> coca leaves, heroin, *marijuana*, or any salt, derivative, or preparation of opium or coca leaves, shall be taken into custody and *deported* in the manner provided in Sections 19 and 20 of the Act of February 5, 1917.[94]

At the time the above statute was enacted, narcotics infractions were grounds only for deportation of aliens already resident in the United States, but not for exclusion of those wishing to migrate to this country. The Immigration Act of 1952[95] was the first statute to list narcotics violators as *excludable*.[96] As originally enacted, the 1952 act barred any alien who had been convicted of violation relating to illicit traffic in narcotics, and any alien who a consular or immigration officer had reason to believe was or had been an illegal trafficker in such narcotic drugs.[97]

In both the 1931 statute[98]—a much earlier version of the present Immigration Act's section 241(a)(11), providing for deportation of resident aliens based on previous drug offenses—and the 1952 statute[99]—the original version of the present Immigration Act's section 212(a)(23), providing for exclusion of visiting aliens based on previous drug offenses—any definitions of marijuana as including *cannabis* resin (hashish) within their respective terms, were conspicuously absent. Whether the Congress did not intend to include *cannabis* resin within the scheme of its legislation, or whether it assumed that *cannabis* resin was included within the term "marijuana," is unclear and, as we shall see, immaterial.

The separate provisions with respect to "excludables" and "deportables" were at once augmented and further bifurcated by passage of the Narcotic Control Act of 1956.[100] Whereas both sections had previously directed their provisions at aliens convicted of crimes directly connected with the trafficking of narcotics, the "Control Act" went still further. The 1956 act amended both the "deportable" and "excludable" sections of the Immigration Act to include (1) *conspiracy* to violate a *narcotics* law and (2) illicit *possession of narcotics* as additional grounds for deporting or excluding an alien from the country. Furthermore, it amended section 241(b) of the Immigration Act to provide that judicial recom-

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[94] Act of May 26, 1922, 42 Stat. 596 (emphasis added).
[95] Act of June 27, 1952, ch. 477, 66 Stat. 166.
[96] *See* C. GORDON & H. ROSENFIELD, 1 IMMIGRATION LAW AND PROCEDURE § 2.45 (1965).
[97] *Id.*
[98] *See* text accompanying note 92 *supra*.
[99] *See* notes 96-97 *supra*.
[100] Act of July 18, 1956, 70 Stat. 567.

mendations against deportation not be permitted with respect to aliens convicted of narcotics offenses.[101] Drafted in terms of "narcotics," the 1956 act did nothing, therefore, to affect or elucidate the term "marijuana" as used in the Immigration Act.

Subsequently, in 1960, in order to overcome the effect of two court decisions which interpreted the 1956 amendment's use of the term "narcotics" as not reaching marijuana,[102] Congress explicitly added the words "or marijuana" to the 1956 modification of both the "deportable" and "excludable" sections, bringing the new "possession" provisions in line with the older "trafficking" portions.[103]

In none of the various amendments and modifications discussed above did Congress indicate, either directly or through regulations, precisely what substances were included in the term "marijuana," and *a fortiori*, specific mention of *cannabis* resin or hashish was nowhere evident. Even so, the Immigration Judge in Lennon's case argued that passage of the previously mentioned Narcotics Control Act of 1956 managed to incorporate into section 212(a)(23), by reference to the Internal Revenue Code of 1954, a definition of marijuana which included the resinous or hashish portion of the plant.[104] The Immigration Judge asserted that the incorporation of a definition for marijuana set down in the Internal Revenue Code of 1954[105] (which was referred to in a separate section of the omnibus 1956 Narcotics Control Act, amending the Narcotic Import and Export Act[106]), should be determinative with respect to every use of the term "marijuana" within the 1956 Act. Aside from the different factual situations with which the two acts are concerned,[107] and the internal inconsistencies within sec-

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[101] Act of July 18, 1956, § 301(b), (c), 70 Stat. 575.

[102] Rojas-Gutierrez v. Hoy, 161 F. Supp. 448 (S.D. Cal. 1958), *aff'd*, 267 F.2d 490 (9th Cir. 1959); Mendoza-Rivera v. Del Guercio, 161 F. Supp. 473 (S.D. Cal. 1958), *aff'd sub nom.* Hoy v. Mendoza-Rivera, 267 F.2d 451 (9th Cir. 1959).

[103] Act of July 14, 1960, § 9, Pub. L. No. 86-684, 74 Stat. 504.

[104] *In re* Lennon, at 33-34.

[105] INT. REV. CODE OF 1954, § 4761, defines the term "marihuana" as including "all parts of the plant including the resin extracted from any part of such plant." *Id.*

[106] Section 106 of the Narcotics Control Act of 1956, Act of July 18, 1956, ch. 629, 70 Stat. 567 amended section 2 of the Narcotic Drugs Import and Export Act to provide greater penalties for the unlawful importation of marijuana.

[107] Former section 2 of the Narcotic Drugs Import and Export Act, Act of Feb. 9, 1909, ch. 100, 35 Stat. 614 (repealed Oct. 27, 1970) (formerly codified at 21 U.S.C. §§ 171-74), prohibited the importation of various narcotic drug and marijuana. It would be highly reasonable for Congress to include hashish within an importation statute, while not including it in a possession statute, inasmuch as hashish, in contradistinction to marijuana,

tion 212(a)(23) which such a position would imply,[108] there is an elementary and more cogent reason that such an interpretation is fallacious. The amendment to the Narcotic Drugs Import and Export Act specifically provided that, "as used in *this section*, the term 'marijuana' has the meaning given to such term by Section 4761 of the Internal Revenue Code of 1954."[109] Such a specific incorporation by reference implies that Congress intended to limit its reference to a particular section, and not to the act in general.

All that can be gleaned from the legislative development of the Immigration Act outlined above is that the courts have construed narrowly the imprecise statutory language of the act, even in the face of contrary congressional intent. As previously discussed, the Narcotics Control Act of 1956 amended both sections 212(a)(23) and 241(a)(11) by providing that those sections would henceforth mandate exclusion and deportation, respectively, for aliens convicted of possession of drugs.[110] However, whereas the earlier trafficking portions of both sections specifically mentioned narcotics and marijuana, the 1956 amendment spoke only of "narcotics."[111] Nevertheless, it was clear from the legislative history accompanying the 1956 act that Congress viewed "general references to narcotics in [the act as] includ[ing] . . . the term marijuana . . . ."[112]

However, two federal district court cases, both ultimately affirmed by the United States Court of Appeals for the Ninth Circuit, interpreted the 1956 amendment as excluding marijuana convictions.[113] The Ninth Circuit, in its affirmance, held that if

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is not native to the United States. *See* Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970).

[108] If, *arguendo*, the 1956 amendment to section 212(a) (23) intended to incorporate the marijuana definition set forth in the 1954 Internal Revenue Code, and was successful, then the acknowledged attempt of the subsequent 1960 amendment, *i.e.*, to erase all incongruities between the substances covered in the "simple possession" and "trafficking" portions of section 212(a)(23) (*see* text accompanying notes 102-03 *supra*), was partly unsuccessful because the 1952-enacted "trafficking" portion's use of the term "marijuana" could never be (as was posited of its "simple possession" sister provision) founded upon a definition set down in a Code created two years subsequent to its own enactment.

[109] Act of July 18, 1956, ch. 629, 70 Stat. 570 (emphasis added).

[110] *See* text accompanying notes 100-01 *supra*.

[111] *See* text accompanying notes 100-01 *supra*.

[112] 1956 U.S. CODE CONG. & ADMIN. NEWS 3294 n.1.

[113] Rojas-Gutierrez v. Hoy, 161 F. Supp. 448 (S.D. Cal. 1958), *aff'd*, 267 F.2d 490 (9th Cir. 1959); Mendoza-Rivera v. Del Guercio, 161 F. Supp. 473 (S.D. Cal. 1958), *aff'd sub nom.* Hoy v. Mendoza-Rivera, 267 F.2d 451 (9th Cir. 1959).

