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Immigration Issues and Airlines

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PASSENGERS SLITTING their wrists at entrances to jetways, passengers held in indefinite custody at airline expense in motel rooms, passengers stripping naked in transit lounges, passengers attacking airline personnel. . . . All these are now, unfortunately, everyday occurrences for airlines. These escalating problems are a result of a mix of law and policy choices and missteps on political asylum issues—a topic steeped in history but one fraught with emotion and as contemporary as today's headlines.

Motivated by valid humanitarian concerns, the United States grants all who request political asylum a full opportunity to demonstrate the "well-founded fear of persecution"1 that guarantees refuge in the United States. These

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1 See Immigration & Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1988) [hereinafter INA]. "Refugee," for immigration law purposes, generally refers to those physically outside the United States, while "asylee" refers to those already in the United States or at a border. See id. The "Asylum Procedure" section of the INA states that alien applicants for asylum may be granted asylum in the United States "if the Attorney General determines that such alien is a refugee." Id. § 1158(a). "Refugee" is defined as:

[any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.}
broad rights are conferred on all, even those who otherwise have extremely limited rights under United States immigration laws. The asylum law trumps all other laws, deliberately so. Unfortunately, it has also opened a loophole for those seeking entry to the United States. Merely uttering the words “political asylum” at a U.S. airport entitles any passenger to all the rights available under the asylum law — and entrée to the United States not available so readily in any other way. The violence thus continues at U.S. airports, and fines against carriers who bring improperly documented passengers to the United States continue to pile up at alarming rates. Common current schemes include the following:

- using good quality counterfeit or photo substituted documents sufficient to pass even the most diligent carrier scrutiny for boarding a United States-bound flight and then either destroying the documents on board or passing them off to an accomplice, and requesting political asylum upon disembarking with no papers; and

- travelling to the United States as a “TWOV” - a transit without a visa passenger scheduled to merely pass through the United States - and requesting political asylum upon arriving at the U.S. airport.

The second category includes the cases that have turned transit lounges into battle grounds. High drama also occurs regularly at airports where the Immigration & Naturalization Service (INS) demands that carriers take

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Id. § 1101(a)(42).

* Among those with extremely limited status under the INA are: alien crewmen, aliens who work illegally or who have otherwise fallen into illegal status, and those who arrive in the United States as TWOV (transit without visa) or visa waiver passengers. 8 U.S.C. § 1255 (1988 & Supp. IV 1992). Aliens in these categories are not eligible to apply for “adjustment of status” to permanent residence. Id.

* In one of the most egregious examples I know, nine Chinese asylum seekers who travelled to New York on a foreign flag carrier from a South American city and requested political asylum mysteriously travelled on the same route on an American carrier the next week. Evidently, the same “photosub” passports were used in both instances - recycled by a smuggler who presumably travelled on the first flight, collected the passports on board, entered the United States legitimately with valid papers and then returned to South America with the nine passports.
custody of certain categories of arriving passengers who request political asylum. Although it usually releases asylum-seekers rather than detaining them itself, the INS nevertheless asserts that carriers must keep such passengers in detention pending determination of their asylum claims—a process that can take years. When carriers disagree, local INS officials have frequently responded with threats to cancel transit agreements, revoke landing rights, and seize aircraft. As a result, in the motels and hotels around airports such as JFK, the carriers are operating unofficial jails.5

Frustrated by INS policies that forced them into the role of jailers, the industry sued the INS more than a year ago.6 The litigation remains stalled in federal district court in Washington, D.C.7 Meanwhile, detention costs continue to mount. Many carriers have spent half a million dollars or more keeping asylum-seekers in custody. Fines, too, are piling up. It is not unusual for a major

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4 William Slattery, Director of the Immigration & Nationalization Services for New York, stated on national television that JFK INS officers routinely release arriving passengers with no papers “from you don’t know where, you don’t know what they’ve done, you really don’t even know their real names.” 60 Minutes: How Did He Get Here (CBS television broadcast, Mar. 14, 1993). In addition, in explaining the “significant burden” which detention of Sheik Omar Abdel Rahman would place upon “government resources,” INS officials noted that “holding potential deportees costs $100 to $600 a day.” Mary B. W. Tabor, United States Rejects Sheik’s Failing As Too Costly, N.Y. TiMES, Apr. 22, 1993, at B1.


