between these crimes and possession of marijuana, except that the latter is less harmful. Particularly in John Lennon's case, where the possession was unknowing, the extreme penalty as compared with the second chance given to other petty offenders is particularly egregious and discriminatory.

D. Subsections 9 and 23 of 8 U.S.C.A. §1182 Read Together are Ambiguous and Therefore Must be Resolved in Favor of the Applicant

Immigration law is clear that ambiguities in statutoy language must be resolved in favor of the alien about to be deported. As the Supreme Court stated in Tan v. Phelan, 333 U.S. 610 (1948):

> "deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a resident in this country. Such a forfeiture is a penalty. To construe this statutory penalty less generously to the alien might find support in logic. But since the stakes are considerable for the individual we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings."

See also Petition of Catalanotte, 236 F.2d 955 (6 Cir. 1956); Immigration Service v. Errico, 385 U.S.

214 (1966).

When subsection 9 of 8 U.S.C.A. §1182, granting a "second chance" to one-time petty offenders, is read together with subsection 23, which provides for the exclusion of "Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marijuana..." an ambiguity is created. The statute is unclear whether any alien who has been convicted of any drug-related offense may be excluded or whether an alien who has been convicted of only one petty drug offense has the right under sub-section 9 to be admitted. In other words, it is uncertain whether the framers of the statute intended the exception granted to one-time petty offenders under subsection 9 to apply

as well to one time petty drug offenders under subsection 23.

The rule that ambiguities must be resolved in favor of the alien commands that the subsection 9 exception apply to petty drug offenses. The correctness of this interpretation is supported by the fact that it reflects the repeated instances of leniency in immigration law toward people who have committed a single offense and the attempt to give them a second chance. Nason v. Immigration and Naturalization Service, 394 F.2d 223 (2nd Cir. 1968).

The statute under which John Lennon is to be deported was not intended by Congress to punish petty drug offenders, but rather to stop the traffic in illicit drugs.

The nature of the offense of possession of

marijuana, particularly when that possession was inadvertent and unknowing for the reasons discussed above, does not justify the exclusion from the United States of a person who is otherwise highly desirable and deserving of permanent resident status.

III. THE FIRST AMENDMENT INTERESTS OF THE AMERICAN PEOPLE REQUIRE THE GOVERNMENT TO SHOW A COMPELLING INTEREST IN EXCLUDING JOHN LENNON FROM THE UNITED STATES

In a series of opinions the Supreme Court has ruled that the First Amendment guarantees the American citizens the inalienable right to receive as well as to disseminate artistic communications free from governmental interference. E.g., Martin v. Struthers, 319 U.S. 141, 143 (1943); Lamont v. Postmaster General, 381 U.S. 301 (1965); Stanley v. George, 394 U.S. 557; United States v. Dellapia, 433 F.2d 1252, 1258 n. 25 (2nd Cir. 1970); Caldwell v. United States, 434 F.2d 1081, 1089 (9th Cir. 1970); Hiett v. United States, 415 F.2d 664, 671 (5th Cir. 1968); Brooks v. Auburn University, 412 F.2d 1171, 1172 (5th Cir. 1969); Fortune Society v. McGinnis, 319 F. Supp. 901, 904 (S.D.N.Y. 1970);

United States v. B & H Dist. Corp., 319 F. Supp. 1231 (W.D. Wisc. 1970); ACLU v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970); Williams v. Blount, 314 F. Supp. 1356 (D.D.C. 1970); Smith v. University of Tennessee, 300 F. Supp. 77 (E.D. Tenn. 1969).

Where government acts so as to affect First Amendment rights it must show both a compelling interest, Brandenburg v. Ohio, 395 U.S. 444 (1969); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Stanley v. Georgia, 394 U.S. 557 (1969); De Jonge v. Oregon, 299 U.S.353 (1951), and that no less drastic alternative to the proposed action exists. Shelton v. Tucker, 364 U.S. 479 (1960).

John Lennon is one of the best musicians and composers in the world. The American people have a right under the First Amendment to enjoy his artistic influence and presence in the United States.

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Thus, before the Immigration authorities can exclude him they must show that a compelling state interest will be served by so doing and that no less drastic alternative to exclusion exists.

Clearly, this is not the case. No conceivable benefit can be derived from excluding people of great artistic stature from our country. On the contrary, this nation is impoverished when it banishes people with life styles differing from the norm, for it is often just those people who add most to our cultural and intellectual life. If immigration authorities believe that John Lennon might in the future repeat his offense, they have the alternative of deporting him at that time rather than punishing him before the fact and depriving citizens of their right to benefit from his presence.

At best the exclusion of a dintinguished

artist from the United States for an old conviction of a petty crime, after he has already lived here for two years, could be viewed as silly.