Congress wished to include marijuana within the terms of the 1956 amendment, it could have particularly so stated. However, if Congress chose not to do so, any doubt as to the statute's meaning should be resolved in favor of the alien.[114]

This sort of "strict construction" with respect to deportation laws is hardly new. In fact, it is well settled that although deportation statutes are not considered strictly penal,[115] inasmuch as they inflict the equivalent of banishment or exile, they should be strictly construed.[116] In cases where the language of Congress is susceptible of several possible meanings "because of the dire consequences which may result, the language used by Congress should be given the narrowest of several possible meanings."[117] If there is any doubt as to the interpretation of a provision in the Immigration Act, that doubt has usually been resolved in favor of the alien.[118]

In keeping with the "strict construction" approach discussed above, it would seem reasonable to attach an interpretation to the term "marijuana" as utilized in section 212(a)(23) which would resolve any lack of clarity in the statute in Lennon's favor. At his hearing, Lennon introduced an acknowledged expert in the field of drugs who testified that *cannabis* resin was commonly known as "hashish," and that neither of these terms referred to the substance of *cannabis sativa* known commonly as "marijuana."[119] Certainly, according to this interpretation, Lennon's hashish con-

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[114] *Cf. In re* Lennon, at 34-35, in which the Immigration Judge attempted to resolve the question of "what Congress *would have intended* to cover by the use of the term marijuana, had the matter reached its specific attention." *Id.* (emphasis added).

[115] Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

[116] Barber v. Gonzales, 347 U.S. 637 (1954).

[117] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). *See also* United States *ex rel.* Brancato v. Lehmann, 239 F.2d 663 (6th Cir. 1956); Tutrone v. Shaughnessy, 160 F. Supp. 433, 437 (S.D.N.Y. 1958).

[118] Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959).

[119] Dr. Lester Grinspoon, Associate Professor of Psychiatry, Harvard Medical School, testified as follows:

Q. Do you consider that Cannabis Resin is hashish?
A. Yes.
Q. Is Cannabis Resin marijuana?
A. Cannabis Resin is not marijuana.
Q. Is Cannabis Resin a narcotic drug?
A. Cannabis Resin is not a narcotic drug.
Q. Based upon your knowledge and research in this field, would I be correct in saying that it is your opinion that Cannabis Resin is not marijuana?
A. Cannabis Resin is not marijuana. Marijauna is not Cannabis Resin.

In re Lennon, Transcript of Proceedings at 37-38.

viction would not run him afoul of any section 212 provision.

Although the decision in *Matter of Lennon* did not agree with the above interpretation,[120] interestingly enough, a subsequent immigration decision did follow a virtually identical approach in construing the word marijuana in section 212(a)(23). In *Matter of Gray*,[121] an alien who had previously been admitted to permanent residence in the United States applied for readmission to the country in 1971. On information from police authorities, the Service released the alien "to Maine State Police for conviction [*sic*] of narcotic laws."[122] He was subsequently convicted in that state of having been illegally in possession of hashish. Upon reapplication for readmission to the United States, the examining Immigration Officer found Gray to be excludable under section 212(a)(23). The alien was then referred to an Immigration Judge for a formal hearing with respect to his purported excludability. The Immigration Judge clearly delineated the issue before him and stated that

> if the hashish which was involved in the applicant's conviction is a narcotic drug or marijuana, he is excludable on the basis of the conviction for possession thereof. Even if he were admitted, he would immediately become deportable under the provisions of Section 241(a)(11) of the Immigration and Nationality Act because of the same conviction.[123]

However, the judge had no difficulty in finding that Gray was not excludable. He stated:

> Hashish is not referred to in Immigration statutes by name. No attempt was made to establish that hashish is a narcotic drug. However, evidence in the form of a pamphlet of the Bureau of Narcotics and Dangerous Drugs, U.S. Department of Justice, and a pamphlet produced jointly by the Department of Defense, Department of Health, Education and Welfare, Department of Justice, Department of Labor, and Office of Economic Opportunity, were introduced into evidence. These pamphlets establish that both marijuana and hashish are included under the generic term "Cannabis Sativa." One of the pamphlets . . . states that hashish is at "least five times stronger than crude marijuana."[124]

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[120] *In re* Lennon, at 30-35.

[121] File No. A30 310 271 (I & N Boston Dist., Sept. 23, 1971).

[122] *Id.* at 2.

[123] *Id.* at 4.

[124] *Id.* at 5-6.

The court further stated:

> The statute under which it is alleged that the applicant is excludable refers to "narcotics drugs" and to marijuana. The applicant was convicted of possession of hashish. There is no allegation here that hashish is a narcotic drug. It is urged that hashish should be included in the term "marijuana" because both are derivatives of Cannabis Sativa. However, neither "hashish" nor "Cannabis Sativa" are mentioned in the statute.[125]

Finally, the Immigration Judge ruled that

> [o]n consideration of this entire record and *in the absence of any law, regulation or decision of the Board or of any court finding that the words "hashish" and "marijuana" are the same or interchangeable, it will be concluded that the applicant has not been convicted in violation of law relating to possession of a "narcotic drug" or marijuana.*[126]

The *Gray* case, in rejecting the broad inclusionary approach to the term "marijuana" espoused in *Matter of Lennon*, seems better reasoned and more in keeping with the tradition of strict judicial interpretation normally encountered in the area of immigration law.

V. DUE PROCESS

Although Congress does possess plenary power with respect to setting the quantitative and qualitative standards for prospective immigration to our shores,[127] it is submitted that excluding or deporting Lennon on the basis of his British conviction would violate the Due Process Clause of the Constitution.[128] Under our

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[125] *Id.* at 5.

[126] *Id.* at 9.

[127] Flemming v. Nestor, 363 U.S. 603 (1960); Carlson v. Landon, 342 U.S. 524, 534 (1952). *See also* text accompanying notes 8-13 *supra*.

[128] Although the Supreme Court has never found any immigration provision to be in violation of the constitutional guarantees of substantive due process, several decisions indicate that the due process injunction might be applicable in an appropriate case. *See* Galvan v. Press, 347 U.S. 522 (1954); Jordan v. DeGeorge, 341 U.S. 223 (1951).

United States Courts of Appeals for the various circuits have disagreed as to whether a statute providing for deportation of an alien to any state that would harbor him posed a "substantial question" requiring a three-judge district court to be convened. *See, e.g.*, Wolf v. Boyd, 287 F.2d 520 (9th Cir. 1961); Marcello v. Kennedy, 194 F. Supp. 748 (D.D.C. 1961), *aff'd on other grounds*, 312 F.2d 874 (D.C. Cir.), *cert. denied*, 373 U.S. 933 (1963).

Several commentators have argued against the Government's ostensibly unqualified powers with respect to the ejectment of aliens. *See, e.g.*, M. KONVITZ, CIVIL RIGHTS IN IMMIGRATION (1953); Boudin, *The Settler Within Our Gates*, 28 N.Y.U.L. REV. 266, 451,

constitutional system, it is considered that basic fairness and the essential substantive and procedural safeguards of due process would be thwarted by a statute which required no proof of criminal intent.[129] Thus, with the exception of certain narrow instances,[130] American penal provisions purport to punish crimes comprised of both *actus reus* and *mens rea* components. Typically, then, a comprehensive review of the laws of all state and federal jurisdictions concerning possession of marijuana reveals that virtually all such statutes require, as an essential element for prosecution, that the defendant be shown to have had possession with knowledge of such possession.[131] Under the British Act and Regulation in force at the time of Lennon's conviction, no criminal intent was required for a possession conviction; innocent possession of a package which later proved to contain narcotics was deemed sufficient grounds for conviction, despite the fact that the accused had no reason to know, or actual knowledge of, either the contents or nature of such package.[132] It is contended that a conviction of this type, lacking an element which we consider essential to fundamental fairness, is alien to our system. Therefore, its use as a basis for excluding from permanent residence an applicant whose child is an American citizen and whose spouse is a permanent resident, should be deemed a denial of due process.[133]

When presented with the above argument in *Matter of Lennon*, the Immigration Judge did not rule upon the merits of the due process argument, but rather concerned himself with the threshold contention of whether all American decisions did, in fact, require a *mens rea* component for marijuana possession. In his decision, Immigration Judge Fieldsteel referred to the case law of several "minority jurisdictions"[134] which all held, he found, that knowledge on the part of a defendant was *unessential* for

634 (1951); Bullit, *Deportation as a Denial of Substantive Due Process*, 28 WASH. L. REV. 205 (1953); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 68 YALE L.J. 1578, 69 YALE L.J. 261 (1959); Maslow, *Recasting our Deportation Law*, 59 COLUM. L. REV. 309 (1956); Note, *Constitutional Restraints on the Expulsion and Exclusion of Aliens*, 37 MINN. L. REV. 440 (1953); Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 563 (1963).

[129] *See* Turner v. United States, 396 U.S. 398 (1970); United States v. Fueston, 426 F.2d 785 (9th Cir. 1970); Griego v. United States, 298 F.2d 845 (10th Cir. 1962); Casella v. United States, 304 F. Supp. 756 (D.N.J. 1969).

