Section 245, and also whenever he feels, in his good judgment, that such normal procedures should not be followed. In this case, the respondent did not appear to be an "otherwise eligible alien", since the Government records contained evidence that he had been convicted of possession of marihuana, and the District Director was certainly entitled to feel (a) that there was prima facie ineligibility to adjust status under Section 212(a)(23), and that (b) this was not a case which should go through normal Section 245 administrative processing since it was highly likely to be denied. The District Director is certainly entitled to decide not to accord an apparently ineligible alien an additional three to six months stay in the United States whilst processing an application under Section 245, prior to the institution of deportation proceedings, when it prima facie appears that the application will not be granted. The District Director was fully aware of the conviction since that conviction had originally been the basis of nonimmigrant visa refusals by the United States Consulate, and by the fact that waivers of non-immigrant admission had previously been required in order for a non-immigrant visa to be issued.

B. In any event, we can do not better than to quote from the case of Lumargue vs. I&NS (7th Cir., April 1972), in which the Court said:

> "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 District Director's discretion to begin a deportation proceeding in this case in no way prejudiced respondent's rights to apply under Section 245 of the Immigration & Nationality Act. Indeed, the respondent should not complain that the District Director, persuaded by an examination of the administrative file that respondent was ineligible under Section 212(a)(23), forbore to adjudicate an application for adjustment of status but, instead, made it possible for the claim to be passed upon by a quasi-judicial officer, the Special Inquiry Officer.

Here, the male respondent is not eligible for a visa. Strange, that in all applications made by respondent for a waiver of excludability - he never

raised any issue as to the propriety or the need for such waiver. While he is not barred from raising the point now, some weight should be accorded the past administrative constructions of the statute by both the State Department and the Attorney General, who had both held that without a waiver he would be barred under Section 212(a)(23).

Counsel further relies on a lower court ruling in the case of Mandel v. Mitchell 325 F. Supp 620 (E.D. N.Y. 1971). However, since counsel submitted his brief, the U. S. Supreme Court has ruled in a manner contrary to counsel's contention and so no further comment need be made on these points.

Note

At the time of this writing, Respondent's medical examinations were not completed and the Government reserves the right to comment thereon should it appear appropriate.

LEGISLATIVE HISTORY

The advisability of extension of the 1957 law was the subject of considerable debate not only in the Congress but in the legislative bodies of several States as well as in the public and the specialized press.

Many instances of abuse of the provisions of the 1957 law have been reliably reported and well documented. The contention was that certain intermediaries have made a lucrative business by acting as representatives of American couples desiring to adopt an alien orphan. Irrespective of the legal and moral questions involved, it became evident that some of the practices which crept into the alien orphans adoption program created considerable hardship for the children and have not served well the interest of the adoptive parents.

Upon the expiration of the 1957 law, Congress, instead of reenacting the expired 1957 law with an extension of the termination date wrote into the law certain procedural requirements under which the Attorney General must make a finding of eligibility after a full investigation has been made similar to the investigation made pursuant to section 205 of the Immigration and Nationality Act in the case of a natural-born alien child of a U. S. citizen.

Since September 9, 1959, the enactment date of the amended statute, until January 1, 1960, the Attorney General has approved 23 petitions filed in behalf of alien children personally adopted abroad by U. S. citizens, while 57 petitions were approved in cases of children coming to the United States for adoption, and 130 petitions were approved in cases where adoption took place by the use of an authorized representative of the adoptive parents (proxy). Twenty-five petitions were denied by the Attorney General. A total of 176 alien orphans were admitted into the United States.

At the present time, the Committee on the Judiciary is engaged in a study of the whole problem and, until such study is completed and further inquiries as to the advisability of a continuation of the alien orphans adoption program are made, the committee is not prepared to recommend an extension of the program beyond 1 year. Section 7 of the joint resolution, as amended, achieves that purpose.

ADJUSTMENTS IN THE IMMIGRATION AND NATIONALITY ACT

Sections 212(a) (23) and 241(a) (11) of the Immigration and Nationality Act set forth the grounds for the exclusion or deportation from the United States of aliens convicted of narcotic law violations. Those provisions of the law were amended by section 301 of the Narcotic Control Act of 1956 (act of July 18, 1956; 70 Stat. 567, 575) at which time language was added to both above-cited provisions of the Immigration and Nationality Act for the purpose of making conviction of a violation of law relating to illicit possession of narcotic drugs an offense resulting in the exclusion or deportation of an alien.