John Lennon, however, has participated in unpopular political causes in the United States, as was noted by the immigration judge below. He has opposed the war and has donated his name and time and talents to peace and other political causes. In such a case the government's action does not appear to be simply a routine matter, but rather to be calculated to achieve an improper government goal: the silencing of aliens who are outspoken when in this country.

While Lennon may not have an absolute First Amendment right to remain in the United States, when government action not only denies the public the right to receive communication, but also appears to have the improper retaliatory motive of punishing

an alien for expressing unpopular views, that action must be closely scrutinized.

The loss to the American people, the damage done to the reputation of the United States as a tolerant country cannot possibly be justified by whatever reason exists here for expelling Lennon. No justification based on the rule of law where that rule appears discriminatory and retaliatory can be offered to explain the order below in this case.

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CONCLUSION

For the reasons given, it is respectfully submitted that the order below should be reversed and the appellant should be granted resident status.

Respectfully submitted,

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Counsel wish to thank Robin Colin, a student at Temple Law School for her invaluable assistance on this brief.

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ITED STATES DEPARTMENT OF JUSTICE
ARD OF IMMIGRATION APPEALS

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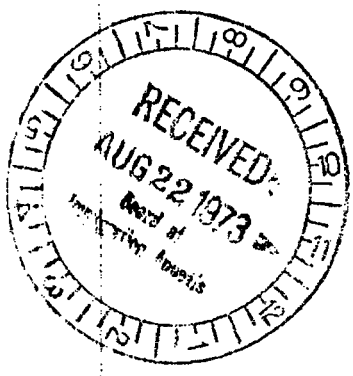
In the Matter of

JOHN WINSTON ONO LENNON,

Respondent-appellant.

----------x



BRIEF ON BEHALF OF RESPONDENT

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UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

---x

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STATEMENT OF RELEVANT FACTS

Respondent John Winston Ono Lennon and his wife, Yoko Ono Lennon, were charged with deportability under Section 241(a)(2), of being "in the U. S. in violation of the [Immigration and Nationality] Act or in violation of any other law of tne U. S." and under Section 212(a)(9) of having been admitted as non-immigrants and having "failed to maintain the non-immigrant status in which [they were] admitted....or to comply with the conditions of any such status," in that they remained in the United States after February 29, 1972 without authority. The Immigration Judge found both respondents deportable under Section 241(a)(2) and made no finding under Section 241 (a)(9), presumably dismissing the latter charge.

Respondent and his wife applied for permanent residence under Section 245 and, in the alternative, for permission to depart voluntarily under Section 244 of the Immigration and Nationality Act. Although his wife's application for permanent residence was granted, respondent's application for the same relief was denied. He was, however, granted permission to depart voluntarily within 60 days from the date the decision becomes final, in lieu of an order of deporation.

The undisputed facts include respondent's concession that on November 28, 1968 he 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. His conviction being his only offense, a fine was imposed upon respondent by the Magistrate. The Dangerous Drugs Act 1965 (see "Statutes Referred To, infra) defined "cannabis resin" specifically and distinguished it from the other defined term "cannabis," the former referring to the "separated resin" (hashish) and the latter referring to the "flowering or fruiting tops" (marijuana) of the plant. It is likewise undisputed that at the time of the offense, the respondent was not aware that he was in possession of any substance whatsoever (Transcript, p. 83).

Respondent has consistently contended that he fully expected the police raid which resulted in the aforementioned guilty plea, because a number of other famous "rock" musicians had been arrested by the same team of drug-squad detectives. He had searched his apartment thoroughly and was convinced that there was no illegal substance to be found therein.* Respondent has consistently maintained that the illegal substances were not in his

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* As a matter of record, Detective Sergeant Pilcher, the officer who conducted the raid at the Lennon home together with his Chief and other members of the Scotland Yard drug squad were subsequently suspended from their duties, indicted on charges of perjury and "perverting the course of justice" and are awaiting trial in England on such criminal charges at this writing.

apartment and that they may have been placed there by the police authorities without his knowledge on October 22, 1968, the date of his arrest, or prior to October 28, 1968 when they were scientifically examined by the metropolitan police authorities in London. In all events, for extenuating personal considerations and upon the advice of counsel, respondent entered a guilty plea and was fined (see Exhibit 10, conviction). A charge of obstructing the same Detective Sergeant Pilcher in the performance of his duties was dropped by the prosecution and accordingly dismissed.