[130] *See* text accompanying notes 164-72 *infra*.

[131] *See* text accompanying notes 136-63 *infra*.

[132] *See* analysis of the British Act and Regulations in section III, *supra* at pp. 287-93.

[133] *But see* Buchowiecki-Kortkiewicz v. INS, 455 F.2d 972 (9th Cir. 1972).

[134] *In re* Lennon, at 22.

conviction. It would appear, however, that such authorities are no longer controlling within their respective jurisdictions.[135]

A review of the legislative and decisional jurisprudence with respect to the possession of marijuana can best be accomplished by looking separately at the federal and state areas. Under federal law, bare possession of marijuana for personal use was never per se a criminal act. However, a series of statutes beginning with the Marijuana Tax Act of 1937[136] did proscribe possession of the drug in connection with various tax schemes. Similarly, marijuana importation was outlawed under the Narcotic Drugs Import and Export Act.[137] The decisional law under all these statutes viewed the proscribed species of possession as one requiring *mens rea*.[138]

On the state level, the Uniform Narcotic Drug Act[139] [hereinafter referred to as the Uniform Act], which was at various times substantially adopted by all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands,[140] is the principal anti-marijuana legislation.[141] Section 2 of the Uniform Act

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[135] Although, as a general rule, it is solely federal and *not* state law which is determinative of whether an alien has committed a crime which would trigger any penalties under the Immigration Act (Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962)), here the author is interested in the broader issue of establishing the general jurisprudential posture of all American fora with respect to a particular crime. *See generally* Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971 (1970).

[136] Act of Aug. 2, 1937, ch. 553, 50 Stat. 551 (repealed 1970) (formerly codified at INT. REV. CODE OF 1954, §§ 4701-36).

[137] Act of Feb. 9, 1909, ch. 100, 35 Stat. 614 (repealed Oct. 27, 1970) (formerly codified at 21 U.S.C. §§ 171-74). The recently enacted provisions of the Comprehensive Drug Abuse and Control Act of 1970, 21 U.S.C. § 801 *et seq.* (1972), replaced the marijuana tax and anti-importation provisions discussed in the text. Underlying the amendment was a marked change in congressional attitude toward the nature of marijuana. *See* 116 CONG. REC. 781 (1970) (testimony of Dr. S. Yolles). For the legislative history and purpose of the Drug Abuse and Control Act of 1970, see 1970 U.S. CODE CONG. & ADMIN. NEWS 4566 *et seq.*

[138] Bass v. United States, 326 F.2d 884 (8th Cir. 1964); Guevara v. United States, 242 F.2d 745 (5th Cir. 1957); United States *ex rel.* Marino v. Holton, 227 F.2d 886 (7th Cir.), *cert. denied*, 350 U.S. 1006 (1955).

[139] The Act was approved by the National Conference of Commissioners on Uniform Laws in 1932. *See* 9 U.L.A. 523 (1973).

[140] *See* 9 U.L.A. 524 (1973) for a list of the states adopting the Uniform Act, and 9 U.L.A. 525 (1973) for a list of the states substantially adopting the Uniform Act.

[141] In 1970, the National Conference of Commissioners on Uniform Laws approved the Uniform Controlled Substances Act, which supplanted the older uniform provision. *See* 9 U.L.A. 145 (1973). However, section 401 of the Controlled Substances Act basically parallels the possession provisions of the Uniform Narcotic Drug Act, § 2. *See* 9 U.L.A. 266 (1973).

provides that "[i]t 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 act."[142] In order to convict a defendant under the possession portion of section 2, the enacting states have almost uniformly found it "necessary to show that the defendant was aware of the presence and character of the particular [proscribed] substance, and was intentionally and consciously in possession of it."[143] Although some jurisdictions have required a lesser standard of knowledge than have others, "no case has been found in which the defendant's conviction for illegal possession of narcotics has been sustained where the prosecution has failed to prove, either directly or by inference, that the defendant had knowledge of the presence of the contraband substance."[144]

There are, however, four state jurisdictions usually listed as exceptions to the general rule outlined above: the states of Washington, Florida, Massachusetts and Maryland. A more careful examination of current law in these states reveals, however, that, with the possible exception of Maryland, their laws no longer refute the proposition that knowledge is a requisite element in the crime of *cannabis* possession.

The state of Washington has the most detailed case law in the area.[145] The origin of its doctrine may be traced to *State v. Henker*,[146] where a Washington court interpreted the deletion of the words "with intent to sell" from the statute as dictating an intent to dispense with a "knowledge requirement."[147] *Henker* was followed in *State v. Boggs*;[148] however, there the central issue was, arguably, not whether the statute required any *mens rea* at all for conviction, but whether *scienter* of the article's narcotic character was also necessary.[149]

However, two developments in recent Washington law have since undercut the *Henker* doctrine. First, in *State v. Hennings*,[150] *Henker* was explicitly disapproved:

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[142] UNIFORM NARCOTIC DRUG ACT § 2.

[143] Annot., 91 A.L.R.2d 810, 811 (1963).

[144] *Id.* at 821.

[145] It is the case law of that state which Immigration Judge Fieldsteel treated most extensively. *In re* Lennon, at 22-23.

[146] 50 Wash. 2d 809, 314 P.2d 645 (1957).

[147] *Id.* at 812, 314 P.2d at 647.

[148] 57 Wash. 2d 484, 358 P.2d 124 (1961).

[149] *Id.*

[150] 3 Wash. App. 483, 475 P.2d 926 (1970).

> [W]e respectfully disagree with the conclusion in *Henker* that the legislative objective was to eliminate *scienter* as an essential ingredient of the crime of trafficking in narcotics. As we discern the legislative purpose, it is to make possession of narcotics a crime without proof of a specific intent to sell. However, the elimination of the requirement of proof of a specific intent to sell does not, we believe, warrant the conclusion that a general intent—wilful guilty knowledge—need not be proven.[151]

Second, in 1969, the Washington legislature removed *cannabis* from coverage under that state's version of the Uniform Act.[152] This action received the imprimatur of the Washington Supreme Court in *State v. Zornes*,[153] where the court also stated that "the consensus is that *cannabis* is not a narcotic but rather a mild hallucinogenic."[154] Thus, the string of authority dispensing with *scienter* in connection with Washington narcotics convictions is no longer applicable to crimes involving any form of *cannabis*.

In Florida, any authority[155] in earlier case law that *scienter* was not requisite in order to warrant conviction for illegal possession of drugs has since been clearly overruled:

> The [various cases cited] require the state to prove that the defendant had physical or constructive possession of the object or thing possessed, *coupled with his knowledge of its presence*.[156]

This proposition has recently been affirmed by a Florida appeals court.[157]

In Massachusetts, the "strict liability" doctrine was established with the case of *Commonwealth v. Lee*,[158] which relied heavily on a public-safety doctrine for its rationale.[159] This Massachusetts view received little elaboration over the following nineteen years; however, in *Commonwealth v. Buckley*,[160] the Su-

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[151] *Id.* at 488-89, 475 P.2d at 930.

[152] Wash. Laws of 1969, 1st Ex. Sess., ch. 256, § 7.

[153] 78 Wash. 2d 9, 475 P.2d 109 (1970).

[154] *Id.* at 18, 475 P.2d at 115.

[155] Boric v. State, 79 So. 2d (Fla. 1955). In a prosecution for possession of marijuana, the State was *not* required to prove intent beyond a reasonable doubt in order to warrant a conviction.

[156] Spataro v. State, 179 So. 2d 873, 877 (Fla. 1965).

[157] Briggs v. State, 262 So. 2d 451 (Fla. 1972) (evidence in a criminal prosecution for possession of marijuana must show that the defendant had knowledge that the contraband was in his possession and control).

[158] 331 Mass. 166, 177 N.E.2d 830 (1954).

[159] For a discussion of this doctrine, *see* text accompanying notes 165-72 *infra*.

[160] 354 Mass. 508, 238 N.E.2d 335 (1968).

preme Judicial Court construed a knowledge requirement to be included in a statute which made unlawful any presence at premises where narcotics were illegally kept. This construction was viewed as necessary to uphold the constitutionality of the law:

> The legislature may determine what shall be deemed a "public welfare offense" punishable notwithstanding innocent intent. . . But an intention to create such an offense should appear in clear and unambiguous language . . . . In view of the seriousness of the penalty which may be imposed . . . we are unwilling to regard the omission from the first clause [of some word having an effect similar to that of "knowing"] as sufficiently indicating the Legislature's "clear and unambiguous" intention to require no proof of knowledge in a prosecution.[161]

Accordingly, absent a clear legislative pronouncement that possession of *cannabis* is a public welfare offense, Massachusetts now requires knowledge as an element of possession.