In 1958, in proceedings for judicial review of deportation orders affecting two aliens, Mexican nationals, the plaintiffs urged that their conviction under the law of California for possession of marihuana did not render them deportable under section 241(a) (11) of the Immigration and Nationality Act. Both aliens claimed that marihuana was not included in the term "narcotic drugs" as it appears in the first clause of the above-

Appendix A.

cited paragraph. The plaintiffs' contentions were upheld by the U.S. District Court for the Southern District of California in Mendoza-Rivera v. Del Guercio (161 F.Supp. 473); and Rojas-Gutierrez v. Hoy (161 F.Supp. 448).

On April 3, 1959, the Court of Appeals for the Ninth Circuit affirmed the decision of the lower court holding that the aliens were not deportable (267 F.2d 451; 267 F.2d 490). Briefly, the court held that because of the construction of the first clause of section 241(a) (11), supra, an alien was not subject to deportation merely because he had been found guilty "of simple possession of marihuana." In Mendoza-Rivera, the court of appeals expressed the opinion that if there had been any attention directed to the consequences the alien was "exactly the type person the Members of Congress who voted for the act would have desired deported," but that there was insufficient legislative history to establish that intent. The court further observed that the alien was obtaining an "unexpected and surprising windfall, if he is not deported." It might be observed here that the plaintiff Rojas-Gutierrez was convicted on three occasions, in 1938, in 1945, and in 1949, for the crime of possessing marihuana in violation of the California Health and Safety Code.

The amendments proposed herein are designed to overcome the effect of the above-outlined judicial decisions so that a person who has been convicted at any time of a violation of a law relating to the illicit possession of marihuana shall be subject to exclusion or deportation as if the violation was for possession of "narcotic drugs." Both amendments will bring the opening clause of the two pertinent provisions of the law in line with other clauses thereof which specify marihuana in the enumeration of the various types of drugs which bring the statute now into play in special circumstances. The instant proposal carries out, and is fully in line with the original intent of Congress expressed in several enactments clearly indicating that its concern with violations of laws relating to marihuana was as great as its concern with violations of laws relating to other narcotic drugs. Usually, violations of laws relating to marihuana are but the forerunners of violations of other laws relating to dangerous and more addiction-forming narcotics. The ease with which marihuana can be obtained is undoubtedly one of the leading causes of the increased incidence of juvenile delinquency and it stresses the urgent necessity for the enactment of this legislation. These changes are contained in sections 8 and 9 of the joint resolution, as amended.

Section 10 of the joint resolution is designed to amend section 245(a) of the Immigration and Nationality Act, as amended by the act of August 21, 1958 (72 Stat. 699).

In recommending the enactment of the amendatory act of August 21, 1958, the Committee on the Judiciary made the following statement of policy (Rept. 2133, 85th Cong.):

> Provision for the adjustment of immigration status in the United States, without institution of deportation proceedings, to that of permanent residents in behalf of aliens who came to the United States as nonimmigrants, was first enacted into law in section 245 of the Immigration and Nationality Act. At that time the conferees in their report on the legislation which became the

edge of and used due diligence to prevent the presence of the narcotic drug in or on such vessel, water craft, railroad car, or other vehicle; but the narcotic drug shall be seized, forfeited, and disposed of as provided in the second paragraph of section 173 of this title. Feb. 9, 1909, c. 100, § 2(g), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, § 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.

Historical Note

Codification. For derivation of this section, see notes under section 173 of this title.

Cross References

Advance of funds in connection with enforcement of this section, see section 529a of Title 31, Money and Finance.

§ 176a. Smuggling of marihuana; penalties; evidence; definition of marihuana

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570.

Appx. A (Exh 2)

[redacted]

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

Source as originally enacted in 1954 Code: Sec. 3234(b), 1939 Code, substantially unchanged.

Amendments:	Sec. as amended effective
P. L. 728, 84th Cong., 2d Sess., § 103	7-18-56

P. L. 728, 84th Cong., 2d Sess., § 103:

Amended Code § 4755(b) to read as above. Effective under § 401, 7-18-56. Prior to amendment it read as follows:

"(b) Transportation.—It shall be unlawful for any person who shall not have paid the special tax and registered, as required by sections 4751 to 4753, inclusive, to send, ship, carry, transport, or deliver any marihuana within any Territory, the District of Columbia, or any insular possession, or from any State, Territory, the District of Columbia, any insular possession of the United States, or the Canal Zone, into any other State, Territory, the District of Columbia, or insular possession of the United States: *Provided*, That nothing contained in this section shall apply to any common carrier engaged in transporting marihuana; or to any employee of any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive, while acting within the scope of his employment; or to any person who shall deliver marihuana which has been prescribed or dispensed by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, who has been employed to prescribe for the particular patient receiving such marihuana, or to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties."