7 Id.
carrier to owe the United States government more than $1 million a year in fines for bringing improperly documented passengers to the United States.

The asylum issue involves desperate individuals, almost unbearable strains on airline operations and airline personnel, and huge expenses an industry in crisis can ill-afford. This article explores the legal aspects of the fines and the detention issues after a brief review of the asylum law of the United States.

I. THE ASYLUM LAWS OF THE UNITED STATES

Bound by international agreements and domestic statutes, the United States is committed to the protection of refugees and those making claims of political asylum. In 1968, the United States signed an international agreement guaranteeing refugees' rights.8 In 1980, Congress passed the Refugee Act, "the centerpiece of current refugee and asylum law in the United States."9 This first "statutory basis" for asylum10 was designed to "bring United States law into conformity with our international treaty obligations."11 The 1980 Act directs the Attorney

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8 The 1967 United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter U.N. Protocol]. The U.N. Protocol extended rights granted to refugees under an earlier international agreement, the 1951 United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention], to which the United States is not a signatory. The U.N. Protocol incorporates articles 2 through 34(2) of the Convention. Article 33 of the Convention prohibits the deportation of a refugee to the "frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Id. art. 33. Moreover, article 31 of the Convention provides that: The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. Id. art. 31.


10 NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 8.6 (1981).

General to "establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum." As a result of the paramount importance of its "irrespective of status" language and the primacy of the Refugee Act, even passengers who arrive in the United States are entitled to apply for asylum. See, e.g., Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982). The general view at the time was that the legislation was needed "to correct the deficiencies of United States refugee policy by providing ongoing mechanisms for the admission and aid of refugees." Thomas A. Aleinikoff & David A. Martin, Immigration Process and Policy 58 (1985).

On the meaning of the key phrase "irrespective of status," In re Pula, 19 I. & N. Dec. 467 (1987), states: "The function of that phrase is to ensure that the procedure established by the Attorney General for asylum applications includes provisions for adjudicating applications from any alien present in the United States or at a land [border] or port of entry, 'irrespective of such alien's status.' " The dissent in Pula also sums up asylum law: "The asylum provisions are humanitarian in their essence and indeed recognize that the forces which impel persons to seek refuge may be so overwhelming that the 'normal' immigration laws cannot be applied in their usual manner." Id.

States without documents or only with documents for a limited immigration category such as TWOV\textsuperscript{13} have the right to request political asylum and the right to have such a request fully considered.

The asylum laws thus supersede other INS laws and regulations, giving abusers entrée into the system. This loophole has wrought havoc on the outdated, poorly drafted and applied pastiche of law, regulation, and practice that governs the relationship between the airlines and the INS.

II. IMMIGRATION FINES

A. INTRODUCTION

The Immigration and Nationality Act (the INA or the Act) provides for fines on carriers who bring to the United States aliens not eligible for or properly documented for the status in which they seek admission to the United States.\textsuperscript{14} Section 273(a) of the Act provides:

It shall be unlawful for any person, including any transportation company . . . to bring to the United States from any place outside thereof . . . any alien who does not have a valid passport and an unexpired visa, if a visa was required under this chapter or regulations issued thereunder.\textsuperscript{15}

Section 273 goes on, in subsection (b), to allow imposi-

\textsuperscript{13} See supra note 2.

\textsuperscript{14} The power of the United States to grant or deny admission to aliens is beyond question: "The power of Congress to control immigration stems from the sovereign authority of the United States as a nation and from the constitutional power of Congress to regulate commerce with foreign nations." H.R. REP. No. 1365, 82d Cong., 2d Sess. 5 (1952), reprinted in 1952 U.S.C.C.A.N. 1653; see also Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889), which states:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.

