a violation of any law or regulation relating to the illicit possession of marijuana can no longer be justified in its present form. . .. The trends of our modern scientists who treat marijuana as a less serious social and medical danger than tobacco and liquor, and the reduction in the seriousness of marijuana possession convictions in many jurisdictions demonstrate a need for a change in the immigration laws harsh attitude towards marijuana."

The answer to this plea for Congressional action is contained within the letter as well. It states:

> "In the United States the authority to formulate immigration policy rests with the Congress and is derived from the constitutional power to regulate commerce with foreign states."

The government of the United States is a government of separated powers. The function of the judicial branch of government and such judicial functions of the executive as I exercise is one of interpretation and adjudication, not legislation.

As the Supreme Court of the United States said in Sinclair Refining Company v. Atkinson, 370 U.S. 195 (1962):

> "The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress - it is a question for lawmakers, not law interpreters. Our task is the more limited one of interpreting the law as it now stands. In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where Congressional intent is discernable and here it seems crystal clear, we must give effect to that intent."

See also such cases as Mugler v. Kansas, 123 US 623 (1887) which involved a conviction for selling of beer in violation of law where Justice Harlan stated as follows:

> "There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive a citizen of his constitutional rights. If therefore, a state deems the absolute prohibition of the manufacture and sale within her limits, of intoxicating liquors for other than medical, scientific and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representative. They have nothing to do with the mere policy of legislation."

On the general question as related to the line of cases connected with prohibition and the general history of marijuana legislation, see the comprehensive article "The Forbidden Fruit and The Tree of Knowledge; an Inquiry Into The Legal History of American Marijuana Prohibition", Richard J. Bonnie and Charles H. Whitebread, 56 Virginia Law Review, pages 971 to 1203, October 1970.

One unusual aspect of these proceedings was the result of the activities of an organization known as the National Committee for John and Yoko, the committee organized for the purpose of soliciting public support for these respondents generally from persons of statute in various fields of artistic endeavor, but including also well known people in political and other fields. The testimony of several of such people was taken in the course of these proceedings (record page 44 to 62)

In addition a collection of over 100 letters solicited by the national committee for John and Yoko, were submitted as a single exhibit 15, all endorsing the respondents and recommending that they be permitted to remain permanently in the United States.

The position taken by the great majority of these correspondents is that the respondents are outstanding artists in their field, that they are of great value to the artistic life of the United States, and that the only reason permanent residence is being denied these respondents is because of their well-known opposition to war and violence and the participation by the United States in the war in Vietnam. The writers of the letters run the gamut from Baron Harlech of England and Mayor Lindsay of

the City of New York through every field of artistic endeavor from poet to professor, from sculptor to musician and museum director, nearly all people of outstanding artistic ability.

Although counsel for the respondent has scrupulously briefed every other aspect of this case, he has not drawn my attention to any case which would make this evidence relevant. Obviously the opinion of the witnesses and letter writers is not needed to establish the artistic qualifications of these respondents. The Immigration and Naturalization Service itself recognizes them as persons of exceptional ability in the arts who will be of substantial benefit to the national economy, cultural interests or welfare of the United States. The position of the letter writers and presumably by inference the position of the respondents appears to be that if a sufficient number of gifted artistic persons hold the respondents in high esteem, the provisions of the Immigration and Nationality Act may safely be disregarded in view of the overall benefits to the cultural life of the country as a whole.

The adjudication by artistic acclaim has of course certain serious difficulties. Is the judicial process to be reduced to a type of popularity contest? If so, would the respondents be willing to abide by the results of the statistical count? The Trial Attorney has indicated that he has received numerous letters from individuals who protest the presence of the respondents in the United States. How many more negative votes would be produced if a show of opinion was solicited generally rather than in the limited fashion engaged in by the national

committee for John and Yoko. Should the votes of creative artists count for more than the votes of automobile workers and farmers? What about the unpopular alien, the spy, the murderer, the captain of organized crime; are they to be deprived of due process of law because they are engulfed in the tide of hostile public opinion?

Whatever value such expression of public opinion might have in an area where Congress had entrusted the exercise of discretion to the judge, it is an empty academic exercise to pursue the matter further where we are concerned with the strict legality of an alien's excludability from the United States under a specific section of law. I respect the opinions of the artistic world for what they are, but find them not relevant in this particular context.

In the course of the hearings before me and in the initial brief filed by the respondent in this matter, some emphasis was placed on the then pending case of Mandel v. Attorney General, 325 F. supp. 620. It had been urged in that case that an alien who had been found ineligible for admission under Section 212(a)(28) of the Immigration and Nationality Act, as a person who advocated the economic international and governmental doctrines of world communism, has no personal right of entry but his exclusion from the United States would result in a deprivation of First Amendment rights to citizens of the United States to have him enter and to hear him.

However, on appeal to the Supreme Court of the United States it was held in Kleindienst, Attorney General v. Mandel, 408 U.S. 753, 92 S. Ct. 2576 (1972), that the power to exclude aliens is inherent in-sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers - a power to be exercised exclusively by the political branches of the government. It pointed out that the Supreme Court, without exception, has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. The court pointed out that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. The alien in that case did not, in fact, question the right of Congress to exclude. What was urged was that where a provision for waiver existed for a temporary admission (i.e. such a waiver as was granted to Mr. Lennon for his temporary admission) the refusal to grant the waiver must be limited by the First Amendment. The Supreme Court felt that the Attorney Geheral had given Mandel a sufficient reason for refusing him a waiver and that it would refuse to interfere with the Attorney General's exercise of the plenary power which Congress had delegated to him by Section 212(a)(29) and 212(d)(3). Obviously the position of the government is completely unassailable where the statute makes no provision whatsoever for a waiver in the case of aliens excludable under Section 212(a)(23) of the Act.

One last point merits discussion. The respondents are confronted by a legitimate legal and emotional dilemma rising out of their fight for

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