[Sec. 4756]

SEC. 4756. OTHER LAWS APPLICABLE.

All provisions of law (including penalties) applicable in respect of the taxes imposed by sections 4701 and 4781 shall, insofar as not inconsistent with this part, be applicable in respect of the taxes imposed by this part.

Source: Secs. 2601, 2287, 1939 Code, substantially unchanged.

[Sec. 4757]

SEC. 4757. CROSS REFERENCES.

For penalties and other general and administrative provisions applicable with respect to this chapter, see sections 4701 and 4762; sections 4771 to 4776, inclusive; chapter 40; and subtitle F.

Subpart C—General Provisions Relating to Marihuana

Sec. 4761. Definitions.

Sec. 4762. Administration in insular possession.

[Sec. 4761]

SEC. 4761. DEFINITIONS.

When used in this part—

(1) PERSON.—The term "person" means an individual, a partnership, trust, association, company, or corporation, and includes an officer or employee of a trust, association, company, or corporation, or a member or employee of a partnership, who as such officer, employee, or member, is under a duty to perform any act in respect of which any violation of this part occurs.

(2) MARIHUANA.—The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(3) PRODUCER.—The term "producer" means any person who (A) plants, cultivates, or in any way facilitates the natural growth of marihuana; or (B) harvests and transfers or makes use of marihuana.

(4) TRANSFER OR TRANSFERRED.—The term "transfer" or "transferred" means any type of disposition resulting in a change of possession, but shall

748

App. A.

Exh. 3

...among big city vo... ...leading his opponent ... his life. I think he wants to win big so that ... Mr. Cannon ... 's Washington bureau, covers the ...te House.

...union members, Cath... ...he doesn't get a Republican Congress this ...

Wall Street Journal 8-14-72

The 'Cultural Lag' in Immigration Laws

By Leon Wildes

In 1968, John Lennon pleaded guilty to the offense of possession of cannabis resin in a British court and paid a modest fine. The unforeseen results of that seemingly harmless plea have plagued him ever since.

His plight is now a matter of public record. Several months ago the Immigration and Naturalization Service, a branch of the U.S. Justice Department, commenced deportation proceedings against John Lennon and his wife Yoko Ono. These proceedings are essentially founded upon their having remained in the U.S. on visitors' visas beyond the time authorized for their visit. During the proceedings, the Lennons applied to adjust their status to become immigrants (permanent residents) of the U.S. Preliminary applications were approved by the Immigration Service by which they were designated outstanding artists "who, because of their exceptional ability in the arts, will substantially benefit prospectively the national economy, cultural interests or welfare of the United States."

Nevertheless, the government has claimed that Mr. Lennon is ineligible for permanent resident status, and no decision has yet been rendered in the case.

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 U.S. immigration law, hardly a paragon of progressive legislation, has thus once again been shown to be in drastic need of revision. Its harsh treatment of aliens convicted of offenses relating to possession of marijuana is an anachronism in modern jurisprudence.

No one doubts the legal right of nations to impose severe conditions upon admissibility of aliens or to provide for their deportation. As a normal incident to their sovereignty, states have traditionally restricted the privilege of aliens to enter their territory, prescribing such conditions as they have felt consonant with their national interests. Even the provisions of international treaties have not been interpreted to imply a surrender of this sovereign right to exclude.

In the U.S., the authority to formulate immigration policy rests with the Congress and is derived from the constitutional power to regulate commerce with foreign states. Laws providing for the exclusion and deportation of "undesirables" have been in existence in this country since 1882. Numerous statutory ...esire a maze-like

The Immigration and Nationality Act's 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. While the other sections of the Immigration Act which relate to serious crimes involving moral turpitude allow for exceptions for persons convicted of petty offenses and based upon hardship to close family members who are Americans or resident aliens, the marijuana possession provision allows for no exception. Thus a convicted rapist may be eligible for residence or exempt from deportation, while one convicted of simple possession of marijuana is necessarily deportable regardless of whether the conviction involves a crime.

The trend among modern scientists to 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 law's harsh attitude toward marijuana.