The respondent last entered the U. S. on August 13, 1971 with permission to remain until September 24, 1971. His admission was authorized pursuant to a waiver under Section 212(d)(3)(A) of the Immigration and Nationality Act (See Exhibit 14) for the purposes of editing film, consulting with business associates, and attending a custody hearing in the Virgin Islands on September 16, 1971. The waiver stated that no extension of stay or change in activities or deviation of itinerary should be authorized without prior approval of the District Director in Washington, D.C. Subsequent extensions of temporary stay were approved with the consent of the Central Office in Washington, of the Immigration and Naturzliation Service, to November 30, 1971, and thereafter to January 31, 1972. Moreover, on January 31, 1972 the Service conferred H-1 status on the respondent to authorize certain television appearances and later readjusted his status to B-2 (visitor) status

with permission to remain until February 29, 1972.

On March 1, 1972 the District Director in New York advised respondent and his wife by letter that:

> "The records of this Service indicate that your temporary stay in the U.S. as visitors has expired on February 29, 1972.
>
> It is expected that you will effect your departure from the U.S. on or before March 15, 1972. Failure to do so will result in the institution of deportation proceedings.
>
> Please notify this Service of the date, place and manner of your departure at least two days in advance of your leaving by calling Mr. Orville R. Conley at 264-5896." (See Exhibit 4)

On March 6, 1972 a further letter was addressed to the respondent and his wife, but on this occasion personally delivered by two Immigration Service Investigators at the respondent's apartment, which advised:

> "Your temporary stay in the U.S. as visitors expired on February 29, 1972.
>
> On March 1, 1972 we advised you in writing that you were expected to effect your departure from the U.S. on or before March 15, 1972. It is now understood that you have no intention of effecting your departure by that date. We are therefore revoking the privilege of voluntary departure as provided by existing regulations (Title 8, Code of Federal Regulations 242.5(c)." (See Exhibit 5)

Together with the aforesaid letter were Orders to Show Cause against respondent and his wife in deportation

proceedings, each charging violation of Section 241(a)(2) of the Immigration and Nationality Act in that respondent was "authorized to remain in the U.S. until February 29, 1972" and that he "remained in the U.S. after February 29, 1972 without authority;" based upon the foregoing allegations, it was charged that he was subject to deportation under Section 241(a)(2) of the Act "in that, after admission as a non-immigrant under Section 101(a)(15) of said Act, he had, remained in the United States for a longer time than permitted."

On the next day, March 7, 1972, respondent and his wife were likewise personally served through the appearance of several Immigration Service Officers at their apartment, with "superseding" Orders to Show Cause in deportation proceedings, these alleging additional facts and an additional ground for alleged deportability, namely, Section 241(a)(9) of the Act. Both sets of Orders to Show Cause contained a notice of hearing scheduled for March 16, 1972 (See Exhibit 2).

Of the eight allegations of fact, respondent admitted five and denied three. He likewise denied deportability under both charges. In substance, he admitted that he was not a citizen or a national of the U.S.; that he was a native of Great Britian and a citizen of the United Kingdom and Colonies; that he entered the United

States at New York, New York on or about August 13, 1971; that at the time he was admitted as a non-immigrant visitor for pleasure and was authorized to remain in the United States until February 29, 1972; that on March 1, 1972 he was granted the privilege of departing the U.S. voluntarily on or before March 15, 1972. He denied that he had abandoned his intention to depart from the U.S. on or before March 15, 1972; he denied that on March 6, 1972 the privilege of voluntary departure to March 15, 1972 was revoked, except that he acknowledged receiving notice of such alleged revocation, denying its legal effect; he therefore denied that he had remained in the U.S. after February 29, 1972 without authority. He likewise denied the legal conclusion that he was deportable under either of the grounds for deportability charged in that after admission as a nonimmigrant he violated status in that he failed to comply with conditions of his status or that he remained for a longer time than permitted. The Government offered no testimony on the issue of deportability, while respondent testified as the sole witness on that issue.

The primary purpose of respondent's trip to the United States, as noted in the approved waiver, was to appear in custody proceedings in the Virgin Islands with respect to Ms. Lennon's child by a prior marriage, Kyoko Cox, commenced by the child's father. The respondent and his wife did appear in such proceedings on a number of occasions and succeeded in securing an order granting custody

of the child. This order was appealed by the child's father, but he was unsuccessful and the order was affirmed on appeal to the U.S. Court of Appeals for the Third Circuit (see Exhibits 15 and 16). The child's father then removed the child to Texas, where none of the parties had previously resided, and commenced a proceeding there in the Domestic Relations Court of Harris County. Respondent and his wife were obliged to appear there as well and likewise succeeded in securing an order of custody which decreed