\textit{Id.}

tion of a $3,000 fine on carriers for violations of the pro-
scription of subsection (a). Subsection (c) directs that
any fines so imposed be remitted or refunded if the trans-
portation company “prior to the departure of the . . . air-
craft from the last port outside the United States did not
know, and could not have ascertained by the exercise of
reasonable diligence, that the individual transported was
an alien and that a valid passport or visa was required.”
The key is thus the “reasonable diligence” of the carrier,
and questions of whether or not a carrier meets that stan-
dard are to be resolved by examination of the carrier’s ac-
tions and procedures in boarding the passenger for
transport to the United States. Another very important
feature of section 273 is that, while remission or refund of
fines is permitted, no mitigation is allowed. For carriers
the fines are thus an all-or-nothing proposition.

Penalties and fines on carriers who improperly bring
aliens to the United States have been on the books for
more than a century, and section 273 itself has been a part
of the immigration law for more than forty years. Air

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16 Id. § 1323(b).
17 Id. § 1323(c). Subsection (d) has specialized provisions relating to stow-
awayways, which are discussed in more detail at infra parts II.C and III. Other provi-
sions of the INA are also the basis for fines against carriers. The most common of
these is § 271(a), which forbids the unauthorized landing of aliens in the United
States. INA § 271(a), 8 U.S.C. § 1321(a) (Supp. IV 1991). This section is most
typically used against carriers in connection with passengers arriving from Mexico
and Canada (Section 273 does not apply to arrivals from foreign contiguous terri-
tories). The most significant distinction between § 271 and § 273 is that the for-
mer allows mitigation of the prescribed $3,000 fine “in the discretion of the
Attorney General.” See id.; see also infra note 54 on possible mitigation of fines
imposed pursuant to Section 273.

18 The first law to impose limitations on immigration also provided for carrier
forbade transport of “oriental coolies” to the United States and put teeth in this
prohibition by placing transporting vessels at risk:

If any vessel, belonging in whole or in part to a citizen of the United
States, and registered, enrolled, or otherwise licensed therein, be
employed in the “cooly-trade,” . . . such vessel, her tackle, apparel,
furniture, and other appurtenances, shall be forfeited to the United
States.

Id.

The act also imposed criminal sanctions on anyone involved in the coolie trade,
including carriers and ship captains, and provided for fines of up to $2,000 and
carriers have thus been dealing with an INS fine scheme since the first days of international service to this country. Traditionally, the fines have been part of the industry's facilitation portfolio. They were viewed as a cost of doing business, i.e., the price for occasional error of a boarding station. Typically they have been processed by the air carriers' accounting or administrative personnel for virtually automatic payment.

Despite the long history of the fines and penalties provisions of the INA, the INS has no regulations in place to define reasonable diligence or to guide the carriers in avoiding the fines. The best guidance available is in the published decisions of the Board of Immigration Appeals (BIA). Only a few court cases, many of them dating

prison terms up to one year. Id. By 1891, those guilty of the misdemeanor of illegally landing aliens in the United States were subject to a maximum fine of $1,000 and a maximum prison term of one year. Act of Mar. 3, 1891, ch. 551, § 6, 26 Stat. 1084, 1085. A major revision of the immigration laws in 1917 raised the penalties for this misdemeanor to a maximum fine of $2,000 and a maximum prison term of five years. Act of Feb. 5, 1917, ch. 29, § 8, 39 Stat. 874, 880 [hereinafter 1917 Act]. These criminal penalties survive in section 274 ("Bringing in and Harboring Certain Aliens") of the current INA. See 8 U.S.C. § 1324 (1988).