Indeed, the official report of the National Commission on Marijuana and Drug Abuse, after a thorough study of all the evidence, has recommended the decriminalization of the private possession of marijuana. In Michigan, a statute imposing long prison sentences for possession was recently held unconstitutional as a cruel and unusual punishment. At the same time, the penalties under federal laws have been reduced and many scientists with impressive credentials in the medical field have joined the effort to decriminalize the private possession of marijuana for personal use. They consider marijuana to be less harmful than tobacco and alcohol and have criticized legislation that imposes legal sanctions upon its private use as an unnecessary invasion of personal privacy—referred to by the late Justice Brandeis as "against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

The plight of aliens involved with this section of the law has not gone unnoticed. Sen. Alan Cranston of California introduced a bill (S. 738) which would permit the Attorney General to waive the excludability or deportability of such aliens in cases which involve hardship. On the House side, the same bill was introduced by Rep. Edward I. Koch of New York. The bill provides minimal relief and deserves prompt and serious consideration by Congress and broad public support.

Congressmen know, however, that it is very difficult to muster the support necessary to generate useful change in the immigration law, there being little public interest in the subject. While a "cultural lag" normally exists between the time when a need for a change in law occurs and the time the change is actually enacted into law, revisions of the immigration law are usually long overdue before Congress senses a need to act.

As a nation which attributes much of its best talent to the contribution of immigrants, it behooves us to be ever vigilant that our immigration laws do not rob us of a great potential natural resource.

Mr. Wildes, a New York attorney, is past president of the Association of Immigration and Nationality Lawyers, and currently represents John Lennon and Yoko Ono Lennon in their deportation proceedings.

Letters to the Editor

Clearing the Decks

Editor, The Wall Street Journal:

Inasmuch as Wall Street is scared out of its mind by the McGovern candidacy it is to be expected that the Journal would treat "The Eagleton Episode" as it did in its Aug. 2 editorial.

The important thing is not that a mistake was made but that the candidate moved to rectify it. In view of the important issues the country needs to face it is not in the national interest to run a campaign on the issue of the health of the vice-presidential candidate.

Your attempt to brand Sen. McGovern as an indecisive, unrealistic and poorly informed man will not wash. The directions in which he would lead the country are clear and have been clear. If one is going anywhere in a sailboat the destination is the important thing, not the tacks that need to be made to catch the wind on the way. Indeed the mark of a skillful sailor is his ability to make the turns and still maintain momentum toward the end of the course. We ought to thank Sen. McGovern for clearing the decks for a race on the great issues before the country.

Rufus Cuthbertson

New York

Underfinanced

Editor, The Wall Street Journal:

The Journal's interesting article which compared President Nixon's and Sen. McGovern's stand on various campaign issues (July 21) contained an unintended error. It is stated there that the cost of Sen. Kennedy's proposal for national health insurance is calculated to be $57 billion a year.

Essentially, Sen. Kennedy's plan calls for shifting nearly all health care expenditures to the federal government. His program would be financed by a 1% tax on the wages of employes, a 3.5% tax on employer's payrolls, and matching contributions from the federal revenues.

...that Sen. George McGovern is able to admit he's made a mistake, in direct contrast to Richard Nixon, who (as an example) will apparently never admit his mistake in continuing the Vietnam war.

I'd rather have a President who isn't always right, rather than one who thinks he is

Jean H. Weber

San Francisco

Vincent A. Schiano
Chief Trial Attorney

July 31, 1972

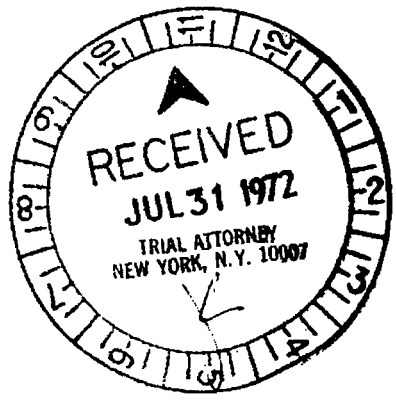
Ira Fieldsteel
Special Inquiry Officer

Brief - A17 597 321 John Lennon
(b)(6) [redacted] Yoko Ono Lennon

There is forwarded herewith a copy of the transcript in the above matter.

In accordance with your request of July 10, 1972 you are hereby granted until August 30, 1972 to submit your brief in this matter.

Will you please serve a copy of your brief on Mr. Wildes as well.



UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
20 WEST BROADWAY
NEW YORK, NEW YORK 10007

PLEASE REFER TO THIS FILE NUMBER

A17 597 323

[redacted]

(b)(6)

July 10, 1972

Mr. Ira Fieldsteel
Special Inquiry Officer
20 West Broadway
New York, New York

Re: John Lennon and
Yoko Ono Lennon

Dear Mr. Fieldsteel:

I have perused the brief submitted by counsel. It contains certain representations that in my opinion are at variance with statements made on record.

In order to submit an answering brief and relate properly to the record, I request a copy of the transcript. Thereafter I shall need only minimum time to submit the Government's brief.

Very truly yours,

Vincent A. Schiano
Chief Trial Attorney
New York District

[redacted]

[redacted] DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of the Deportation of

JOHN WINSTON ONO LENNON and
YOKO ONO LENNON,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS

LEON WILDES
Attorney for Respondents
515 Madison Avenue
New York, N.Y.
753-3468

56

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
----------x

In the Matter of the Deportation of

JOHN WINSTON ONO LENNON and
YOKO ONO LENNON,

Respondents.

----------x

BRIEF ON BEHALF OF RESPONDENTS

Leon Wildes
515 Madison Avenue
New York, N.Y.
753-3468

Attorney for Respondents

TABLE OF CONTENTS

Statement of Relevant Facts ---------- 2

Statutes Referred To ---------- 5

Issues Presented ---------- 9

Argument:

Point I: Respondents' motion to terminate the deportation proceedings should be granted. ---------- 10

A. The Service has violated its own rules and should be prevented from continuing such violation ---------- 10

B. The Service has violated its own invariable agency practice regarding commencement of proceedings in cases with humanitarian aspects and those with approved third preference petitions, and should be prevented from continuing such violation ---------- 13

C. The Government has failed to show a compelling state interest in excluding the respondents from the United States. ---------- 16

D. Maintenance of these proceedings prevents respondents from complying with U.S. Court orders. ---------- 18

Point II: The Deportation proceedings should be terminated because the Government has not sustained its burden of proof by clear, unequivocal and convincing evidence that the facts as alleged in each separate basis for deportation are true. ---------- 21

Point III: Respondent John Lennon's conviction under the British statute is not included in §212(a)(23) of the Immigration and Nationality ACt as a bar to his application for permanent residence.---------- 26

TABLE OF CONTENTS (cont.)

A. Analysis of the British statute under which respondent John Lennon was convicted demonstrates that the statute did not require proof of "mens rea" for a conviction, and that a conviction could thus be obtained without proof that the accused was aware that he possessed a forbidden substance.----------26

B. Only those convictions of marijuana possession under circumstances which would enable the accused to traffic in the substance are included in Section 212(a)(23) of the I.N.A.---------- 40

C. The use of the Dangerous Drugs Act of England as a bar to residency would deny respondent due process--- 46

D. The legislative history of the Immigration Act supports the view that Mr. Lennon's conviction is not included in Section 212(a)(23)-- 51

E. 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.----------57

Point IV: Section 212(a)(23) is unconstitutional insofar as it relates to "illicit possession of marijuana." ---- 62

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.---------- 62

B. Section 212(a)(23) as enacted violates the right to privacy.------ 64

CONCLUSION ---------- 70

STATEMENT OF RELEVANT FACTS

Respondents JOHN and YOKO LENNON are charged with deportability under Sections 241(a)(2) and (9) of the Immigration and Nationality Act, in that they remained in the United States after February 29, 1972, without authority and in that they abandoned their nonimmigrant intention and are in violation of status.

Respondents denied certain factual allegations and the legal conclusions of deportability at the hearing. Respondent JOHN LENNON's testimony was the only evidence of deportability on the contested issues of fact which was presented at the hearing.

Respondent YOKO ONO LENNON is fully eligible for permanent residence, having been granted "third preference" status and being otherwise eligible for residency under the immigration laws, either as a third preference or a nonpreference applicant. She may indeed have been a permanent resident throughout these proceedings.

Respondent JOHN WINSTON ONO LENNON has also been granted "third preference" status; however, the Government contends that Mr. Lennon is ineligible for adjustment of status pursuant to Section 245 of the Immigration and Nationality Act, for which he has duly applied, on the sole ground specified in Section 212(a)(23) of the Act in that he is an alien "who has been convicted of a violation of...any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana..." This is based upon the conceded fact that on November 28, 1968, respondent JOHN LENNON was established guilty (by way of plea) to having "in his possession a dangerous drug to wit cannabis resin without being duly authorized," contrary to Regulations 3 Dangerous Drugs (No. 2); Dangerous Drugs Act 1965 (a British statute). This being his only offense, a fine was imposed by the Magistrate. At the time of the offense Mr. Lennon was not aware that he was in "possession" of cannabis resin.