> "that Defendant, YOKO ONO LENNON is hereby GRANTED temporary custody, solely and exclusively, of the minor child KYOKO COX and that such custody may be exercised at any place within the territorial limits of the United States of America...the said Plaintiff ANTHONY D. COX is hereby ORDERED forthwith to deliver said child, KYOKO COX to Defendant, YOKO ONO LENNON, or any representative authorized by her." (See Exhibit 17)

The child's father, nevertheless, absconded from Texas with the child. He was ~~subsequently~~ previously held in contempt of court and ordered imprisoned for a period of five days for violating the court order, but respondent and his wife have not yet been able to secure physical custody of the child, despite their continued efforts. These legal proceedings, and the search for the child which continued thereafter, followed a similar search in several European countries, over a period of almost two years (See Transcript, pp. 92 et seq., and pp.63 et seq.) A final order granting permanent custody of the child to Ms. Lennon was only recently entered by the Court in Texas

and is attached hereto as Brief Exhibit A.

After the issuance of the Order to Show Cause in deportation proceedings, respondent filed motions dated March 15, 1972 and March 24, 1972 to cancel deportation proceedings with the District Director. (See Official Record.) These motions requested the cancellation of the Order to Show Cause, or in the alternative, the termination of proceedings thereunder, under the authority of 8 C.F.R. 242.7. The motions were predicated upon the claim that respondent's wife, then a respondent in the deportation proceedings, was fully qualified for residence, had filed an approvable third preference petition as an outstanding artist, and should have been permitted, under applicable regulations and operations instructions, to apply for adjustment of status to permanent residence in normal course without the institution of deportation proceedings; that the proceedings were in all events premature in that the respondent was awaiting the outcome of legal actions in England which might result in the expungement of his conviction there; that respondent and his wife were the parents, as defined in Section 101(b)(1) of the Act, of a child who was a citizen of the U.S. whose legal custody was pending in judicial proceedings in two jurisdictions and the deportation charges threatened to remove him from the jurisdiction of the court or frustrate the order of the court; that in view of the unique internationally-acclaimed talents of the respondents, their presence in the United States having been adjudicated as substantially beneficial to

the cultural and economic interests of the nation, deportation proceedings were not in the public interest; that the proceedings constituted a grave hardship and tended to disrupt and separate a family and to prevent the continued search for the child of the respondent in derogtation of court orders granting custody of the infant child and further asserting that the commencement of these proceedings was discriminatory and violative of established practicies and policies of the Immigration and Naturzliation Service not to commence proceedings to deport in these circumstances. Respondent and his wife requested merely that they be given the additional time necessary within which to complete the termporary purpose for which they had been admitted, as stated in the waiver approval noted above. The requests made in the aforesaid motions were danied by the District Director on April 24, 1972 by letter, a copy of which is in the record.

On March 3, 1972 the respondent and his wife submitted separate applications for third preference priority under Section 203(a)(3) of the Act as outstanding artists. When, on or about April 15, 1972, respondent's counsel appeared at the Immigration Service office to inspect his client's administrative file, he noted that the applications did not appear to have been considered at all, and, after satisfying himself that the petition was not likely to be acted upon, commenced a proceeding for a mandatory injunction

in the Federal District Court for the Southern District of New York (Civil Action 72 C 1784). He secured an order (see Exhibit 3) granting a temporary restraining order pending a hearing for a preliminary injunction in the matter. The District Director promptly adjudicated the petitions and granted the third preference priority individually to both the respondent and his wife within one hour of the time he was notified by the U.S. Attorney of the entry of the restraining order.

At the continued hearing of the deportation proceedings, the respondent offered a number of witnesses whose testimony related to the discretionary aspects of his requests for permanent residence and/or voluntary departure. In addition, he offered an expert witness, Dr. Lester Grinspoon, whose qualifications (see Exhibit 12) as an outstanding American medical authority on marijuana and narcotic drugs were conceded by the Government and whose expert testimony (Transcript, p. 35 et seq.) was to the effect that "cannabis resin" was neither a "narcotic drug" nor "marijuana." He described it as being hashish, which, unlike marijuana, was not a product to be found anywhere in the United States. The government offered no contrary evidence or testimony.*

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* In cases of criminal proceedings cited by the Immigration Judge, the U.S. Attorney, likewise representing the U.S. Department of Justice, had taken the same position as Dr. Grinspoon and in fact had offered its own government expert witness, whose qualifications were likewise acknowledged, to the same effect, namely, that marijuana and hashish were not the same substance.

Respondent moved to terminate the proceedings both before and after the Government's case was presented, as well as at the close of respondent's case. The motions were denied, as part of the full decision rendered on March 23, 1973.

