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Streamlining Deportation Proceedings: Self-Incrimination, Immunity from Prosecution and the Duty to Testify in a Deportation Context

HENRY G. WATKINS*

Several recent legislative proposals have appeared, designed, among other things, to streamline deportation proceedings. These proposals have become entangled in the legislative and political processes and have not, as yet, been enacted. This article outlines a nonlegislative proposal to streamline many deportation cases. The author addresses, in a deportation context, the invocation of the right against self-incrimination and offers a proposal to grant immunity from prosecution to persons in deportation proceedings, thus triggering the "duty to testify." The author submits that this proposal will eliminate many evidentiary and procedural problems now common in deportation proceedings and will result in a saving of time and resources to all concerned.

INTRODUCTION

An order of deportability must be supported by clear, convincing and unequivocal evidence.1 Traditionally, the Immigration and Nat-
uralization Service (INS) has taken a variety of approaches in attempting to meet this burden. For instance, on occasion the arresting officers and those officers who interview the respondent after arrest are called to testify. On other occasions the I-213 "Record of Deportable Alien" is offered into evidence. These and other approaches are likely to result in numerous evidentiary and procedural objections by the respondent's attorney. If the immigration judge rules incorrectly on these objections the case may be remanded and the proceeding begun anew. This prolongs an alien's illegal stay in the country, and may result in eligibility for other relief. While a request for other relief may be denied, the alien's departure is delayed while appeals are taken on this aspect of the case. Such delays in deportation proceedings constitute a problem that has now been recognized by the Board of Immigration Appeals (Board).

With increasing frequency in deportation proceedings, immigration judges must resolve claimed constitutional violations. However, a claimed fourth amendment violation involving an illegal search or seizure is not a basis for excluding testimony or other evidence obtained in violation of that amendment. In *Immigration and Naturalization Service v. Lopez-Mendoza*, the Court held the exclusionary rule does not apply to deportation proceedings, and reaffirmed the following rule in deportation proceedings: "The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."

While fourth amendment issues in a deportation context have largely been eliminated, other thorny constitutional disputes remain. These issues will be discussed below; however, the vast majority of

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2. The I-213 is a standard investigative report used by INS to record information concerning recently apprehended suspected undocumented aliens. It contains, among other things, information concerning the apprehension of the aliens, biographical information, prior immigration law violations, and the time, manner and place of last entry into the United States.

3. See, e.g., Iran v. Immigration and Naturalization Service, 656 F.2d 469 (9th Cir. 1981).


these claims, as well as the above-mentioned problems can be eliminated in most deportation cases by a new and relatively simple approach. This approach would allow immigration judges to devote less time to those issues that do not relate to a respondent’s deportability, thus increasing the time they can devote to serious claims such as asylum requests and suspension of deportation claims.

The Proposal

In deportation proceedings, the INS can ask a respondent questions concerning alienage or the right to be in the United States. It is submitted that the respondent has an obligation to answer all nonincriminating questions, and his or her failure to comply supports a finding that the respondent’s wrongful refusal to answer is tantamount to an admission.

It is recognized, however, that many genuine and complicated self-incrimination issues exist in current deportation proceedings which often justify a respondent’s refusal to answer. The author has been unable to discover one instance where a respondent’s answers in deportation proceedings have been used against the respondent in subsequent criminal proceedings. Accordingly, it is recommended that the Attorney General promulgate a policy granting respondents in deportation proceedings immunity from prosecution for immigration law violations. Alternatively, immunity should be granted, at a minimum, for the offenses of entry without inspection, reentry after deportation, and failure to register as an alien.

If the grant of immunity is limited to these three offenses, other types of immunity for possible crimes, not involved in the typical deportation proceeding, could be conferred as appropriate by the United States Attorney.

Immunization from prosecution obliges the respondent to answer questions concerning alienage or any right to remain in the United States. An adverse inference is properly drawn where a respondent wrongfully refuses to answer. Significantly, such immunity obviates the need of immigration judges, the INS, and respondents to address these time-consuming and often difficult questions. Moreover, this

10. Id. at § 1254(a).
11. See infra notes 112-17 and accompanying text.
14. Id. at § 1326. See infra note 42.
15. Id. at §§ 1302, 1306. See infra note 51.
grant of immunity requires no alteration of the government's *de facto* policy of not using statements obtained in deportation proceeding for subsequent prosecution of immigration law violations. The formalization of this policy would eliminate many claimed constitutional violations, as well as procedural and evidentiary problems. Reliance upon prior statements or other evidence obtained in alleged violation of the fourth or fifth amendment, or the right to counsel would no longer be required. Further, the procedures and evidence employed in deportation matters would be simplified. As noted in *Lopez-Mendoza*, even assuming an illegal arrest, search, or interrogation, no basis to object to deportation proceedings arises because a respondent's body and identity are not suppressible. This fact, coupled with the respondent's duty to answer nonincriminating questions, would result in simplified and efficient deportation procedure.

In summary, (1) the body and identity of respondents are never suppressible even assuming an illegal search, arrest, or interrogation. Assuming that evidence concerning alienage or deportability is untrustworthy or inadmissible for some other reason, independent evidence may be introduced; (2) because respondents are obliged to answer nonincriminating questions a proper grant of immunity requires that respondents testify and that their admissions constitute independent evidence to support findings of deportability; (3) in those few cases where respondents refuse to testify after being granted immunity, their silence is tantamount to an admission of questions regarding alienage and deportability.

**Privilege Against Self-Incrimination**

As the respondents in deportation proceedings have a duty to answer nonincriminating questions, it is appropriate to discuss the privilege against self-incrimination in such proceedings. The fifth amendment reads in pertinent part: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The privilege against self-incrimination, however, applies in more than the criminal context. If the sovereign was able to compel incriminating testimony in a civil or administrative proceeding, and then use that testimony in a subsequent criminal proceeding, the privilege would be a cruel hoax. Thus, the Supreme Court has recognized that the privilege may be claimed in any proceeding, whether criminal or civil, administrative or judicial, investigatory or adjudicative.

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16. See infra text following note 103.
17. See infra notes 110-33 and accompanying text.
18. U.S. CONST. amend. V.
The exercise of this privilege in deportation proceedings has been specifically recognized. The privilege against self-incrimination is personal to the witness; consequently, it may not be invoked to protect another. It is the witness' ultimate decision to claim or waive the privilege; it is not the decision of the court, nor even of the witness' attorney. The witness is, however, entitled to the advice of counsel before deciding whether to invoke the privilege. The trial judge has the discretion to permit the witness' counsel to invoke the privilege on his behalf.