At the deportation hearing, Dr. Lester Grinspoon, one of the most outstanding American medical authorities on the subject of marijuana, whose qualifications were conceded by

the Government, testified that in his expert opinion "cannabis resin" was neither a narcotic drug nor marijuana. No evidence to the contrary was produced at the hearing.

Respondents moved to terminate these proceedings both before and after the Government's case was presented, as well as at the close of respondents' case. Decision on the motions was reserved.

STATUTES REFERRED TO

Dangerous Drugs Act 1965 (British)

Sec. 1. "The drugs to which this Part of this Act applies are raw opium, coca leaves, poppy-straw, cannabis, cannabis resin and all preparations of which cannabis resin forms the base."

Sec. 5. "If a person--
(a) being the occupier of any premises, permits those premises to be used for the purpose of smoking cannabis or cannabis resin or of dealing in cannabis resin (whether by sale or otherwise); or
(b) is concerned in the management of any premises used for any such purpose as aforesaid;

he shall be guilty of an offence against this Act."

Sec. 24. "(1) In this Act the following expressions have the meanings hereby assigned to them respectively, that is to say:--

"cannabis" (except where used in the expression 'cannabis resin') means the flowering or fruiting tops of any plant of the genus cannabis from which the resin has not been extracted, by whatever name they may be designated;

"cannabis resin" means the separated resin, whether crude or purified, obtained from any plant of the genus cannabis;..."

The Dangerous Drugs (No. 2) Regulations 1964 (British)

Sec. 3. "A person shall not be in possession of a drug unless he is generally so authorized or, under this Regulation, so licensed or authorised as a member of a group, nor otherwise than in accordance with the provisions of these Regulations and, in the case of a person licensed or authorized as a member of a group, with the terms and conditions of his licence or group authority."

Sec. 9. "(1) A person shall not be in possession of a drug or preparation unless he is generally authorised or, under this Regulation, so licensed with the provisions of these Regulations and, in the case of a person licensed or authorised as a member of a group, with the terms and conditions of his licence of group authority."

Sec. 20. "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."

Immigration and Nationality Act

Sec. 212(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into 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 marihuana,

or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addiction-sustaining opiate; or any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs;"

Sec. 241(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

...

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

...

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status;

...

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time 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 marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possesion for the purpose of the manufacture, production, compounding, transportation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;"

ISSUES PRESENTED

I. Whether respondents' motion to terminate the deportation proceedings should be granted.

II. Whether the deportation proceedings should be terminated because the Government has not sustained its burden of proof by clear, unequivocal and convincing evidence that the facts as alleged in each separate basis for deportation are true.

III: Whether respondent John Lennon's conviction under the British statute acts as a bar to his application for permanent residente under Section 212(a)(23) of the Immigration and Nationality Act.

IV: Whether Section 212(a)(23) is unconstitutional as it relates to "illicit possession of marijuana."

POINT I: RESPONDENTS' MOTION TO TERMINATE THE DEPORATION PROCEEDINGS SHOULD BE GRANTED.

A. The Service has violated its own rules and should be prevented from continuing such violation.

The Operations Instructions governing the practice and procedures of the Immigration and Naturalization Service provide as follows:

> "...an otherwise eligible alien who has not heretofore filed a §245 application shall normally be afforded an opportunity to file such an application prior to the institution of deportation proceedings." Op. Inst. Sec. 245.1 (April 8, 1970).

These proceedings were begun after the respondents filed third preference petitions. Therefore, it is clear beyond any doubt that Mrs. Yoko Lennon came clearly within this rule and it is amply clear that the Government has willfully disobeyed its own regulation in this case. This action by the Service goes beyond the exercise of discretion to disregard a rule safeguarding an alien's rights.

It appears settled that a Federal District Court would have jurisdiction to grant relief in the nature of mandamus if official con-

duct has "gone so far beyond any rational exercise of discretion..." and to compel an administrative agency, even the United States Army, to follow its own regulations. United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968); Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970); Massignani v. Immigration and Naturalization Service, 313 F.Supp. 251, aff'd 438 F.2d 1276 (7th Cir. 1971).