On May 1, 1972 the respondent filed a request under the Freedom of Information Act with the District Director, and received a perfunctory rely (See Brief Exhibit B, attached hereto) dated June 14, 1972 which failed to comply with the request or to furnish the information requested. The respondent renewed his request before the Immigration Judge on June 27, 1972 in the form of a motion to depose the District Director (See Brief Exhibit C, attached hereto) or any other officer with knowledge, with respect to the subject matter in order to assist the defense in proving that the charges were discriminatory and in violation of standard agency practice. This motion was likewise denied by the Immigration Judge by letter dated June 28, 1972 which noted that the reasons for denial would be given as part of his full decision. The request was made of the Central Office on April 13, 1973 and the reply, notably incomplete, was dated July 16, 1973. To date the essential questions of how the Service treats similar cases has not been supplied, particularly as to whether similar cases are declared "non-priority" and not processed for deportation or where departure is deferred indefinitely.

In view of the fact that there were complicated and novel issues of law, some arising under British law,

respondent's counsel requested time to file a brief. He was granted until July 1, 1972, a period of about five weeks to do so, and at the same time the Immigration Judge ruled (Transcript, p. 113) that the Government should have two weeks thereafter within which to reply, although the Government's trial attorney stated that he would limit himself to "one or two days." In fact, the Government's brief was not filed until November 13, 1972, a period of four and one half months after the filing of respondent's brief. The Immigration Judge thereafter granted the respondent a period of two weeks within which to reply to the Government's brief, and furnished counsel with the Government's brief together with the extensive transcript of the proceedings at the same time. Counsel for respondent requested additional time to file his reply brief, but the request was summarily rejected. The Immigration Judge stated no reason for having supplied the transcript to the Government's trial attorney for the purposes of preparing his brief months in advance or for the apparent extension of time for the Government to file its brief, nor has there been any justification offered in the decision for refusing additional time to respondent's counsel to file his briefs and the failure to furnish him with a copy of the transcript when it was made available to counsel for the Government.

The decision of the Immigration Judge was rendered on March 23, 1973, at which time the District Director called a press conference to observe the occasion. A timely notice of appeal was filed by respondent.

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, poppystraw, cannabis, cannbis 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 respeetively, 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 anyplant 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 Rgulation, 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 caisses of aliens shall be ineligible to receive visas and shall be excluded from admission into the United states:

...

(9) Aliens who have been convicted of a crime involving moral turpitude...,or aliens who admit having committed such a crime;... Any alien who would be excludable because of the conviction of a misdemanor classifiable as a petty offense under the provisions of Section 1(3) of title 18, United States Code, by reason of the punishment actually imposed, or who would be excludable as one who admits the commission of an affense that is classifiable as a misdemeanor under the provisions of section 1(2) of title 18, United States Code, by reason of the punishment which might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admqssible: Provided, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense."

...

(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

tne taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, excahnge, 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;

...

(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 possession for the purpose of the manufacture, production, compounding, transportation or exporation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or insonipecaine or any addiction-forming or addiction-sustaining opiate;"

ISSUES PRESENTED

I. Whether the Service violated its own invariable agency practice regarding commencement of proceedings in cases with compelling humanitarian aspects and those involving approved third preference petitions and if it did, whether such violation amounted to a violation of respondent's right to due process?

II. Whether the Government sustained its burden of proof by clear, unequivocal and convincing evidence that the facts as alleged in the Order to Show Cause were true?

III. Whether respondent's conviction under the British statute is included in Section 212 (a)(23) of the Act as a bar to his application for permanent residence?

IV. Whether section 212(a)(23) is unconstitutional insofar as it relates to "illicit possession of marihuana?"

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POINT I: THE SERVICE VIOLATED ITS OWN INVARIABLE AGENCY PRACTICE REGARDING COMMENCEMENT OF PROCEEDINGS IN CASES WITH COMPELLING HUMANITARIAN ASPECTS AND THOSE INVOLVING APPROVED THIRD PREFERENCE PETITIONS; THE IMMIGRATION JUDGE ERRED IN DENYING RESPONDENT THE OPPORTUNITY TO DEPOSE A SERVICE OFFICER WITH KNOWLEDGE OF WHAT THE INVARIABLE PRACTICE CONSISTED OF; SUCH ACTION BY THE GOVERNMENT AMOUNTED TO A DENIAL OF DUE PROCESS.

Over the years, the Immigration Service has developed a respected and honored practice, founded upon humanitarian considerations, not to institute deportation proceedings in every case where an alien appears to be technically "deportable." It is a well known fact that the Service does not institute proceedings in cases involving the very young, the elderly, the infirm, against persons who would be discriminated against or persecuted in other countries, against the parents of children whose cases present compelling humanitarian aspects, those involving the beneficiaries of third preference petitions, etc., unless there are special circumstances requiring the institution of deportation proceedings. The Immigration Service has maintained a measure of community respect for its humane administration of the immigration laws by consistently applying humanitarian considerations to the administration of the law.