Maryland, a state with little case law on the subject, although not requiring a strict *mens rea* component for conviction,[162] does mandate, for successful prosecution, a showing by the state that a defendant at least have had knowledge of the presence of a proscribed object, if not of its narcotic quality.[163] Basic to the Maryland position, and implicit in similar state approaches which required no *mens rea* for conviction of narcotics possession, is the notion that possession of controlled drugs falls within the "public safety" or "public welfare" class of crimes.[164]

An analysis of the theory underpinning the establishment of public-safety legislation reveals that such theory is thoroughly unsuitable for application to statutes concerning the possession of marijuana or hashish. In *Morissette v. United States*,[165] the Supreme Court, in holding that a statutory provision against removing Government property without permission could not be viewed as a crime dispensing with all elements of intent, listed two criteria for determining which crimes might be considered "public welfare" or "strict liability" crimes:

> [1] The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might

[161] *Id.* at 513, 238 N.E.2d at 338 (1968).
[162] *See* Jenkins v. State, 215 Md. 70, 137 A.2d 115 (1957).
[163] Davis v. State, 9 Md. App. 48, 262 A.2d 578 (1970).
[164] *See generally* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).
[165] 342 U.S. 246 (1952).

> reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibility. [2] Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.[166]

Surely, the British Act involved in Lennon's conviction does not meet the aboveoutlined criteria. First, inasmuch as its provisions condemned even innocent possession,[167] a party seeking to insure compliance would have had ceaselessly to search both his premises and possessions. Second, although Lennon's conviction resulted in merely a monetary penalty, the statute also provided for the imposition of prison sentences.[168]

In *Balint v. United States*,[169] another dimension distinguishing narcotics possession statutes from true "public welfare" statutes was illuminated. The *Balint* case involved a conviction for violation of section 2 of the Harrison Act,[170] *i.e.*, selling narcotics without written authorization. In holding that the offense in question was one of "strict liability," the Court declared:

> It is very evident from a reading of [the statute] that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the government. . . . Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and, if he sells the inhibited drug in ignorance of its character, to penalize him. . . . Doubtless considerations as to the opportunity of the seller to find out the fact, and the difficulty of proof of knowledge, contributed to this conclusion.[171]

Thus, in a sense, true "public welfare" crimes, in contradistinction to "strict liability" possession statutes, do involve a culpable mental element: the recklessness or negligence of a party engaged in a particular business, in failing to ascertain and comply with the various provisions governing his business. Therefore, in weighing the deleterious consequences that an inadequately supervised dealer in drugs or food might effect upon the public

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[166] *Id.* at 256.

[167] *See* note 132 *supra*.

[168] Lennon's conviction might have resulted in a prison sentence. *See* Dangerous Drugs Act 1965 c. 15, § 10.

[169] 258 U.S. 250 (1922).

[170] 38 Stat. 785 (1914) (repealed 1970) (formerly codified at INT. REV. CODE OF 1954, §§ 4701-36).

[171] 258 U.S. at 253-54.

against that dealer's constitutional rights, the imposition of a "duty to know" standard enforced by means of a criminal sanction lacking in true *mens rea* might seem reasonable; however, the absence of a true *scienter* requirement in a statute outlawing the bare act of possession by private persons should be considered repugnant to our basic constitutional notions of due process.[172]

VI. Constitutionality: A Brief Overview

Although this Article has not advanced on principally constitutional grounds, certain constitutional arguments have been raised, and several additional constitutional considerations deserve mention.[173]

At the outset, it should be clear that once present in the United States, an alien is a "person" in the constitutional sense, and is, therefore, entitled to the basic protections of life, liberty and property under the Due Process Clause of the fifth amendment to the United States Constitution.[174] Furthermore, although the fifth amendment contains no Equal Protection Clause, it nevertheless forbids any discrimination which is so unjustifiable as to be violative of due process.[175] As previously indicated, excluding an alien on the basis of a criminal conviction wholly lacking any *mens rea* component would seem to be a substantial departure from due process.[176]

A further significant issue raised, and nowhere dispelled in the legislative history, is whether section 212(a)(23) is void for vagueness,[177] inasmuch as the section contains no definition of the term "marijuana";[178] it is entirely unclear after a fair reading whether hashish or *cannabis* resin is included therein. It is well

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[172] *But see* Buchowiecki-Kortkiewicz v. INS, 455 F.2d 972 (9th Cir. 1972).

[173] *See generally* C. Gordon & H. Rosenfield, 1 Immigration Law and Procedure §§ 4.2 to 4.3f.

[174] "[A]n alien [who legally became part of the American community,] . . . since he is a person, . . . has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen." Galvan v. Press, 347 U.S. 522, 530 (1954).

[175] Schneider v. Rusk, 377 U.S. 163 (1963).

[176] *See* section V, *supra* at pp. 303-10. *But see* Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206, 218-28 (1953) (Jackson, J. dissenting), deliniating the contrast between substantive and procedural due process.

[177] Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962), *aff'd on other grounds*, 374 U.S. 449 (1963). The Ninth Circuit struck down a statute directing the exclusion of sexual deviates as persons with psychopathic personalities. *See also* Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 Vill. L. Rev. 566, 585 (1963). *See generally* C. Gordon & H. Rosenfield, 1 Immigration Law and Procedure § 4.3b (1965).

[178] *See* section IV-B, *supra* at pp. 296-303.

settled that a federal statute must be judged on its face.[179] Reference to legislative history may be had only after it has been ascertained that the language of the statute is sufficiently definite to satisfy due process standards.[180] The void-for-vagueness doctrine is not limited to criminal prosecutions;[181] immigration statutes are not excluded from the purview of the doctrine.[182]

The eighth amendment, too, has a bearing on the *Lennon* case, for in view of the fact that excludability of deportability based on a criminal conviction is likely to follow a prior punishment for the same act, it has been urged that deportation is in effect a cruel and unusual punishment.[183]

Furthermore, founded upon the constitutional right of privacy, a relatively strong case can be made for claiming that our government has no basis whatsoever for punishing the private possession of marijuana. The right to privacy was first enunciated in Justice Brandeis' famous dissent in the case of *Olmstead v. United States*:[184]

> The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[185]

This argument now seems to have become accepted, so that although various Justices may disagree as to the true constitutional source of the "right of privacy," it is unlikely that any would deny its existence.[186]

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[179] United States v. Harris, 347 U.S. 612, 617 (1959).

[180] *Id. See also* Gubbles v. Hoy, 261 F.2d 952 (9th Cir. 1958).

[181] Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925).

[182] *See* note 177 *supra*.

[183] Such challenges have thus far been unsuccessful. *See* Chabolla-Delgadov v. INS, 384 F.2d 360 (9th Cir. 1967). *See also* Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758 (1963). Similarly, it was held that the double-jeopardy provision does not prevent criminal prosecution based on the same act for which an alien is subjected to deportation. United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972).

[184] 277 U.S. 438 (1928).

[185] *Id.* at 478.

[186] *See* Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

Surely it is time for the private consumption of marijuana and hashish to be included within the sphere of privacy, immune from governmental intrusion,[187] for an arsenal of evidence is being compiled that hashish and marijunana are not narcotic drugs, are not physicially addictive, and do not produce psychological dependence harmful to society or to the user.[188] Neither drug (1) causes criminal or aggressive behavior;[189] (2) leads to the use of dangerous or so-called hard drugs such as heroin; or (3) causes insanity.[190] Certainly, even if Congress has acted properly in prohibiting entry into this country by persons who had been convicted of selling, distributing, smuggling or manufacturing marijuana, it is more difficult to defend a similar prohibition with respect to persons who may have merely used or possessed marijuana for their own private use.

CONCLUSION

The plight of aliens entangled in the intractable provisions of section 212(a)(23) of the Immigration Act has not gone unnoticed. Senator Alan Cranston of California introduced a bill which would permit the Attorney General to waive the exclusion or deportation of such aliens in cases which involve hardship.[191] In the House, the same bill was introduced by Representative Edward I. Koch of New York.[192] This bill provides at least minimal

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[187] For Congress to exclude or deport an alien from the United States simply because he or she may have used marijuana in private would tend to impinge upon the rights to privacy and due process of law, as guaranteed by amendments I, IV, IX and XIV to the United States Constitution.

[188] *See generally* Allentuck & Bowman, *The Psychiatric Aspect of Marijuana Intoxication*, 99 AM. J. PSYCHIATRY 249 (1942).