The court should not require specific or legalistic words prior to recognizing a respondent's invocation of the privilege. The Supreme Court in *Emspak v. United States* has stated "no ritualistic formula or talismanic phrase is essential to invoke the privilege. All that is necessary is an objection stated in language that may reasonably be expected [to be understood] as an attempt to invoke the privilege." In *In re Sandoval*, the Board noted that the immigration judge continued to question a respondent concerning her alienage in the face of her protestations that she would not "like to answer," and with her attorney's explanation that this was an invocation of her privilege against self-incrimination. The immigration judge ignored this claim, later reasoning that the respondent had not "personally and expressly" claimed the privilege. The Board reversed the immigration judge, ruling that the privilege had been "fairly brought to the attention of the tribunal," as was required in *United States ex...*
In this type of situation, a serious question arises as to whether a judge may disregard counsel's statement that the privilege is invoked. Since the privilege may be invoked only as to individual questions, a witness should be allowed to confer with counsel before answering each possibly incriminating question. To meaningfully recognize the right to counsel inherent in claiming the privilege, the court should allow counsel to invoke the privilege if the witness so desires, or permit the witness to confer with counsel before answering each possibly incriminating question.

Although a witness may not invoke the privilege against self-incrimination on behalf of another, the spousal testimonial privilege, which applies in deportation proceedings, may justify the refusal to answer certain questions in deportation proceedings. As a result, when a married couple is involved in deportation proceedings, the privilege against self-incrimination may not be circumvented by asking each spouse questions about the other.

The right against self-incrimination does not, however, excuse a witness in deportation or other civil proceedings from taking the stand, being sworn, and having questions asked of him. Once on the stand, the privilege cannot be invoked as a blanket refusal to answer all questions. Rather, the witness may invoke the privilege against self-incrimination only as to individual questions. The court must then determine whether a refusal to answer a particular question on these grounds is well-founded. The “mere say-so” of a wit-
ness that an answer would be incriminating is insufficient.\textsuperscript{38} The privilege may be claimed only where the witness shows how the answer might be used in criminal proceedings, or lead to other evidence which might be so used.\textsuperscript{39}

To claim the privilege, it need not be shown that an answer would directly support a conviction, but only that it would furnish a link in the chain of evidence needed to prosecute.\textsuperscript{40} Hence, an answer admitting alienage, or leading to evidence of alienage is incriminating where prosecution is possible for entry without inspection\textsuperscript{41} or reentry after deportation.\textsuperscript{42} Moreover, such an answer would be incrimi-

\begin{itemize}
\item \textsuperscript{38} Hoffman, 341 U.S. at 486.
\item \textsuperscript{39} NLRB v. Trans Ocean Export Packing, Inc., 473 F.2d 612 (9th Cir. 1973); Ponder, 475 F.2d at 37.
\item \textsuperscript{40} Malloy v. Hogan, 378 U.S. 1 (1964); In re R-, 4 I. & N. Dec. at 720. For example, alienage standing alone is not illegal; however, it is an essential element of an illegal entry, 8 U.S.C. \textsection 1325 (1982), and of reentry after deportation, \textit{Id.} at \textsection 1326, offenses. \textit{See} United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980).
\item \textsuperscript{41} 8 U.S.C. \textsection 1325 (1982) reads as follows:
Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $5,000, or both.

Where a possibility of prosecution under this provision exists, an alien may invoke the privilege to refuse to answer questions concerning alienage or any other incriminating questions. \textit{Carillo}, 17 I. & N. Dec. at 30. In this case, the respondent was charged in deportation proceeding under section 1251(a)(2) (entry without inspection). However, regardless of the charge in deportation proceedings, if there is a possibility of criminal prosecution under section 1325 the privilege may be invoked. \textit{In re Martinez-Ramirez}, A23106531 - San Diego (BIA 1984).

Where no possibility of prosecution under section 1325 exists, e.g., where the alien entered legally and overstayed his authorized time in the country, section 1325 cannot provide a basis for invoking the privilege. \textit{Santos}, Interim Dec. No. 2969 at 7 n.2. \textit{Santos} might be read as suggesting (at footnote 2) that failure to register as an alien is not an offense for which the privilege against self-incrimination may be invoked.

\item \textsuperscript{42} 8 U.S.C. \textsection 1326 (1982) reads as follows:
Any alien who (1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to any alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two
nating where a failure to register as an alien charge is possible.

In assessing self-incrimination claims, the court must determine whether the claimant is confronted by substantial and real dangers of incrimination. The claimant may not refuse to answer harmless questions. There is no right to refuse to testify about a prior conviction or acquittal since no possibility of another criminal prosecution on those same facts exists.

Furthermore, the privilege cannot be invoked where criminal prosecution is barred by a statute of limitations. A criminal prosecution for entry without inspection is subject to a five year limitations period. Consequently, the privilege against self-incrimination may not be invoked for fear of prosecution for entry without inspection where the entry occurred more than five years in the past. A reentry after deportation is, however, a continuous violation, and the statute of limitations does not run so long as the alien remains in the United States. Since the willful failure or refusal to register as an alien in

years, or by a fine of not more than $1,000, or both.


This provision does not, however, support a self-incrimination claim where an alien who has previously been deported, or excluded and deported obtains express consent for admission, or does not require such consent because his prior deportation was more than five years before his reentry, or his prior exclusion and deportation was more than one year before his reentry. See id. at § 1182(a)(16),(17), amended by Pub. L. No. 97-116.


45. Zicarelli, 406 U.S. at 472. See also United States v. Compton, 365 F.2d 1 (6th Cir. 1966) (the privilege does not apply where a witness’ name and address are asked).

46. Reina v. United States, 364 U.S. 507 (1960); Wall v. Immigration and Naturalization Service, 722 F.2d 1442 (9th Cir. 1984); In re R-, 4 I. & N. Dec. at 720.


48. 18 U.S.C. § 3282 (1982); Gonzales v. City of Peoria, 722 F.2d 467 (9th Cir. 1983); United States v. Rincon-Jimenez, 595 F.2d 1192 (9th Cir. 1979). The entry without inspection offense occurs at the time of entry and no criminal prosecution may be brought five years thereafter. 18 U.S.C. § 3282 (1982).