The District Director (and after commencement of deportation proceedings, the Immigration Judge) has the power, in his discretion and on the basis of appealing humanitarian factors, to cancel and terminate deportation

proceedings. The determination whether to withhold or terminate deportation proceedings is clearly discretionary. 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, respondent's wife's child, Kyoko, an American citizen, is being held incommunicado by her natural father in contempt of two court orders. The Immigration Service's action has supported his contemptuous behavior. Respondent's wife has been awarded custody of Kyoko with the strict proviso that they raise her within the territorial limits of the United States (See Exhibit 17). A U.S. Circuit Court of Appeals has affirmed the custody order (Exhibit 15-A).[See also the final order of custody recently entered by the Texas Court, attached hereto as Brief Exhibit A.] The Government, however, seeks to remove the respondent on the ground that he has overstayed his time in this country, not based on some objective failure on respondent's part, but by first "revoking" his permission to stay, apparently for no stated or unstated reason, and by then declaring him to be an illegal overstay. The posture taken by the Service, that it has no alternative but to enforce the law, is ironic in that the effect of these proceedings has been to hamper the implementation of court orders.

Respondent contends that it is the Service's invariable policy not to commence deportation proceedings in a case such as the present one, but rather to decline to commence deportation proceedings, to grant such aliens extensions of temporary stay as visitors or extended periods of voluntary departure, to accommodate the humanitarian aspects of their cases. This is, after all, a case in which it appeared throughout the proceedings, that an American child's custody and welfare were involved. The child, Kyoko, is respondent's child as defined in Section 101(a) of the Immigration Act, and the child is a citizen of the United States and presumably continues to reside here. Respondent has, together with his wife, spent several years pursuing the child and finally succeeded in efforts to obtain legal custody in both jurisdictions where custody proceedings were commenced by the child's natural father. The custody order (Exhibit 17) specifically requires that the child be raised in the United States, and the Lennons' desperate search for the child is a matter of public and official record.

In shameless disregard of the Lennons' pleas for additional time to continue their efforts to find the child and to execute the custody order of the court, contrary to the Service's respected and honored practice to make every effort not to separate families, the District Director commenced proceedings which have resulted in extreme hardship to the respondent and his wife. The

effect of the order granting residence to the wife and denying the same remedy to the husband is to require the wife to choose between her husband and her child; she can either remain in the United States and continue to search for her child or she can leave with her husband who has been ordered to leave the United States upon penalty of deportation.

In addition, the respondent and his wife were granted third preference priority, as noted above, in separate petitions filed by each with the Service. Respondent was entitled, as the beneficiary of a third preference petition, to the effect of whatever invariable practice existed with respect to such beneficiaries; in addition, he is entitled as the derivative beneficiary of his wife's third preference petition and to her present status as a permanent resident, to the applications of any administrative practice which would normally be applied to the spouses of such persons. It is submitted that a practice existed, except in the case of exchange visitors, to permit aliens who are the beneficiaries of approved third preference ptitions to remain in the United States until their applications for permanent residence could be filed administratively and adjudicated, regardless of the likelihood of success of such residence applications. This practice was not followed in this case, [redacted] even the approval of the petitions was not forthcoming with judicial intervention.

Upon information and belief, considering all these factors, the institution of deportation proceedings in this case departs radically from established invariable Service practice and constitutes, accordingly, an abuse of discretion and a denial of due process. Considering the respondent's known anti-Vietnam war views, it is submitted that these proceedings were discriminatorily commenced and prejudicially prosecuted.

In an effort to demonstrate that the institution of these proceedings was discriminatory and violative of established practice, respondent requested, through counsel, certain information pursuant to Section 552 of the Administrative Procedure Act, 5 U.S.C.A. §552 (commonly known as the Freedom of Information Act). The request was made by letter dated May 1, 1972 to the District Director, a copy of which is in the official record. The letter requested information relating to cases of other aliens, similarly situated, who are deportable under the immigration laws and against whom no deportation proceedings have been commenced. The Government has failed to properly supply the information requested. As a result, respondent has been and continues to this date to be unable to brief and argue this important issue, since decisions by the Service not to commence deportation proceedings aginst persons in respondent's situation are unpublished, and known to the Service alone.

In a further attempt to secure the information needed to brief and argue this point, the respondent filed a motion with the Immigration Judge on June 27, 1972 to

take testimony of knowledgeable government witnesses with respect to the same information. The motion was denied as part of the full decision of the Immigration Judge for the unacceptable reason that it did not request information on cases substantially identical with the present case. It is submitted that this ruling was erroneous and a denial of respondent's due process right to prepare a proper defense. Cf. Matter of Athanasopoulos, Interim Decision #2113 (Decided by the Board December 30, 1971). The Immigration Judge couldhave limited the questioning to issues which he ruled to be pertinent to the issues in the instant case.