Reliable modern scientific evidence reveals that although no drug, including aspirin, is totally harmless, marijuana is a comparatively mild, relatively harmless drug when taken by most people in conventional doses, and produces no effects which are or would be harmful to society or to the user. The Government would be hard pressed to sustain its burden of proving a rational connection between the private use of marijuana and harm to the public or to the user.

[189] REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 224 (1967).

[190] Mandel, *Who Says Marijuana Use Leads to Heroin Addiction?*, 43 J. Secular Educ. 211 (1968).

[191] S. 277, 93d Cong., 1st Sess., 119 CONG. REC. 357 (daily ed. Jan. 9, 1973).

[192] H.R. 681, 93d Cong., 1st Sess., 119 CONG. REC. 77 (daily ed. Jan. 6, 1973) is a bill "[t]o amend the Immigration and Nationality Act with respect to the waiver of certain grounds for exclusion and deportation." The bill would amend section 212(a)(23) of the Immigration and Nationality Act, which renders aliens who have been convicted of narcotics violations ineligible to receive visas and to be admitted into the United States, by

relief and deserves prompt and serious consideration by Congress, as well as broad public support.

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

As a nation which attributes many of its greatest accomplishments to the contribution of immigrants, it behooves us to be ever vigilant that our immigration laws do not rob us of a great potential national resource.

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allowing the Attorney General, after a hearing, to receive the application for a visa, and to consent to the admission of an alien who has been convicted of possessing marijuana. The bill would also amend section 241(b) of the Immigration and Nationality Act, which contains exceptions to the section 241(a)(4) provision for deportation of aliens convicted of crimes, by adding a section which would permit the Attorney General, after a hearing, to waive deportation of an alien who has been convicted of possessing marijuana.

The bill appears to have administration backing. As stated in a letter of August 13, 1973, from the Department of Health, Education and Welfare to Congressman Peter A. Rodino:

> The Immigration and Nationality Act was enacted at a time when marihuana was inaccurately regarded as a narcotic, and Federal criminal penalties for possession of marihuana were severe. The "Comprehensive Drug Abuse Prevention and Control Act of 1970" (P.L. 91-513) reduced the penalty for a first conviction of simple possession of marihuana from a felony to a misdemeanor, and permitted a judge to substitute probation for incarceration in appropriate cases.
>
> The subject bill recognizes the change in Federal policy with respect to marihuana. It permits the Attorney General to exercise a similar kind of discretion in the case of an alien convicted of simple possession of marihuana when he believes that exclusion or deportation is not necessary to protect the public welfare.
>
> We believe that H.R. 681 is fully consistent with Federal policy and we would have no objection to the enactment of H.R. 681.
>
> We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Letter of Aug. 13, 1973, from Dep't of Health, Educ. and Welfare to Rep. Peter A. Rodino of New Jersey.

Board of Immigration Appeals

Memorandum for the File

In re: John Winston Ono Lennon

File: A17 595 321

At 3:00 p.m. I received a telephone call from Assistant U. S. Attorney Joseph Marro in New York. He advised that an application for a temporary restraining order was argued before United States District Court Judge Owen today and the Court took the case under advisement. The Court requested Mr. Marro to find out from the Board whether it would hold up its decision until the Court has an opportunity to rule on the motion. In the absence of some such assurance, the Court will issue a temporary restraining order. Mr. Marro hoped that the Judge will not be put in a position where he has to issue a temporary restraining order.

I pointed out to Mr. Marro that we have just received an appendix to counsel's brief, which will have to be circulated to the Board. The Board's decision has not yet been drafted and it is highly unlikely that it will issue in final form, approved by the Board, in the near future. (Mr. Schmidt, who was present in my office when the telephone call came in, advised me that he has a rough draft of some 20 odd pages and that he is working on the last point. His rough draft will not be finished before next week). Mr. Marro stated that he thought Judge Owen, who is newly appointed and completely unfamiliar with immigration law, will probably come out with his decision on the motion in a week or two.

I told Mr. Marro that, while I could not commit the Board to withholding final decision indefinitely, it seemed to me that the Board's decision in due course would not come out in the next couple of weeks. We will, however, continue with the case as if nothing had happened. If our decision should be approved in final form, I will telephone him and advise him of that fact, if before that time the Judge has not rendered a decision on the motion. Mr. Marro stated that this was satisfactory.

Maurice A. Roberts
Chairman

March 1, 1974

Board of Immigration Appeals

Memorandum for the File

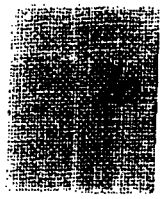
In re: John Winston Ono Lennon

File: A17 595 321

Assistant United States Attorney Joseph Marro of the Southern District of New York telephoned yesterday in my absence concerning this matter. I returned his call this morning (Area Code 212, 264-6588).

Mr. Marro stated that he was calling at the request of the respondent's attorney and of the United States District Court judge before whom respondent's civil litigation is pending. Those actions charge bias and prejudice on the part of the District Director in starting the deportation proceedings, seek information which has been denied under the Freedom of Information Act, seek a judicial hearing on the charge of unlawful electronic surveillance and request, among other things, an injunction against further proceedings in the deportation matter. Respondent's attorney had requested the Board to defer decision on the appeal, pending completion of the litigation in the District Court. This Board had heard oral argument on that request, together with oral argument on the merits of the appeal, and had reserved decision. Respondent's attorney now wishes to proceed with the litigation and present evidence in support of his request for an injunction. This would include, among other things, taking the deposition of various Government officials, possibly including the members of this Board. Before embarking on this action, counsel suggested that Mr. Marro communicate with me to ascertain how soon the Board's decision might be expected. The District Court judge agreed that this should be done.

I had discussed this case this morning with Paul Schmidt, the staff attorney to whom it has been assigned. He told me that he has reviewed the record, done fairly exhaustive research, and is about to embark on a first draft of opinion, which he hopes to be in a position to present to the Board by the end of next week. Of course, he cannot predict when a final opinion ready for signature will be available.



Accordingly, I told Assistant United States Attorney Marro that while this case is now under active consideration, all I can state is that an opinion should be forthcoming in the not too distant future, without indicating in any way what that decision will be or how soon it can be expected. I told him that it was unlikely that the decision would be coming out in a week or so but that conceivably it might be forthcoming in perhaps a month or more.

Mr. Marro expressed his appreciation for this information, which he will relay to counsel and to the Court.

Maurice A. Roberts
Chairman

February 14, 1974

cc: Mr. Irving A. Appleman
Appellate Trial Attorney
I&N Service

November 20, 1973

In re: John Winston Ono Lennon
File: A17 597 321

Leon Wildes, Esq.
515 Madison Avenue
New York, New York 10022

Dear Mr. Wildes:

Thank you for your letter dated November 16, 1973 concerning the above-captioned matter.

I have not yet seen a transcript of the oral argument. I am certain, however, that the Board made no commitment which could support your "understanding" as recited in the last paragraph of your letter. I have consulted the Board members and they corroborate my recollection. Without in any way implying what the Board's ultimate decision will be on your application for deferment of decision on the merits, I must therefore tell you that you are incorrect in your understanding that you will be informed of that ruling, if it is adverse, separately and in advance of any determination on the merits.

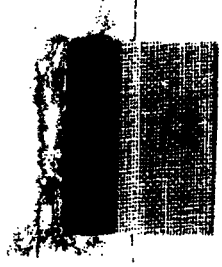
Sincerely yours,

Maurice A. Roberts
Chairman

cc: Vincent A. Schiano, Esq.
Trial Attorney, I&N Service
New York, New York 10007

Irving A. Appleman, Esq.
Appellate Trial Attorney
I&N Service

MAR:mhl



LEON WILDES
ATTORNEY AT LAW
515 Madison Avenue
New York, N.Y. 10022
PLAZA 3-3-168

CABLE ADDRESS
"LEONWILDES," N. Y.

November 16, 1973

Board of Immigration Appeals
U.S. Department of Justice
521 12th Street, N.W.
Washington, D.C. 20530
Attention: Mr. Maurice Roberts, Chairman

Re: LENNON, John Winston Ono
A17 597 321

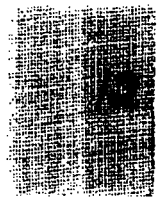
Dear Sir:

I wish to thank the Board for the courtesies extended to me in connection with the presentation of my oral application before the full Board on October 31st.