49. The Supreme Court, in Lopez-Mendoza, declined, however, to decide whether a violation of 8 U.S.C. § 1325 is a continuing or completed crime following an illegal entry. 104 S. Ct. at 3489 n.4. Thus, the above-cited cases continue to govern the limitations period for 8 U.S.C. § 1325 prosecutions.

It should also be noted that a respondent in certain cases may claim the privilege although the entry date alleged in the deportation proceeding is before the five year statute of limitations. This would be true in cases where there is a subsequent entry within the five year period which exposes the respondent to prosecution.

violation of sections 1302 and 1306 of the United States Code is a continuous offense, the statute of limitations does not commence if the alien remains in the country.

These same sections 1302 and 1306 impose criminal penalties for the willful failure or refusal to register as an alien within thirty days of entering the United States. The duty to register is not triggered, however, if an alien is in the United States thirty days or less. Moreover, it must be proven that an alien in the country more than thirty days "was fully aware he was an alien required to register and be fingerprinted but purposefully and wrongfully refused to do so." If an alien comes before an immigration court within thirty days after entering the country, then there is no possibility of criminal prosecution under the failure or refusal to register provisions. Furthermore, it would seem that an alien apprehended within thirty days after entry, and detained beyond the thirty day period, would not face the possibility of prosecution for failure to register, because incarceration prevents registration, and the failure to register cannot be deemed "willful." It is questionable whether most aliens appre-

51. Section 1302 reads, in pertinent part:
   (a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days. (b) It shall be the duty of every parent or legal guardian of any alien now or hereafter in the United States, who ... is less than fourteen years of age [to register the alien if (a)(2) and (a)(3) (above) apply.] Whenever any alien attains his fourteenth birthday in the United States he shall, within thirty days thereafter, apply in person for registration and to be fingerprinted. 8 U.S.C. § 1302 (1982).

52. United States v. Franklin, 188 F.2d 182 (7th Cir. 1951). See also Lopez-Mendoza, 104 S. Ct. at 3489 n.3.

53. See supra note 51.

54. Justice O'Connor suggested in Lopez-Mendoza, at footnote 3, that the failure to register "without more, constitutes a [continuing] crime." 104 S. Ct. at 3489 n.3. This suggestion was not a direct holding of the Court and as Justice White pointed out in dissent, it is simply wrong. Id. at 3493-94.

hended within thirty days of entry and released on bond, although they remain in the United States beyond the thirty day period, may be prosecuted under sections 1302 and 1306. If the aliens use their true name, remain in contact with the INS and the court, and appear at all scheduled proceedings, absent an express demand to register, it can hardly be said that they have "willfully" failed or refused to register. Since their presence would be "registered" with the INS and the immigration court, it would seem extremely difficult to prove that such aliens had not registered. Accordingly, the better view is that sections 1302 and 1306 do not provide a basis for the invocation of the privilege against self-incrimination.

Realistically, few illegal aliens know of their duty to register as aliens; it will be the exception when "willfullness" can be proved. Although prosecution under the registration provisions is unlikely, the privilege against self-incrimination may be claimed in other cases where no possibility of prosecution exists. This occurs because the "possibility" rather than the "probability" of criminal prosecution is the test.66

The Congressional power to require alien registration has long been settled.67 However, compelling an alien to testify concerning his or her failure or refusal to register, or alienage, which is an essential element of a registration violation, would violate the privilege against self-incrimination unless no possibility of prosecution exists.68

Where a self-incrimination claim is erroneously rejected in a deportation proceeding, the answers must be stricken, and may not support an order of deportation.69 Any fruits of the testimony must also be suppressed.60

Since the privilege is solely for the benefit of the witness and is

56. Zicarelli, 406 U.S. at 472; Hoffman, 341 U.S. at 479. The court in United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973), stated that "[n]either the practical unlikelihood of further prosecution nor the Assistant United States Attorney's denial of an intention to charge [the witness criminally] negated [the] privilege." Id. at 1209 n.2.


58. In Sacco, 428 F.2d at 271, the court noted that the alien registration statutes are "essentially non-criminal" regulatory provisions, and held that requiring an alien to register does not violate his right against self-incrimination. However, lest this decision be misread, it merely held that the statutory requirement that aliens register cannot be avoided by claiming that the statute is unconstitutional because it violates the privilege against self-incrimination.

Sacco was a criminal prosecution and the defendant was indicted under the alien registration provisions. Thus, the court did not mean to suggest that a violation of the provisions is not a crime. Rather, the court ruled that the duty to register is itself a regulatory requirement, and thus did not violate the privilege against self-incrimination.

59. Valeros v. Immigration and Naturalization Service, 387 F.2d 921 (7th Cir. 1967); Sandoval, 17 I. & N. Dec. at 70.

deemed waived unless invoked, it must be claimed or the testimony is not "compelled" within the meaning of the fifth amendment. Thus, if the privilege is not invoked, the testimony will not be suppressed, unless coercion can be proved. Unless fairly brought to the attention of the tribunal the privilege is waived; therefore, the privilege cannot be raised on appeal if it was not claimed with some specificity before the trial court.

Absent an applicable statute providing to the contrary, neither the trial judge nor the prosecuting attorney is required to advise a witness of the privilege against self-incrimination. The Ninth Circuit recently held in United States v. Alderete-Deras that there is no duty to advise a respondent in a deportation hearing of the privilege. After being informed of his right to be represented by an attorney, to question witnesses, and to present a defense, the respondent admitted that he was a Mexican citizen who had entered the country illegally, by avoiding border inspection, and was then deported. Several years later, in a criminal prosecution for reentry after his deportation, the district court, because of fifth amendment violations, suppressed the fact that the respondent had been previously deported. The Ninth Circuit reversed, holding that there was no duty to advise the respondent of his right to invoke the fifth amendment. The court reasoned that the government in the criminal prosecution had not sought to introduce the respondent’s previous admissions, but only that he had been deported. Further, the rights that normally attach to a criminal prosecution do not apply in a deportation proceeding. Accordingly, the immigration judge had no duty to counsel an unrepresented respondent concerning his fifth amendment rights.