What has occurred here is a plainly improper series of events and a situation which should be remedied by the Board of Immigration Appeals: the respondent was in a perfectly legal status on March 6, 1972 with permission to remain to March 15, 1972, when the District Director, in his apparent haste to remove the respondent for undisclosed reasons, took action against him. In one fell swoop, he attempted to revoke the status already granted to Lennon retroactively, and then declared that by virtue of such purportedly retroactive "revocation" Lennon had been in the United States illegally since the expiration of his last extension of temporary stay, February 29, 1972. This unusual action was taken in a case frought with humaniatrian concern, where it was obvious that extreme

hardship would immediately result from the government action taken. It was, likewise, in view of the existing and invariable practice to not commence proceedings to deport in such cases, a patent abuse of discretion. When respondent petitioned the District Director to reconsider and to terminate the proceeding (under the regulations authorizing such termination where proceedings are "improvidently" begun) the District Director refused to reconsider. When the motion was renewed before the Immigration Judge, he declined to take any action, claiming under the decision in Matter of Geronimo, infra, that he was powerless to do so. When respondent requested information from the government, which is not elsewhere available, to help prove that the District Director abused his discretion in violating the unvaried agency practice, his request was not complied with; when the request was renewed before the Immigration Judge in the form of a motion to take the testimony of any immigration officer with knowledge, the motion was refused as being too broad, but the Immigration Judge never permitted even limited examination of the government. What resulted was a clear violation of respondent's rights by the District Director, with the Immigration Judge sitting by and claiming that it is not his function to review the action of the District Director, notwithstanding the provisions of 8 C.F.R. 242.7, and 242.8 which accord the Immigration Judge full power to make all necessary orders in a case before him.

The Board of Immigration Appeals should not

permit this condition to continue and should order that the proceedings be reopened for the purpose of taking the testimony of a government official with knowledge on the matters stated in respondent's request. Failure to do so permits the intolerable situation to continue by which a District Director may violate established agency practice with total impunity.

The law is quite clear that an "invariable practice" of an administrative agency must be given great weight, unless unreasonably or flatly contrary to the statute. United States ex rel. Knauff v. McGrath, 181 F.2d 839 (2nd Cir. 1950). In addition, the rule requiring the government to disclose to the accused information in its possession which would be helpful to the defense should likewise apply to afford the respondent an opportunity to properly defend himself on this issue. See, for example, the Jencks Act, 18 U.S.C. 3504. The effect of the Immigration Judge's refusal to issue a subpoena effectively denied respondent the ability to prepare an available defense and consequently was a denial of due process.

It is urged that the Government has not only abused its discretion, but has done so on so many different occasions that it has effectively denied the respondent his constitutional right to a fair hearing under the due process clause, a right recognizable in deportation proceedings, and a ground for reversal before the Board of Immigration

Appeals. The following acts it is submitted constitute in the aggregate a gross denial of due process requiring a reversal:

1. The refusal by the District Director to grant any further extension of temporary stay under the circumstances of this case and
   (a) the existence of extreme extenuating circumstances requiring an extension of time to further pursue the legitimate and authorized purpose of securing custody of the child;
   (b) the failure of the District Director to comply with the terms of the respondent's admission, i.e. to consult with the District Director in Washington, being a necessary condition of the waiver under which the respondent was admitted for all further extensions of time;
   (c) the prejudgment by the District Director that no further extensions would be granted regardless of how extenuating the circumstances might become, in advising respondent's counsel that no extensions would be granted beyond February 29, 1973 under any circumstances;

2. The commencement of deportation proceedings by the District Cirector in a case fraught with humanitarian concern and other factors as stated above without affording the respondent a reasonable time within which to depart voluntarily prior to their institution.

3. The refusal by the Immigration Judge to terminate deportation proceedings in order to permit the adjustment of status applications of the respondent and his wife to be filed under Section 245 as authorized by the invariable existing practice and as stated in the Operations Instructions, there being full authority for the Immigration Judge to so act by regulation;
   (a) The Immigration Judge's refusal to terminate permitted the District Director to prejudge the applications as being unapprovable, and prevented the respondent from having the two chances to have his application adjudicated normally accorded to applications for

adjustment of status. This particularly violated respondent's rights, as his wife's application was clearly approvable (demonstrated by its subsequent approval by the Immigration Judge). It likewise prevented respondent from having "another chance at the bat" which would likelwise have been a meaningful opportunity, as illustrated by Matter of Gray, infra.