In keeping with the undertaking of counsel for both the government and the respondent to apprise the Board of Immigration Appeals of developments, I wish to inform the Board of the fact that service of process has been completed in both lawsuits pending before the U.S. District Court for the Southern District of New York. Moreover, I am advised (see copy of cablegram attached) that the trial of Detective Sergeant Pilcher and the other officers who participated in the arrest of the respondent in England in 1968 has been concluded, and that Officer Pilcher was convicted and apparently sentenced to four years imprisonment. I am instructing British counsel to study the proceedings which have transpired to determine whether they may now form the foundation for a proceeding to reopen respondent's conviction in London.

I will keep the Board apprised of any such developments.

It is my understanding that the Board will reach a determination with respect to my application that its deliberations be deferred and that I will be informed of the ruling separately and in advance



of any determination on the merits.

Very truly yours,

LEON WILDES

LW/ts
Encl.
cc: Vincent A. Schiano, Esq., Chief Trial Attorney, New York District
cc: Irving Appleman, Esq., Appellate Trial Attorney

RCA Global Telegram

NNNN

ZCZC LEON WILDES

515 MADISON AVE

NYC 10022

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LEON WILDES CARE LEONWILDES

NEWYORKCITY

PILCHER GUILTY OF PERJURY SENTENCE FOUR YEARS LETTER

FOLLOWS

[redacted]

COL NIL (b)(6)

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Telegram

Reply via RCA: call 212-363-4141

Reply via RCA: call 212-363-4141

-4141

Board of Immigration Appeals

Memorandum for the File

In re: John Winston Lennon

File: A17 595 321

The following accredited wire service newsmen were briefed regarding the above case. They were furnished information already in the public domain with respect to the history of the case, the decision below, and contentions of counsel. General background regarding operation of the immigration laws was also provided.

Gary Thomas - U.P.I. - 393-3430
Bill Brobst - New York Times - 293-3100
Tom Stewart - Reuters - 638-1261
John L. Engel - A.P. - 833-5300

Theodore P. Jakaboski
Executive Assistant

November 14, 1973

BEFORE THE BOARD OF IMMIGRATION APPEALS

Oral Argument: Oct. 31, 1973

In Re: JOHN WINSTON LENNON

File: A-17595321

Board: Mr. Roberts, Miss Wilson, Mrs. McConnaughey, Mr. Torrington, and Mr. Maniatis

Heard: For Respondent: Leon Wildes, Attorney
515 Madison Ave.
New York, New York 10022

For Immigration Service: Vincent A. Schiano, Trial Attorney

Request: Action be deferred pending court litigation - and 245 Relief

Chairman: We will hear from you on the appeal. As I understand it you are the appellant and you are free to present of course any argument that you see fit on the merits, as well as on a preliminary motion, which I understand you have to make. You have asked for and been granted extra time and we will hear you at length, as well as the Service.

Attorney: Thank you very much Mr. Roberts. I have the impression, because this is as I understand it, 3 years that the Board has been in this building, and I have never been here. Since my practice has largely been specialized in Immigration, I hope this Board will recognize that I am not in the custom of filing unnecessary appeals, or in making unnecessary applications; and I think my application requires that kind of an advance statement to your introduction, because what I

intend to ask for is probably somewhat unusual in oral argument before this Board. I want to thank you for the special opportunity to come down, and although I do not intend to argue the merits of the case, as indicated in the exchange of correspondence between the Board and myself and the telephone conversations I have had with Mr. Roberts, the purpose of my appearance is not to present oral argument on the merits, but rather to make a special application with respect to the case.

The application which I most respectfully make at this time is to defer and withhold the reaching of decision on this appeal and.....

Chairman: Would it bother you if I interrupted to ask you a question preliminarily. Last week you sent us a sheaf of documents which we had never seen before and that included copies of a complaint filed in the U.S. District Court for the Southern District of New York. Has any order been rendered in any of those cases which would affect our capacity to hear or determine this case?

Attorney: No. I intend to review those actions and explain why I feel I must take this position, and I am making this request in view of those situations. My application is made to defer and withhold a reaching of a decision until there is final determination with respect to those 2 actions both filed in the Federal District Court for the Southern District of New York.

My application also includes a request that the Board rule in advance on my special application

before reaching a determination of the merits of the case. I intend to set forth briefly the nature of the actions which my client has instituted in the Southern District and the reasons why I believe the Board should grant my application. I would then hope the government would express its views on my application first, before it proceeds with whatever argument they wish with respect to the merits.

The summons and complaint in those actions have already been submitted to the Board, together with my letter of Oct. 23, and permit me to review them. The first is an action under the Freedom of Information Act, which requests the court enter a preliminary and final injunction directing the defendants to cease from withholding from my client the record kept by the defendant as to non-priority cases being together with any evidence, criteria or standards considered by the government in making such decisions.

Non-priority cases, as you know, are those cases of deportable aliens where the government chooses, for humanitarian or other reasons, not to proceed with or to execute deportation. This action was filed on Oct. 17, and is, I understand, entitled to a court calendar priority under the Freedom of Information Act. Attached, as exhibits to the complaint, was an exchange of correspondence mentioned by me in May, 1972, requesting a series of documents and information, and the last exhibit is a letter dated Aug. 1, 1973, requesting specifically the information as to the non-priority cases, which letter has never been replied to, and the information never furnished.

I therefore commenced the suit 6 weeks after the failure to comply with that specific request. I have prepared in order to expedite that proceeding, a notice to admit under Rule 56(a) of

the Federal Rules of Civil Procedure, covering most of the issues of the case, which I hope will expedite a ruling on the first cause of action. The second lawsuit filed on Oct. 24 contains 3 causes of action. The first request is in other words, an order compelling defendant to perform their statutory duty under 18 USC 3504 to either affirm or deny the occurrence of illegal acts including wiretap and surveillance of the defendant and/or his attorney.

It also requires that a hearing be conducted to determine to what extent such illegal acts have influenced a number of decisions made by the government with respect to my client's Immigration status.

It further requests the government, including this Board,be enjoined from rendering a decision on the matter until the admissions, denials or hearings sought herein are forthcoming. No request for a preliminary restraining order has been filed to this date however.

The second cause of action requests that a hearing be held for the purpose of determining whether my client's case was prejudged, and if so, ordering the government to vacate the proceedings.

The third cause of action requests a hearing to determine whether my client's civil or constitutional rights have been violated by illegal wiretap or other method of surveillance. Among the exhibits to that complaint is a copy of what appears to me to be a government memorandum, which can only be categorized as shocking. It is entitled "The Supervision of the Activities of Both John and Yoko Lennon."

I won't attempt to paraphrase it because it is short and I prefer to read it.

Chairman: Mr. Wildes, the copy which was appended to the papers you sent us seems to have the right margin missing. I don't know if that was so in the original or.....

Attorney: It was not, that is from my photocopying machine, I will be pleased to exchange that for you. It is from the Supervisor, Intelligence Division, Unit 2, to the Regional Director, Group 8, as follows: "It has come to the further attention of this office that John Ono Lennon, formerly of the Beatles and Yoki Ono Lennon, wife of John Lennon, have intentions of remaining in this country and seeking permanent residence therein, as set forth in a previous communication this has been judged to be inadvisable and it was recommended that all applications are to be denied."

"Their relationships with one (6521) Jerry Rubin, and one John Sinclair (4536), also their many commitments which are judged to be political and unfavorable to the present administration. This was sent forth to your office in a previous report. Because of this and their controversial behavior, they are to be judged as both undesirable and dangerous aliens."

"Because of the delicate and explosive nature of this matter the whole affair has been handed over to the I&N Service to handle. Your office is to maintain a constant surveillance of their residence and a periodic report is to be sent this office. All cooperation is to be given to the I&N Service and all reports are to be digested by this office."

It should be obvious that if the contents of the memorandum are true, and if they were communicated to the officers of the Immigration Service responsible for the decision in the Lennon case, what results is a strong case for prejudgment and a patent miscarriage of justice.

The outcome of both of these court actions is necessarily an integral part of the record of appeal to this Board. Without the result of the first cause of action under the Freedom of Information Act it is impossible for my client to show that he may be irreparably prejudiced by the selective type of prosecution; and that other aliens with the same or lesser equities were not processed for deportation, particularly if the reason for the selective prosecution is information obtained through an illegal source.

The second law sought may result in a determination vacating these proceedings entirely, or it may result in evidence less than sufficient to support the vacating of these proceedings, nevertheless it is important to this Board. Another possibility, rather a possible result,is that the government may be cleared of all wrongdoing and this Board may then be able to reach a determination based upon the facts and the law as shown in a completed record.