64. Vajtauer, 273 U.S. at 113.
65. Id.
66. In United States v. Alderete-Deras, 743 F.2d 645 (9th Cir. 1984), the court held that an immigration judge may require an unrepresented respondent to testify. The judge has no duty to advise the respondent that he or she has a right to refuse to answer incriminating questions. See also Wharton’s Criminal Procedure, § 396 (12th ed. 1975) and cases cited therein; In re R-, 4 I. & N. Dec. at 720; In re P-, 5 I. & N. Dec. 306 (BIA 1953).
67. 743 F.2d 645 (9th Cir. 1984).
68. While the court’s conclusion is correct, another analysis is possible. If the prosecution was for the original entry under 8 U.S.C. § 1325, the respondent could argue that any violation of the privilege was harmful. If, however, a respondent was criminally charged with the first illegal entry, he could raise the claim of violation of the privilege because the privilege was allegedly violated regarding the completed act. On the other
While a judge is not strictly prohibited from counseling the respondent, the judge cannot claim the privilege against self-incrimination for the witness.  

Self-Incrimination and Requests for Relief In Lieu of Deportation

It is not unusual for a respondent to contest alienage in the deportation stage of the hearing, but admit alienage in the relief phase of that same hearing. Evidently, because the respondent must be found deportable before the immigration judge may consider requests for relief in lieu of deportation, the Board has held that evidence presented during the relief phase of the hearing may not be considered on the issue of deportability. If the privilege is invoked in requesting relief in lieu of deportation, and the respondent fails to go forward on key issues, the request will be denied because the respondent bears the burden of demonstrating entitlement to such relief. Voluntary departure or other discretionary relief may not be denied, however, merely because the respondent properly invoked the privilege and put the government to its burden of proof.

Occasionally, a respondent will invoke the privilege in refusing to admit deportability, but will effectively waive it in seeking relief in lieu of deportation by stating facts that admit alienage or deportability. This should constitute a waiver of the privilege. Although the basis for claiming the privilege is an alleged fear of potential criminal prosecution, no true fear of prosecution exists once alienage, immigration status, or other “incriminating” facts are admitted in any aspect of the deportation hearing. Accordingly, the privilege should be waived regarding these admissions for all purposes, including deportability.

hand, the simple answer to the respondent’s claim that the privilege was violated in the prior deportation hearing is that the privilege cannot be invoked as a shield from prosecution for future criminal conduct. At the time of the deportation hearing there was no danger of a reentry after deportation charge since the reentry had not yet occurred. It may be argued that the prior deportation provided a link in the chain of evidence necessary to prove the reentry after deportation charge. However, the chain cannot extend to possible future conduct. This becomes clear if it is assumed that the respondent at the earlier deportation hearing was granted immunity from prosecution on the illegal entry charge. He nevertheless could be prosecuted for reentry after deportation. Thus, the result would be identical whether the respondent in the prior proceeding was granted immunity or had his right to invoke the privilege violated. In sum, no prejudice can be shown from the failure to advise respondent of the privilege in the deportation hearing.

69. Ginsburg, 96 F.2d at 882.
70. The most common requested relief is that a respondent be allowed to depart the country voluntarily in lieu of deportation. See 8 U.S.C. § 1254(e) (1982).
The Board set forth a contrary rule in *In re Bulos.* The respondent invoked the privilege and refused to testify concerning his deportability, while testifying in support of his application for voluntary departure. The immigration judge indicated that unless the respondent testified as to the manner that he entered the country, voluntary departure would not be possible. The respondent then testified that he had entered without inspection. Relying in part on this testimony, the immigration judge found the respondent deportable. The Board ruled that the judge erred, and noted that, "under 8 C.F.R. 242.17(d) [now 8 C.F.R. 242.17(e)] an application for voluntary departure shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability." The Board then went on to explain:

[t]here appears to be a misconception concerning the scope of the testimony of a respondent who is applying for the privilege of voluntary departure. Such testimony is given for the purpose of ascertaining whether the respondent is eligible for, and deserves a grant of, that privilege. . . . The testimony of a respondent in connection with his application for the privilege of voluntary departure may or may not touch upon alienage and deportability. In any case, such testimony must not be used for the purpose of either establishing or confirming his alienage or deportability.

The Board’s conclusion in *Bulos* could have been supported on the ground that the immigration judge improperly ruled that voluntary departure was not possible absent an admission of the illegal entry, which is not an essential condition to a grant of voluntary departure. As the Board in *Bulos* stated, a respondent’s testimony in support of an application for voluntary departure “may or may not touch upon alienage and deportability.” Only when a respondent invokes the privilege against self-incrimination in failing to go forward on key issues may voluntary departure be denied. Thus, the Board in *Bulos* could have held that the respondent’s testimony concerning his illegal entry was coerced under the rule of *Valeros v. Immigration and Naturalization Service,* and *In re Sandoval,* and thus should be stricken.

74. 15 I. & N. Dec. 645 (BIA 1976). Whatever the soundness of the BIA’s analysis in *Bulos,* it constitutes binding precedent for immigration judges. 8 C.F.R. § 3.1(g) (1985).


76. *Id. See also Sandoval,* 17 I. & N. Dec. at 84, (citing *Bulos,* 15 I. & N. Dec. at 645).


79. 387 F.2d 921 (7th Cir. 1967).

The privilege, however, does not apply to noncompelled incriminating statements. The privilege may not be invoked for one purpose and waived for another in the same proceeding. Indeed, the Board itself has recognized that, "where a witness has once given testimony voluntarily it may afterwards be used against him in the same deportation proceedings, and he may not claim the privilege of self-incrimination as to such testimony."

The basis for the privilege against self-incrimination is that the witness fears having incriminating statements used in a subsequent criminal prosecution. Nothing bars, however, a criminal prosecution based on incriminating statements, where those statements are made to obtain the benefit of relief in lieu of deportation. This should be fatal to the original invocation of the privilege, since the respondent has shown no real fear of prosecution. Moreover, even assuming that the respondent feared a subsequent criminal prosecution, the privilege would be waived with respect to any prior voluntary testimony.

The meaning of 8 C.F.R. Section 242.17(e) is not the pertinent inquiry in this context; rather, the issue is in what circumstances the privilege against self-incrimination may be invoked. Where no basis to invoke the privilege exists, or where it is waived, it simply may not be used to bar admissions of alienage or deportability.