4. The refusal of the District Director to adjudicate the respondents' third preference petition:
   (a) the granting of a restraining order by a Federal District Court and the subsequent approval of the application within an hour of the District Director's receipt of notice of the entry of such order demonstrate that a court will intervene on the basis that the District Director has refused or neglected to perform a mandatory act required by statute.

5. The refusal by the District Director and Central Office of the Immigration Service to furnish full information under the Freedom of Information Act as to the action taken in similar cases by the Immigration Service, particularly whether similar cases have been declared "non-priority" and proceedings deferred or terminated.

6. The refusal by the Immigration Judge to depose a government official with knowledge as to the same information, permitting the District Director's refusal to go unchecked and preventing respondent from properly preparing an available defense to these proceedings, i.e., that the proceedings were discriminatorily instituted, a condition which continues to prevent respondent from arguing and briefing an important issue in this appeal;
   (a) the Immigration Judge's refusal was based upon his feeling that the demand was too broad, but he was within his authority to permit the deposing of a government witness on more limited issues, those which he thought to be relevant to the proceedings, and failed to do so.

7. The revocation by the District Director of the short period of time within which to

depart voluntarily and his charge that respondent was here illegally at a time when the District Director had clearly given him authority to remain.

8. The refusal by the District Director to terminate the deportation proceedings, which were designated even by the Immigration Judge as "precipitous."

Although the service's failure to follow one of its own rules or regulations might indeed be properly considered by the Immigration Judge to be "harmless error" under proper circumstances, the extensive series of violations of respondent's right to a fair hearing listed above are such an aggregate gross abuse of discretion that they deny the respondent due process. It is well-established that an agency's failure to comply with its rules and regulations may constitute a denial of due process. United States ex rel. Rudick v. Laird, 412 F.2d 16 (2nd Cir. 1969), Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968). Furthermore, it is settled that a Federal District Court would have jurisdiction to grant relief in the nature of mandamus if official conduct has "gone so far beyond any rational exercise of discretion...." and to compel the administrative agency, even the United States Army, to follow its own regulations. United States ex rel. Schonbrun v. Commanding Officier, 403 F.2d 371 (2nd Cir. 1968); Feliciano v. Laird, 426 F.2d 424 (2nd Cir. 1970); Massignani v. Immigration and Naturalization Service, 313 F. Supp. 251, aff'd 438 F.2d 1276 (7th Cir. 1971).

Indeed, the Federal District Court for the Southern District of New York has done so in the instant proceeding, requiring the District Director to perform a ~~discretionary~~ mandatory act within the Service's rules and regulations, namely, his duty to adjudicate the respondent's third preference petition. Lennon and ano. v. Marks, 72 Civ. 1784 (U.S.D.C., S.D.N.Y.) (See Exhibit 3). It was clearly a denial of due process for the Immigration Judge to refuse to terminate the proceedings in order to permit the respondent to apply for adjustment of status before the District Director. As noted by the Immigration Judge himself (Opinion, p.4) the nature of his jurisdiction is "thus not only an original jurisdiction but also in the nature of an Appellate jurisdiction where a previous application has been denied by the District Director." The normal situation is that an applicant who appears qualified is permitted two opportunities to apply for adjustment of status, one before the District Director and the other before the Immigration Judge. Mr. Lennon was robbed of his opportunity and it is no answer to speculate what the District Director might have done, or to permit the District Director to neglect to exercise his discretion with respect to such an application completely. This is more than an abuse of discretion on the part of the District Director, as he never allowed himself to consider an application and thus exercise his discretion; he simply took action to commence a deportation proceeding, thus precluding himself from considering an application for adjustment of status. The Immigration Judge incorrectly considers that his termination of proceedings would have

been an "empty gesture" in that the District Director's action on the application was predictable. This constituted prejudication on the part of the Immigration Judge of what the District Director might have concluded. Clearly, with respect to respondent's wife's case, the District Director was likely to have approved the application himself. Likewise with respect to respondent's case, as demonstrated in the decision in the Boston District in Matter of Gray, infra, the District Director might have reached a favorable conclusion. The Immigration Judge concludes that the only purpose of such a termination of proceedings would be to afford the respondent a certain amount of procedural delay, while the issue is not at all a procedural one, but a substantive one. If respondents are normally accorded two opportunities to make a certain application, it was a denial of due process to have granted Lennon only one. This is what is indeed intended by the Operations Instructions, which prescribe the normal practice of the Immigration Service:

> "...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. §245.1 (April 8, 1970).

Moreover, the District Director has asserted that the decision respecting the denial of extensions of temporary stay and the institution of deporation proceedings was taken solely by him and without the instruction or ad-