Now I have no doubt that my client is entitled to see the record of non-priority cases similar to his own under the Freedom of Information Act, and I am equally confident that he is entitled

to an evidentiary hearing before the Federal District Court to determine whether there has been any pre-judgment based upon the decisions in the Bufalino and Accardi decisions, which are well known to the Members of this Board. I also know that the ultimate function of this Board, as that of any tribunal of law, is the orderly search for the truth, and the only question that exists is whether it is appropriate for the Board at this time to reach a decision on the merits of this case before these vital threshold issues are determined; or whether it is more appropriate for the Board to disregard these 2 lawsuits which probe the very essence of the search for truth in this case, and reach its decision regardless of the outcome of the court actions.

I believe it was in the Accardi case that the Members of this Board or their predecessors were called upon to testify before the Federal District Court, probably with respect to contacts with other governmental officials and so on, which might have influenced the independence of their judgment.

The purpose of my presence here today you must recognize, as I say I am not here very often, in support of this special application which could just as easily have been made in writing, is to suggest most respectfully to the Members of this Board, that such a procedure should not be called upon, called for in this case, as it necessarily impugns the sincerity and integrity of this esteemed tribunal.

There seems to me no good reason why this Board in the face of such serious allegations of government misconduct, which may have resulted in the pre-judgment of this case, should involve

itself in any course of conduct which could likewise be interpreted as being an utterance of the continued pre-judgment of an Immigration case. I believe the Members of this Board bear a public trust and owe a duty not to involve the Board in any course of action which might diminish the esteem in which it is held by the public and by the Bar.

The handling of this case for over a year and a half has given me an over-all view of its significance which I would like to impart to the Board as best I can today. Although there are significant technical issues raised by the unusual and unprecedented acts of the government in this case as can be seen by the fact I filed a brief in excess of 130 pages long, the importance of this case lies on a much higher level; and it has taken me all of this time to put the pieces together.

What is really significant here is whether under the circumstances of the type of conspiracy which has occurred at the very highest level of our government relating to this case, as alleged in the complaint, whether any Board, acting as the delegate of the Attorney General,can render an unbiased or unprejudiced decision.

If the issues of this case were simply limited to those which could be raised on the law in a brief, the government would have no purpose in refusing to furnish us with the record of its non-priority cases, and to show us what action it actually takes in the cases of other aliens with convictions for marijuana possession similar to John Lennon.

If the significance of this case were limited to the issues which the Board wishes to have argued

orally before it today, the government would have no reason whatsoever to refuse to furnish sworn declinations by the investigating agencies involved in this case, as to the occurrence of illegal activities.

Nor would it have any hesitancy, as it obviously does, in having former and present high officials of the Department of Justice give testimony as to whether or not the government officials responsible for the decisions in this case, were instructed to prejudge each and every application, to entrap my client through a revoking of his existing visitor's status and charging him with the status which resulted in his being an alien illegally in the U.S., as an overstay.

I must advise the Board the essential inquiry in this case must be the discovery of the truth. Exactly who ordered this case to be pre-judged, his reasons and motivations, whom he communicated with, and how he effectively caused the entire case to be pre-judged. In my opinion though such sweeping inquiries can be made in any form other than in a Federal District Court, where testimony of responsible high officials of the U.S. Government can be taken under oath to determine whether or what illegal activities, if any, may have transpired.

And how those activities were related to the prejudgment of this case. Under the circumstances of my view of this case I most respectfully must decline to participate in the discussion or argument of the merits of the case at this time, and I say this with all due regard to my conversations with the Chairman of this Board, to whom I have on several occasions presented, or expressed a different view with respect to my intentions.

I have given this case a great deal of thought and I most respectfully request that an order be entered upon my request.

The final point I would like to make relates to the prejudice that my request might cause to the government. My application should present no hardship or inconvenience to the government at all. Were I representing Mr. Accardi or Mr. Bufalino, whose cases involved a similar issue, I might expect the government would have some objection to permitting my client to remain in the U.S. because his presence could conceivably be argued to have an adverse effect on the American public.

No such claim could be made in the case of John Lennon, who is perhaps one of the world's outstanding musical geniuses of all times. Unless it is felt his recording of immensely successful rock compositions adversely affect the public security. The New York District Director didn't think so because he approved a 3rd-preference petition in behalf of Mr. Lennon. Confirming under the law he is an outstanding artist whose presence is beneficial to the cultural interests of our country although it required some prodding by the Federal District Court before that confirmation was granted, my application need not cause any excessive delay, and may result in a complete disposition of the case.

I would not wish the Board to think I was here to throw a monkey wrench into the thing, or to extend the period of its consideration of this case unduly. To a large extent the government is in a position to expedite the legal proceedings in both court actions. As it is they who hold the records of the non-priority cases, it is they who know whether or not illegal acts have been performed which may

have resulted in the prejudgment of the case. I am quite certain that the government counsel, Mr. Schiano, will have something to say with respect to the possible prejudice to the government. And to be quite specific, my request is that the Board withhold the reaching of a decision in this case until a period of time of 30 days has elapsed from the completion of the court proceedings; or to such a reasonable period of time as it feels that considering the good faith of both sides to the litigation, they should be completed.

Chairman: When you refer to completion I assume you mean completion at the highest level including appeal and perhaps an application for certiorari to the U.S. Supreme Court?

Attorney: Or perhaps even by a stipulation or the filing of certain affidavits, or the demonstration of certain documents and records which could take place within a few days. It is very hard, and Mr. Roberts, your experience with court proceedings is more extensive than mine as to the time that could elapse. All I can tell you is of the good faith that I wish to express to this Board as to my intentions, I am not out to delay this case.

Chairman: No, I am not implying that, but I am trying to fix the nature of your request and you have told us that you have filed an action, two actions in the U.S. District Court, and when you refer to the complexity of the action, we all know that an aggrieved party has a right of appeal to a Court of Appeals. And if he loses there, he may petition for certiorari to the U.S. Supreme Court; and if the Supreme Court grants certiorari, then there will usually be a decision on the merits. And all of this can and usually does take considerable time.

So I am just trying to, I am not trying to pin you down, but trying to approximate what it is you are asking us to do.

Attorney: A lot depends on the government's response. It is hard to know the period I am asking for.

Chairman: But conceivably this could take years.

Attorney: That is conceivable.

Chairman: I am not speaking about probability but the nature of the litigation I gather is not that simple.

Attorney: That is conceivable but highly unlikely as I believe the government must answer the complaint within 60 days. I have already prepared notices to admit and I am prepared, if the government were to set this down for a hearing tomorrow, or consents to that, I am prepared to appear at a hearing tomorrow and commence a determination of what I consider to be the essential underlying truth of this case.

Chairman: Is there anything further now with respect to your application for deferment?

Attorney: No.

Chairman: Before we hear from counsel for the Service I am sure that the Board Members will have some questions, that perhaps you can answer, I know I have, but first I would like to make this plain, and I think I have already in our interchange of correspondence. Now we had set this down for oral argument

on the merits, and we had denied your request which you are now making again, for a continuance. We gave you a brief continuance until today to give you an opportunity to be here and present your argument, but I think we made it very plain that we are prepared to hear argument on the merits.

Now, whether you wish to present argument on the merits is a matter which you must determine as a matter of litigative judgment as an attorney, and it may be that after hearing everything we will grant your request for a continuance. I cannot say at this point, but I do want to make it very plain that if you do not present oral argument on the merits, and if you wish you may rely entirely upon your exhaustive brief. You are taking a calculated risk,if we deny your request for a continuance you will have no further opportunity to present oral argument on the merits.

Attorney: That has been made abundantly clear.

Chairman: And I think we will accept your position that we should hear oral argument on your request for a continuance first, and that is what we will ask from counsel for the government, but first I think there are a few questions. Even if you were able to prove everything that you allege, how would that affect the proceedings before us? And before you answer let me tell you what troubles me.

First you must realize that this Board is strictly an appellate body. We do not engage in prosecutive functions, we don't start cases, we merely adjudicate appeals on the record before us. The Immigration Judge is a quasi-judicial officer. He doesn't engage in prosecutive functions. He doesn't generate cases and doesn't start deportation proceedings.

While you have referred to the government generally, and wrongdoing on the part of the government, actually the government is a pretty big outfit, and each one of us in the government has his own part to play. And in the scheme of things it is the District Director who is the officer of the Immigration Service who is chargeable with enforcement. It is he, or the people working under him, who start deportation proceedings.