81. *In re P-,* 5 I. & N. Dec. at 307. In *In re R-,* 4 I. & N. Dec. at 720, the Board stated, "where a witness has once given testimony voluntarily, it may afterward be used against him in the same or other proceedings and he may not claim the privilege of self-incrimination as to such testimony" (citation omitted, emphasis added). *Id.* at 721-22.

It has been stated that the waiver of the privilege at one stage of a proceeding does not constitute a waiver for future stages. United States v. Trejo-Zambrano, 582 F.2d 460, 464 (9th Cir. 1978), *cert. denied,* 439 U.S. 1005 (1978). This rule does not, however, undermine what has been said above. Rather, it pertains to the rule, in some jurisdictions, that once an individual elects to partially waive the privilege and discloses his criminal connection, he is not permitted to stop but must make a full disclosure. *Trejo-Zambrano,* and the cases it cites, hold that the privilege is not waived for other possibly incriminating testimony because it has been waived for some purposes. These cases stress that a witness' further testimony may result in additional criminal liability. See also United States v. Burch, 490 F.2d 1300 (8th Cir. 1974), *cert. denied,* 416 U.S. 990 (1974); United States v. Johnson, 488 F.2d 1206, 1209 (1st Cir. 1973) (the privilege, however, is lost for testimony already given).

82. Even if 8 C.F.R. § 242.17(e) was properly construed as barring admissions of alienage and deportability, in a voluntary departure application, to support an order of deportation, the privilege would be waived by the witness' incriminating statements. On its face, 8 C.F.R. § 242.17(e) does not require the result reached in *Bulos.* By providing that "an application for voluntary departure" shall not constitute a concession of alienage or deportability, it seems merely to allow pleading in the alternative. That is, it permits an alien to deny deportability, but apply for voluntary departure if deportability is found. Thus, the mere fact that such an application is made does not concede alienage or deportability. The facts set forth in connection with such an application, are not by the plain language of section 242.17(e), insulated from consideration regarding alienage or deportability. 8 C.F.R. § 242.17(e) (1985).

While in other contexts there may be reasons to construe section 242.17(e) as the Board did in *Bulos,* no fifth amendment argument or other justification exists where the privilege against self-incrimination is involved.
IMMUNITY FROM CRIMINAL PROSECUTION

A grant of immunity from criminal prosecution eliminates the need for the privilege against self-incrimination because no possibility of prosecution exists. When immunity from prosecution is granted "a witness once again owes the obligation imposed upon all [witnesses] — the duty to give testimony — since immunity substitutes for the privilege."

To displace the privilege against self-incrimination, the grant of immunity must be fully co-extensive with the privilege. In other words, before a grant of immunity "substitute[s] for the privilege" it must immunize the witness from the possibility of criminal prosecution on the basis of the testimony. Immunity from prosecution for one crime does not require the witness to answer incriminating questions if there is a possibility of prosecution under another statute.

Several provisions of Title 18 provide for "use" immunity. Use immunity guarantees that neither a witness' answers nor the fruits thereof will be used against him in a criminal prosecution. The witness is not protected, however, from criminal prosecution based on evidence gathered independently of the witness' testimony. On the other hand, "transactional" immunity ensures that the witness will not be prosecuted for the transaction or incident about which he is called upon to give testimony. Either form of immunity displaces the privilege against self-incrimination.

The failure to use the statutory mechanism of the federal immunity statute does not render an immunity agreement unlawful. For example, an immunity agreement, although not reduced to writing or signed by the witness, remains valid.

84. Mandujano, 425 U.S. at 576.
85. Reina, 364 U.S. at 507.
88. See Kastigar, 406 U.S. at 453.
89. Tierney, 409 U.S. at 1232.
91. Id.
An immunity grant must be co-extensive with the privilege before the witness is obliged to give testimony. In deportation proceedings a grant of immunity must, therefore, immunize the recipient against all possible criminal prosecutions which may be brought as a result of the witness' testimony. If there is a possibility of criminal prosecution in more than one jurisdiction, a grant of immunity from less than all jurisdictions is not considered co-extensive with the privilege.

In *United States v. Carter*, the court held that a promise of immunity, made by the United States Attorney in the District of Columbia, could not be breached by the United States Attorney in the Eastern District of Virginia. The court reasoned that if a problem arises between the districts of the various United States Attorneys, "the solution lies in the administrative controls which the Attorney General of the United States may promulgate to regulate and control the conduct of cases by the United States Attorneys and their assistants." The court observed that the honor of the government and public confidence in the fair and efficient administration of justice were at stake. Accordingly, the immunity agreement was ruled enforceable outside of the district in which it was made. *Carter* has been cited by many courts with apparent approval. Hence, it appears reasonable to give express assurances to a witness that the immunity grant applies in other districts where a criminal prosecution for perjury if the immunized testimony is intentionally false. *Mandujano*, 425 U.S. at 564. *See also* 18 U.S.C. § 6002 (1982). Where a witness intentionally gives false testimony, fails to give testimony after a grant of immunity, or otherwise fails to carry out his duty to testify, the agreement not to prosecute is not binding on the government. *United States v. Nathan*, 476 F.2d 456 (2d Cir. 1973), *cert. denied*, 414 U.S. 823 (1973), *reh'g denied*, 414 U.S. 1086 (1973).


93. *Johnson*, 448 F.2d at 1209-10. *See also* supra notes 33-43 and accompanying text.

94. *See United States v. Lieber*, 473 F. Supp. 884 (E.D. N.Y. 1979), which states the general rule that a promise of immunity made by a United States Attorney in one district cannot bind a United States Attorney in another district. The court noted that the authority of a United States Attorney is limited to matters arising within the district to which he is assigned. *See* 28 U.S.C. § 547 (1982). The court in *Lieber* ruled, however, that an exception to this rule should be made where the United States Attorney making the promise of immunity had discussed the grant of immunity with the Internal Revenue Service and Justice Department officials (the Tax Division) and led the defendants to believe he was acting on behalf of the government. *Lieber*, 473 F. Supp. at 892.


96. *Id.* at 428.


may be brought. 99

Section 1329 100 of Title 8 provides that jurisdiction over civil and criminal actions under the immigration laws is in the district where the violation occurred or, in section 1325 and 1326 prosecutions, where the alien was apprehended. Thus, violations of the latter sections may be brought in either district. 101 Consequently, an alien who makes an illegal entry in one district and is apprehended in another may demand immunity from prosecution in both, before otherwise incriminating testimony may be compelled. This requires either coordination between the offices of the United States Attorneys for various districts, or a uniform policy statement issued by the Attorney General regarding these provisions.