Yet the respondents need not resort to an action in the nature of mandamus when the Government is on clear notice that it has failed to follow its own regulations. The Special Inquiry Officer is in a position to at once terminate the within proceedings on that ground alone: that the respondents were not offered an opportunity to apply for adjustment of status as required by the Service's own Operations Instruction, supra; moreover, the Service's failure to comply with its own rules and regulations is a denial of due process to the respondents. United States ex rel. Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969), Hammond v. Lenfest, 398 F.2d 705 (2d Cir., 1968).

If this were the only violation of its

own rules by the Service, the Special Inquiry Officer might conceivably ignore such a violation of practice, rules and regulations as "harmless error." However, other violations of practice and law have occurred; the respondents in this proceeding were in fact compelled to commence an action in the nature of mandamus to compel the District Director to perform another mandatory act which was encompassed by the Service's own rules and regulations, namely, to adjudicate respondents' third preference petitions, a duty required to be performed by the Service by statute. [See Lennon and ano. v. Marks, 72 Civ. 1784, U.S. District Court, Southern District of N.Y., which resulted in the Director's granting of respondents' "third preference" petitions.]

The continued failure to follow established rules by the Service in this case, must compel the Special Inquiry Officer to terminate these proceedings as having been commenced and maintained with the continued effect of denying respondents the due process to which they are entitled by virtue of the United States Constitution.

B. The Service has violated its own invariable agency practice regarding commencement of proceedings in cases with humanitarian aspects and those with approved third preference petitions, and should be prevented from continuing such violation.

It is one of the most respected and honored practices of the Immigration Service to make every possible effort not to separate families in any respect whatsoever. Respondents respectfully requrest the Special Inquiry Officer to take administrative notice of the fact that cases involving the very young, the elderly, the infirm, people who will be discriminated against in other countries if deported, and those who are parents of children whose cases present humanitarian aspects, are all the types of cases in which the Service would normally desist from commencing deportation proceedings, unless there were some special circumstances not normally present.

It is the respondents' contention that it is the Service's invariable policy that in a case such as the present one, where an American citizen child is in danger of losing her parents, and where two American courts have awarded the respondents custody upon the condition that the

parents remain within the territorial bounds of the United States, the Service would decline to commence deportation proceedings, but rather would grant extensions of temporary stay or grant an extended voluntary departure privilege to accommodate the humanitarian aspects of the case. In the instant case, the Service departed from this invariable practice and humanitarian policy.

Although by letter dated May 1, 1972 the respondents, through counsel, attempted to obtain information pursuant to Section 552 of the Administrative Procedure Act, 5 U.S.C.A. §552 (commmnly known as the Freedom of Information Act), the Government has failed to properly respond to such letter and has indeed failed to supply the information. Respondents are even now unable to properly brief and argue their position, since decisions by the Service not to commence deportation proceedings against persons in the position of the respondents are unpublished, and known to the Service alone. This "invariable practice" (not to commence deportation proceedings in a case like the one herein) has been held by the Courts to be given

great weight, unless unreasonable or flatly contrary to the statute. United States ex rel. Knauff v. McGrath, 181 F.2d 839 (2d Cir. 1950).

Nevertheless, the Service insists on varying its "invariable practice" in the case of respondents alone, without any justifiable reason; in fact, without any reason whatsoever.

The proceedings should be terminated on this ground alone, and that the Special Inquiry Officer has the power to so do is clear from the statute and regulations. 8 C.F.R. 242.7, 242.8

Moreover, an unvaried practice exists, except in the case of exchange visitors, to permit aliens who are the beneficiaries of approved third preference petitions to remain in the United States until their applications for permanent residence can be filed administratively and adjudicated. This practice was similarly not followed in this case, where even the approval of the petitions was not forthcoming without judicial intervention. The institution of proceedings in such cases is a rarity, particularly where the public interest in an artist is so pronounced.

In view of the fact that a motion was made by respondents on June 28, 1972 to defer consideration on this point of law until the government, by a knowledgeable representative, is deposed as to the subject matter of this point, peculiarly in the knowledge of the Service and not avilable elsewhere, we respectfully request permission to file a supplementary brief on this point at a later date.

C. The Government has failed to show a compelling state interest in excluding the respondents from the United States.

The Supreme Court of the United States has ruled that the First Amendment to the United States Constitution guarantees the American citizenry the inalienable right to hear, read, and otherwise receive artistic communications free from governmental interference. E.g., Stanley v. Georgia, 394 U.S. 556; Caldwell v. United States, 434 F.2d 1081, (9th Cir. 1970.