Now this Board has held on many occasions that we will not review the judgment of a District Director in the exercise of prosecutorial judgment to start or not to start a deportation proceedings against an alien. Once he starts the proceeding the alien is entitled to a hearing, and he gets that hearing before an Immigration Judge who is not subject to control of the District Director.

If there is a decision and there is an appeal to this Board we determine the appeal solely on the basis of the administrative record before us as a matter of law. Now, as I gather your position here it is that the District Director was improperly influenced to start this case by considerations which you hope to prove in the litigation. And my question is, suppose you can <u>prove</u> that, how does that affect the judgment which the Immigration Judge is called upon to render, and we in turn are called upon to render?

As I read the record and your excellent brief the issues presented are strictly issues of law. The respondent is charged with having come to the U.S. as a non-immigrant visitor in order to remain here until Feb.29, 1972, and he is charged with remaining here longer than permitted and thereby rendering himself subject to deportation.

As I understand it, there is no claim made that he has a right to remain here indefinitely, as an alien who has been admitted for permanent residence. As a matter of fact from this record and your brief it appears very clear that after having been found to be deportable he sought permanent residence by an application for adjustment of status under Section 245 of the Act. And you have pointed out that he meets some of the qualifications for that status because he is the beneficiary of an approved 3rd-preference visa petition.

But the Immigration Judge found there was another requirement which he could not meet, and that is admissibility to the U.S. because of a conviction in England. And one of the questions presented has been whether that conviction bars eligibility. Now these are all questions of law. There are other questions you present but how would it make a difference in our role in this case which is entirely judicial, if you are able to prove that somebody did twist the arm of a District Director so that he started an action against your client when perhaps he might not have otherwise?

If I have confused you by my long statement.....

Attorney: First of all I want to thank you for outlining the limitations of the jurisdiction of this Board, and the very reason why I am here with this request. What you are saying is that the Board's jurisdiction is limited to certain legal, technical issues put in issue and raised by the fact that a proceeding has been begun and certain things have occurred.What I am

trying to explain as best I can is the fact that the issues here are so much broader than the jurisdiction of the Board that I wish the Board to withhold its decision until a proper disposition of the entire matter can be had.

I don't wish to enter into a discussion of the cases; you are talking about the Geronimo case by which this Board has stated it limits itself to the legal issues arising out of the proceedings, and in effect it will ignore or not rule upon the issues as to how outlandish, scandalous or illegal it was for that proceeding to have been commenced to begin with.

I don't want to express a personal opinion about the theory, this is a theory which limits the jurisdiction of the Board, but in legal contemplation, considering the over-all aspects or picture of the law, if justice is to be done I think the Geronimo decision and the principle of it is the blindfold; because it circumscribes and permits the Board to sit back and say well, we'll consider the technical issues arising out of this proceeding, regardless of how scandalous it is, and what deprivation of civil and constitutional rights is involved, in the very bringing of the proceedings.

I might also point out that my complaint alleges that every decision in this case was influenced and prejudged, and that includes the determinations of the Immigration Judge, and of every application for discretionary relief, and I believe that was done on instruction.

Chairman: Well now, did the Immigration Judge exercise discretion? I was under the impression he

found respondent ineligible for the discretionary relief requested, and never reached the question of exercising discretion one way or another.

Attorney: Well, once again we border upon the merits of the case. But let me cite just one small incident where he exercised discretion. I have claimed throughout these proceedings that there is likely to be ample records among the government's files of non-priority cases. That there are others convicted of possession of marijuana where proceedings were either not brought or where the alien's departure was not enforced if they <u>are</u> brought.

I asked the Immigration Judge for permission to subpoena because I have no right to subpoena in a deportation case. I cannot prove my case unless the Immigration Judge feels that I am entitled to that subpoena, and I asked him to subpoena any of those officers of the Immigration Service to testify as to that, and he refused.

And in his decision he talks about a completely different basis, and he refused also to enter an order early in the proceedings so that I might challenge it elsewhere, but waited until he reaches a decision a year later to incorporate it in the decision. And throughout the handling of the case there were many applications and requests that were made which required the invocation of discretion. And I believe that there was a pattern throughout the case of denial of all those discretionary applications.

Chairman: I would like to develop a little further your complaint with respect to the restricted nature of the Board's jurisdiction, because I think that goes to the heart of your argument. The fact is that the enforcement of the Immigration laws which devolves on the Attorney General under the statute has been delegated by him and he has delegated certain functions to the Commissioner of Immigration and to various people in the Immigration Service.

The enforcement functions, the adjudicative functions, the trial of cases has been vested by the statute in the Immigration Judges. And the hearing and adjudication of appeals from their decisions has been delegated by the Attorney General to this Board; and by direction of the Attorney General we function exclusively as an appellate tribunal.

If we were to assume the role you would have us, wouldn't we be getting involved in enforcement functions, which is really none of our business? What you are asking us to do is to review the action of the District Director, an enforcement officer of the Immigration Service, and these are prosecutorial roles which we have no part of.

If I can just develop that a bit, wouldn't we be merging our function and blurring the lines of our judicial role? Also, if we bought your argument think what would happen. Every year there are hundreds of thousands

of aliens in the U.S. who are found to be here illegally prima facie, and scores of thousands of hearings are held, and a couple of thousand of the decisions of the Immigration Judges come before us on appeal. Now if we were to accept your thesis, an alien against whom deportation proceedings had been brought, and who is here as an overstayed crewman, or an overstayed visitor, and who has absolutely no defense to the charge upon which his deportation has been ordered, could blithely insist before the Immigration Judge that he would like to see all the records of the Immigration Service in similar cases because he thinks that he has been singled out for discriminatory action. And if he made a claim there had been an illegal wiretap or something like that, and it was the burden of the Service trial attorney then to stop everything and check all the Immigration files and make inquiry of every agency of the government which conceivably engages in or has engaged in bugging or wiretapping; and all this was available to an attorney who unlike yourself, might be unscrupulous and might be engaged just in trying to buy additional time for his client, what would happen to law-enforcement?

Where would we be? If we could go into the question of the District Director's conduct in deciding to start proceedings, deportation proceedings against a deportable alien, wouldn't we be running the Service, and wouldn't we be involved in law-enforcement as distinguished from adjudicative pursuits? Now that is a big order but I think.....

Attorney: That is a long question.

Chairman: And you may break it up in any way you see fit.

Attorney: It has two parts as they say in T.V. Your first question was, are we to assume the role of the enforcement official by taking under our jurisdiction his functions as well? Far be it from me to wish to expand or contract the jurisdiction of this Board. My esteem for this Board is based upon the fact that it knows its limitations and keeps carefully to them.

It is for that reason that I ask you not to reach a decision, because I have a problem which must be resolved which involves more than the determination of the technical issues of the appeal which this Board's jurisdiction is limited to. So I am asking the Board not to participate in this, and to wait until the outcome of the major problem, so that we may either not have to go through this at all, because the government may decide to drop its case. Or we may resolve those issues and re-appear here.

And I certainly don't want to waste the Board's time either, at such time I would be willing to file on the record. The second point that the Chairman makes is basically, are we to permit a situation to exist where we will blithely permit any alien to exercise certain rights which might be abused? That is about the essence of it I believe, of the question.

If that were a legitimate criticism, that would mean no criminal defendant should

have the right of cross-examination, or an attorney, because he could cross-examine and subpoena and could exercise his rights to counsel in such a way they would be abused. Why then does the statute give us the Freedom of Information Act? Why does it give us the right to see certain records? And why does the wiretap statute say that it is the government's obligation to affirm or deny?

Why then has Congress seen fit to place these tools in the hands of the accused? Obviously because the government has been known to overreach. There is nothing that I could ask for before this Board which could not be countered by an argument that such a benefit, if granted, could be abused by other people. There is nothing that I have ever asked a board for, or no right I have ever fought for, for a client, which was not subject to abuse.

Chairman: One further question, you have cited to us the Accardi and Bufalino decisions, and I just want to draw a couple of distinctions and see whether you still feel they are germane. In the Accardi case there was an application for discretionary relief from deportation, and this relief was denied in the exercise of discretion. Counsel for Accardi alleged that this Board in exercising discretion, had been influenced by outside pressures from the Attorney General; and that issue was the one which was tried, it was subsequently found the allegation was unfounded.

In the Bufalino case there were allegations similarly made of pressure in the exercise of discretion and also allegations of illegal electronic surveillance, which it was claimed led to the ascertainment of facts which were used in denying discretionary relief. The point I am making is this, in both of these cases it was alleged that the Immigration Judge's discretion had been influenced improperly. But does the