Immunity From Prosecutions For Statements Made in Deportation Proceedings

Occasionally, the government institutes a criminal prosecution of an alien for illegal entry or reentry after deportation. Generally these prosecutions occur prior to a deportation proceeding. Once a deportation proceeding is commenced, the aim of the government is to have the alien removed from the United States. The vast majority of aliens in these proceedings have violated sections 1325 and 1326, as well as the alien registration provisions. It is common knowledge, however, that if no criminal prosecution has been initiated prior to a deportation proceeding, none will be brought. 102 But, since the government has the power to bring these charges, the "possibility" of prosecution remains, thus triggering the privilege against self-incrimination.

The privilege complicates deportation proceedings by requiring independent evidence. 103 Procedural and evidentiary problems abound, decisions regarding the privilege itself may be overruled on appeal, and the case remanded for a new hearing. These problems are simply unnecessary. A proper grant of immunity in these cases elimi-

102. The INS stated that it will not present such cases for prosecution because it believes that the United States Attorney's position is that they do not warrant prosecution. In re Carrillo, 17 I. & N. Dec. 30, 33 (BIA 1979).
103. For example, border patrol agents and other immigration officials are called from their duties to testify.
nates both self-incrimination problems and those noted above. At the same time, the immunity grant would be nothing more than a formalization of existing policy to not prosecute criminally the above-referenced violations, as a result of testimony given in deportation proceedings. It would be preferable for the United States Attorney General to issue a blanket immunization from prosecution for immigration law violations in these cases, which would eliminate the problems arising from coordination between districts on immunity grants.

If for policy reasons the Attorney General wishes to limit immunity grants to prosecutions under sections 1325, 1326, or 1302 and 1306, in cases where other criminal violations are possible, the INS may seek further grants of immunity where appropriate.

**Self-Incrimination Violations Should Be Mooted By A Subsequent Grant Of Immunity**

Where an immigration judge wrongfully orders a witness to testify in violation of the privilege against self-incrimination, the testimony must be stricken and may not support a deportation order. But where a subsequent grant of immunity is conferred, mooting the respondent’s self-incrimination concerns, the error in ordering the testimony over valid objection should be cured. Hence, the earlier testimony should not be barred from consideration in connection with the respondent’s alienage and deportability. This result is supported by a recent Supreme Court case, where the Court ruled that although evidence may have been obtained in violation of the right to counsel, the error is harmless if the evidence would have been inevitably discovered despite the violation. Since the grant of immunity moots the self-incrimination claim, no prejudice remains because the respondent has a duty to answer nonincriminating questions. The Board has ruled that no prejudice results from evidence introduced in violation of the right to counsel, where the respondent complied with his duty to answer nonincriminating questions.

Similarly, where answers are rendered nonincriminatory by a subsequent grant of immunity, the respondent suffers no prejudice. A contrary result would exalt form over substance, and require a remand so that the respondent could repeat the previous answers. Thus, appropriate grants of immunity, issued after a deportation proceeding, should moot self-incrimination claims, rendering admissible any previous incriminating statements.

104. Valeros v. Immigration and Naturalization Service, 387 F.2d 921 (7th Cir. 1967); Sandoval, 17 I. & N. Dec. at 70.
For the same reasons as set forth above and discussed in Santos, a grant of immunity can render moot any claimed violations of the right to counsel, as well as fifth amendment claims of involuntary or coerced statements. First, as reaffirmed in Lopez-Mendoza, even assuming an illegal search, arrest, or interrogation, neither the body nor the identity of the respondent is suppressible. Second, if immunity from prosecution is granted, the respondent has a duty to answer questions concerning alienage and deportability. The respondent's responses to these questions will usually admit alienage and deportability; however, even if there is a wrongful refusal to answer, a respondent's silence may support an order of deportability.

Thus, where immunity from prosecution is granted, a respondent must answer all questions concerning alienage and deportability. This will substantially reduce the myriad constitutional, procedural, and evidentiary problems in deportation proceedings. The Supreme Court in Lopez-Mendoza eliminated fourth amendment issues in deportation proceedings. Additionally, the Attorney General or the various United States Attorneys can all but eliminate the fifth amendment issues, right to counsel claims, and many procedural and evidentiary problems in deportation proceedings by following the approach outlined above.

**Failure to Answer Nonincriminating Questions Concerning Alienage Supports an Order of Deportability**

In most cases where there is no colorable fifth amendment claim, respondent's counsel will direct the respondent to testify. In the vast majority of cases, the respondent's testimony will prove deportability and the remaining issue will be relief in lieu of deportation. Generally a respondent declines to testify only on the advice of counsel. Accordingly, if immunity is granted, the respondent has a duty to answer all questions because no basis to refuse to testify exists. Counsel is then obliged to modify any previous inconsistent advice and instruct the client to testify.
In most cases, after a proper grant of immunity is conferred, the respondent will admit alienage and concede deportability. If a respondent improperly refuses to answer questions after being granted immunity, deportability will not be difficult to establish. First, evidence usually exists concerning the respondent's alienage or deportability or the respondent would not be involved in deportation proceedings. Where this evidence is documentary, and relates to the respondent, failure to testify concerning the accuracy or authenticity of it should operate to waive any objections to its admissibility.\(^{11}\)

Second, since the Supreme Court in *Lopez-Mendoza* ruled that the exclusionary rule does not apply in deportation proceedings, evidence allegedly obtained in violation of the fourth amendment is admissible and may prove deportability. As the Court noted, allowing such evidence to be admitted in deportation proceedings is not meant to sanction improper conduct by police or immigration officers. There may be remedies to address such conduct; the exclusionary rule, however, is not one of them.

It has long been a rule of evidence that a party to a case who fails to respond to assertions made in his presence, which if untrue should be denied, will be deemed to have made an admission.\(^{118}\) This rule applies even though the person has no duty to speak and the unrefuted statement is made out of court. Thus, it is all the more reasonable to view as an admission the improper refusal to answer a question that one has a legal duty to answer, and which one is uniquely qualified to answer. Both the Supreme Court and the Board have recently provided a strong indication that a respondent's refusal to answer nonincriminating questions about alienage is tantamount to an admission of alienage, which can support an order of deportation.\(^{114}\)

Respondents in deportation proceedings have a duty to answer questions put to them, or suffer an adverse inference from their silence.\(^{110}\) In *In re Santos*, the Board agreed with this proposition.