In Mandel v. Mitchell, 325 F.Supp. 620 (E.D.N.Y. 1971), cert. granted _____U.S.___(1971), a case concerning the exclusion from this country

of a Marxist scholar by the Immigration and Naturalization Service, the Court Stated:

> "The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views." 325 F.Supp. 620, at 631.

The American public therefore has a right, a Constitutional right, to enjoy the artistic presence of the respondents herein; and prior to the Government's exclusion of these two great artists, the Government must demonstrate that a compelling state interest will be served by excluding them and that there is no alternative other than the drastic remedy of deportation. See Shelton v. Tucker, 364 U.S. 479 (1960).

It goes without saying that no such compelling state interest has been demonstrated by the Government in this case, nor could it be shown. On the contrary, the Government has, by approving the respondents' third-preference applications, conceded the great artistic worth of these to individuals to the American public and the American scene, by its finding that they are artists "who

because of their exceptional ability in the...arts will substantially benefit prospectively the national economy, cultural interests or welfare of the United States." 8 U.S.C.A. 1153(2)(3).

D. Maintenance of these proceedings prevents respondents from complying with U.S. Court orders.

Whether the child Kyoko, a U.S. citizen, is a necessary party to such proceedings against her parents is debatable; nevertheless no case has been decided squarely on point with the within proceeding because in these proceedings court custody orders are involved which are not present in the other decided cases.

The District Director (and after commencement of deportation proceedings, the Special Inquiry Officer) has the power, in his discretion and on the basis of appealing humanitarian factors, to cancel and terminate deportation proceedings. The determination whether to withhold or terminate deportation proceedings is clearly discretionary. 8 C.F.R. 242.7; Millan-Garcia v. INS, 343 F.2d 825 (9th Cir. 1965), vacated and remanded, 382 U.S. 69.

In the present case, Kyoko, an American citizen, is being held incommunicado by her natural father in contempt of two court orders. His only ally is the Immigration Service in this contemptuous behavior. Respondents have been awarded temporary custody of Kyoko with the strict proviso that they raise Kyoko within the territorial limits of the United States. A U.S. Circuit Court of Appeals has affirmed the custody order. The Government, however, seeks to remove the respondents on the ground that they have overstayed their time in this country, not based on some objective failure on respondents' part but by first revoking their permission to stay, for apprently no justifiable reason, and by then declaring them illegal overstays. The posture taken by the Service, that it has no alternative but to enforce the law is ironic, for the law requires the Service to grant visitors the time necessary to accomplish their temporary purposes, and mandates that this duty be carried out with regard to human problems and human dignity. The Service abrogated its duty in this case. The failure on the part of the District Dir-

ector to cancel these proceedings was a flagrant abuse of his discretionary powers under the Regulations, in view of the compelling humanitarian interests prevailing in this case. The failure on the part of the Special Inquiry Officer to terminate these proceedings would be, for the same reasons, an abrogation of his discretionary power, which power can only be measured in degrees of humanitarianism. The Service has, in the exercise of sound administrative discretion, cancelled deportation proceedings for compassionate or humanitarian reasons in many cases because of an alien's health, age, or family circumtances and no less a remedy is adequate here.

The compelling and almost tragic family circumstances surrounding Kyoko and her natural father's attempt to remain in contempt of two American Court decrees until the Government has removed her temporary guardians, warrants an exercise of special humanitarianism, and the respondents respectfully suggest that the Special Inquiry Officer so act in this case.

POINT II: THE DEPORTATION PROCEEDINGS SHOULD BE TERMINATED BECAUSE THE GOVERNMENT HAS NOT SUSTAINED ITS BURDEN OF PROOF BY CLEAR, UNEQUIVOCAL AND CONVINCING EVIDENCE THAT THE FACTS AS ALLEGED IN EACH SEPARATE BASIS FOR DEPORTATION ARE TRUE.

According to some of the older decisions, where the alien's entry was unlawful, he had the burden of establishing his right to remain. On the other hand, where entry was lawful and deportation is sought on the ground that by his subsequent conduct the alien in question had lost the right to remain, as in the instant case, the view has been taken that the burden is on the government to show that the alien has committed some act or offense by which, under the Immigration Act, he has lost his right to remain. Hughes v. Tropello, 296 F. 306 (3rd Cir., 1924). In Hughes the Court held that the presumption of innocence exists in the alien's favor and that it is by virtue of the due process clause of the Constitution that the burden is placed upon the Government to establish the facts warranting the alien's deportation. See also United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 44 S.Ct. 54 (1923), Wood v. Hoy, 266 F.2d 825 (9th Cir., 1959), Rodrigues