\(^{11}\) Interim Dec. No. 2969 (BIA 1984).

\(^{112}\) *Iran v. Immigration and Naturalization Service*, 656 F.2d 469, 471 n.4 (9th Cir. 1981).

\(^{113}\) See *United States v. Giese*, 597 F.2d 1170, 1196-97 (9th Cir. 1979), cert. denied, 444 U.S. 979 (1979); see generally 4 WIGMORE, EVIDENCE § 1071 (Chadbourn Rev. 1972).

\(^{114}\) *Lopez-Mendoza*, 104 S. Ct. at 3479; *Santos*, Interim Dec. No. 2969.

\(^{115}\) United States *ex rel. Bilokumsky v. Tod*, 263 U.S. 149, at 153-54 (1923). See also *Vajtauer*, 273 U.S. at 110-11; *Chavez-Raya v. Immigration and Naturalization Service*, 519 F.2d 397 (7th Cir. 1975); *Laqui v. Immigration and Naturalization Service*, 422 F.2d 807 (7th Cir. 1967). See *Zicarelli*, 406 U.S. at 472 (rule applies in other civil proceedings as well as deportation proceedings).

stating:

Moreover, once the respondent was placed under oath at his deportation hearing, he had no right to remain silent to nonincriminating questions . . . and he was under an obligation to answer any questions truthfully or suffer the adverse inferences that could be drawn from his silence.117

This was not the first time the Board has recognized a respondent’s duty to answer nonincriminating questions or suffer the adverse inference drawn from his silence.118

The Supreme Court in Lopez-Mendoza strongly suggested that alienage may be proven by a respondent’s failure to answer a nonincriminating question concerning alienage. In explaining why the exclusionary rule does not apply in deportation proceedings, the Court stated that the deterrent value of the exclusionary rule in such proceedings is not sufficient to justify its application. The Court noted:

As the BIA has recognized, in many deportation proceedings “the sole matters necessary for the government to establish are the respondent’s identity and alienage — at which point the burden shifts to the respondent to prove the time, place and manner of entry.” In re Sandoval, 17 I. & N. Dec., at 79. Since the person and identity of the respondent are not themselves suppressible . . . the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently atten- tuated from, the original arrest . . . . The INS’s task is simplified in this regard by the civil nature of the proceeding.119

The Court then explained that proving alienage was “simplified” because United States ex rel. Bilokumsky v. Tod,120 held that it is proper to draw an adverse inference from a respondent’s refusal to answer questions. The court quoted from Bilokumsky as follows:

Silence is often evidence of the most persuasive character . . . . [T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak . . . . A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute.121

Thus, the Court seemingly sanctioned a finding of alienage based upon a respondent’s refusal to answer nonincriminating questions.

The Board appeared to implicitly reach this same conclusion in In

117. Id. In essence, a failure to answer a nonincriminating question results in an adverse inference. The Board cited Vajtauer, 273 U.S. at 110; Bilokumsky, 263 U.S. at 154; Chavez-Ray, 519 F.2d at 401.
119. 104 S. Ct. at 3487 (emphasis added).
120. 263 U.S. at 153-54.
121. Lopez-Mendoza, 104 S. Ct. at 3487 (citing Bilokumsky, 263 U.S. at 153-54).
re Santos. In Santos, the respondent appealed to the Board for a reversal of an order of deportation on the charge that respondent was an alien overstay. Respondent’s appeal claimed that he was denied an adequate opportunity to obtain counsel, and was thereby deprived of due process. The respondent’s appeal was, however, rejected for two reasons. First, it was held that the respondent voluntarily and knowingly waived his right to counsel. Second, the Board stated that even if the respondent had been denied his right to counsel, he could demonstrate no prejudice and, therefore, his appeal must fail. In its analysis, the Board cited considerable authority to support the proposition that a denial of the right to counsel is not error per se.

The Board then observed that since the respondent had a duty to answer nonincriminating questions, he had an obligation to answer questions regarding his remaining in the United States longer than authorized, or suffer an adverse inference from failure to do so. Based on this obligation, the Board held that the respondent was not harmed by the lack of counsel. Accepting the Board’s conclusion that Santos was not prejudiced by the lack of an attorney, it follows that respondents who have the benefit of counsel would be no worse off if they failed to answer nonincriminating questions. However, if respondents, after conferring with counsel, learn that they may not be deported solely on the adverse inference of their silence, they would be in a better position than the respondent in Santos. In Santos, the respondent was found deportable on the basis of his statements; but if respondents who improperly refuse to answer nonincriminating questions could require the government to come forward with other evidence, they would be in a better position than the Santos respondent.

124. The Board did not refer to a decision which the author believes bolsters its conclusion. In Nix v. Williams, 104 S. Ct. 2501 (1984), the Supreme Court held that evidence obtained in violation of the right to counsel is not suppressible, if it would have been inevitably discovered. The Court has therefore embraced a harmless error rule in cases claiming violation of the right to counsel. This may prove significant since the Board opined that the Seventh and District of Columbia Circuit Courts of Appeals still held the view that the violation of the right to counsel is a fundamental error requiring reversal. Santos, Interim Dec. No. 2969 at 6. Nix casts serious doubt on the “fundamental error” view. The Court in Nix reasoned:

However, if the government can prove that this evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. Nix, 104 S. Ct. at 2511 (emphasis in the original).
Therefore, reading *Santos* as holding that no prejudice befalls a respondent speaking without the benefit of counsel, it follows that the adverse inference drawn from a failure to answer nonincriminating questions concerning alien status is tantamount to an admission. Although a respondent who improperly refuses to testify may be compelled by a federal district court to answer under pain of contempt, the Court in *Bilokumsky* stated that no requirement exists prior to drawing the adverse inference regarding the respondent's silence. Viewed in this light, a respondent's refusal to answer nonincriminating questions should support a finding of deportability.

Further, because respondents have a duty to answer nonincriminating questions in deportation proceedings, it does not seem unfair or unwarranted to enforce that duty by considering refusals to answer questions regarding their immigration status as admissions. To hold otherwise is to render this "duty" illusory. This conclusion appears to be supported by the *Lopez-Mendoza* and *Santos* decisions, as well as by the cases cited in them.

Arguably, the approach outlined above is not legally permissible in light of *Gastelum-Quinones v. Kennedy*. A close reading of that decision demonstrates, however, that it erects no bar to finding deportability based on a respondent's refusal to answer nonincriminating questions about alienage or immigration status. In *Gastelum-Quinones*, the INS sought to divest the respondent of his lawful permanent resident status which he had enjoyed for forty years. The


126. *Bilokumsky*, 263 U.S. at 153-54. A refusal to answer, in the face of a contempt order, would subject the respondents to detention and a possible fine. Some respondents, however, have already been detained and are without funds; therefore, to refuse an adverse inference in this situation would merely add to the overcrowding in federal detention facilities. Meanwhile, the respondent who admitted alienage after being wrongfully deprived of counsel would be subject to deportation.

127. The Board in *Santos* opined that questions concerning an alien overstay, as distinguished from an illegal entry, implicated no crime. On this basis, the Board concluded respondent had no basis to assert his fifth amendment privilege against self-incrimination. However, as discussed below, this conclusion is doubtful at best, given the criminal sanctions which attach to nonregistration by an alien. *See* 8 U.S.C. §§ 1302 and 1306 (1982). *See also Lopez-Mendoza*, 104 S. Ct. at 3488-89 (Justice O'Connor's assertion that an alien's willful failure or refusal to register is a continuing crime).

128. The Ninth Circuit, in *Iran*, 656 F.2d at 469, ruled a document inadmissible because it was not properly authenticated. The court declined to rule on whether the respondent's refusal to testify concerning that document resulted in an adverse inference, justifying its admission because the Board did not rely on this argument. *Id.* at 471 n.4. This decision is interesting in that the court left the door open to an adverse inference approach to circumvent the maze of procedural and evidentiary rules.

charge was that the respondent had, during some remote period, meaningfully associated with the Communist Party by attending party meetings and paying dues. The government called witnesses to testify regarding this charge but did not call the respondent. The government argued that because its witnesses testified to the respondent's past attendance at Communist Party meetings and to his paying dues to that party, the burden shifted to respondent to refute these claimed showings of meaningful association. The Court noted that the respondent had resided in the United States since 1920, when he had immigrated from Mexico as a ten-year old boy, and that he had raised and supported a family, all of whom were American citizens. The Court then observed that "deportation is a drastic sanction . . . which can destroy lives and disrupt families . . .," and concluded that deportability must therefore be premised upon evidence of "meaningful association" more directly probative than a mere inference based on the alien's silence.

Even accepting Gastelum-Quinones as good law, the case does not undermine the approach suggested by the recent case law and Board decision discussed above. First, the respondent was not called to testify and had no questions put to him; thus, no duty to testify arose. Second, the holding of the Court does not address the issue of whether the facts of past Communist Party dues paying and attendance were established, because the Court seemed to accept these facts as true. Rather, the Court held that the legal conclusion of "meaningful association" was not supportable by an inference drawn from the respondent's failure to rebut the testimony of the witnesses. In sum, the government's case turned on whether its witnesses' testimony supported a finding of "meaningful association." The Court held that it did not. Accordingly, a respondent's refusal to answer

130. It is not clear why the respondent was not called as a witness. Moreover, it is not clear whether he could have invoked the privilege against self-incrimination if he were called. The court did not address these issues.

131. Gastelum-Quinones, 374 U.S. at 479.

132. While we need not catalogue every factor distinguishing Gastelum-Quinones from Bilokumsky and its progeny, it should be noted that the latter cases address nonincriminatory questions concerning alienage or immigration status. Gastelum-Quinones, however, involved a legal conclusion, not "facts" relating to alienage or immigration status. Additionally, Gastelum-Quinones involved a lawful permanent resident whose rights have been held to be greater than those of other aliens in matters of evidence and burdens of proof. For example, an alien seeking admission into the United States bears the burden of showing admissibility. In re De La Nues, 18 I. & N. Dec. 140 (BIA 1981). Once a prima facie showing is made that the alien is a returning lawful permanent resident, however, the burden shifts to the government to justify exclusion. Chew v. Rogers, 257 F.2d 606 (D.C. Cir. 1958); In re Mincheff, 13 I. & N. Dec. 715 (BIA 1971).

Some courts have intimated, in dicta, that inferences drawn from a respondent's silence may not be sufficient to sustain a finding of deportability by clear, convincing and unequivocal evidence. See, e.g., Paointhara v. INS, 708 F.2d 472, 474 (9th Cir. 1983) reh'g denied 721 F.2d 651 (9th Cir. 1983); Sint v. INS, 500 F.2d 120 n.1 at 123 (1st Cir. 1974). However, this issue seems to have been put to rest by Lopez-Mendoza, 104
nonincriminating questions regarding his alienage or immigration status would support an order of deportability.

**CONCLUSION**

As the foregoing analysis demonstrates, addressing the issue of privilege against self-incrimination in deportation proceedings can prove to be a complex and time-consuming matter. Especially where delay is the only defense or strategy available to a respondent, the invocation of this privilege occurs with increasing frequency. This stratagem can be eliminated easily by a proper grant of immunity. Such an immunity grant would serve to not only eliminate self-incrimination claims, but also to eliminate many constitutional and other claims, as well as procedural and evidentiary problems. This simplified approach is possible for the following reasons:

1. A respondent’s body and identity are never suppressible even assuming an illegal search, arrest, or interrogation.
2. A respondent must answer nonincriminating questions. Therefore, a proper grant of immunity requires the respondent to testify, and such testimony constitutes independent evidence that supports a finding of deportability.
3. If a respondent refuses to testify after being granted immunity, it is tantamount to an admission on questions regarding alienage and deportability.

The implementation of a formal immunity policy should be undertaken by the Attorney General. Such a policy would formalize what is in fact a longstanding practice of not prosecuting respondents for immigration law violations discovered as a result of statements made in deportation proceedings. Moreover, this formalization and the resulting duty on respondents to answer nonincriminating questions would streamline and simplify deportation proceedings, reduce to a minimum the need to call immigration officers into court from their other duties to give testimony, and provide formal assurances to respondents that their constitutional right against self-incrimination will be honored.

S.Ct. at 3479.