The 1917 Act also added a provision for a $200 civil penalty against transportation companies for bringing to the United States "any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease." 1917 Act, ch. 29, § 9, 39 Stat. at 880. In 1924, the 1917 Act was amended to increase the civil penalty to $1,000. Act of May 26, 1924, ch. 190, § 26, 43 Stat. 166. The fines remained at that level even with the post-World War II reform of the immigration laws. With the passage of the McCarran-Walter Act, the transportation company fine section was first numbered section 273. Act of June 27, 1952, ch. 78, § 273, 66 Stat. 163, 227 (codified at 8 U.S.C. § 1323 (1988)). The $1,000 penalty was increased to $3,000 in 1990. 8 U.S.C. § 1323(b) (Supp. III 1991); see infra note 22 and accompanying text.

19 The BIA is a Department of Justice agency subject to the general supervision of the Director of The Executive Office of Immigration Review. It is independent of the INS itself. The seven-member Board (headed by a Chairman), sits in Falls Church, Virginia. It hears appeals of carrier fine cases decided by the National Fines Office, an INS agency also located in Falls Church. See Board of Immigration Appeals, 8 C.F.R. § 3.1(b)(4) (1993). Board decisions are "binding on all officers and employees" of the INS, and "selected decisions designated by the Board . . . serve as precedents in all proceedings involving the same issue or issues." Id. § 3.1(g) (emphasis added). BIA decisions are available on electronic services and compiled in a reporter. "Interim Decisions" are available through commercial sources. However, not all precedential decisions are published. Unpublished precedential decisions are indexed and available in the Board's library.
from the 1930s,20 address fines under section 273. When analyzing questions of "reasonable diligence" under section 273, the cases emphasize the case-by-case nature of their inquiry.21

With the passage of the Immigration Act of 1990,22 fines on airlines increased from $1,000 to $3,000, but the level of fines on carriers increased at a rate far in excess of treble the previous annual totals. Quite a few carriers, both United States and foreign, quickly found themselves facing annual fine totals in excess of $1 million.23 Sud-

in Falls Church. Few published BIA decisions deal with airline fines cases. Interestingly enough, there are several unpublished decisions in favor of carriers on fines cases. See, e.g., Alitalia Airlines Aircraft, AZ-630, BOS - 10/11.142 (Mar. 26, 1968); TAN (Transportes Aereos Nacionales, S.A.) Aircraft "HR-TNG," MIA - 10/12.204 (Apr. 27, 1966); see also M/V Olympos, BAL - 10/1.586 (Oct. 19, 1988) (failure to detain stowaway).

20 The names of these cases make it evident that they are from an earlier era, when immigrants arrived by ship. See, e.g., Cunard S.S. Co. v. Elting, 97 F.2d 373 (2d Cir. 1938); Navigazione Generale Italiana v. Elting, 89 F.2d 31 (2d Cir. 1937); North German Lloyd v. Elting, 86 F.2d 93 (2d Cir. 1936), cert. denied, 300 U.S. 675 (1937); Rederaktiebolaget Nordstjernen v. United States, 61 F.2d 808 (9th Cir. 1932); United States v. Smith, 27 F.2d 642 (7th Cir. 1928).

It is possible to argue that much of the teaching of these cases is irrelevant today. They date from an era when the principal obligation of the steamship captain with respect to the immigration laws involved checking the current status of the quota for immigrants of the nationality of his passengers. They provide little, if any, guidance for carriers operating under the visa-based system of the modern immigration laws, which requires that they inspect documents and satisfy themselves that passengers have proper documentation for admission. There is a chance that new standards for carriers will emerge in new regulations, see infra note 54, or by means of agreements between the Service and carriers. See infra note 61 and accompanying text.


23 Even though more and more carriers are fighting these fines, INS statistics indicate that only about 15% of the air carrier fines are ever defended. According to statistics forwarded to U.S. Representative James Oberstar by then-INS Commissioner McNary in response to a question asked him at a July 9, 1992 hearing, only 3,155 of 20,459 fines cases against carriers since October 1, 1988 had been defended. (These 20,459 cases involved 39,112 individuals, and the 3,155 defended cases involved 9,144 individual violations). Attachment to letter from A-
denly, modest administrative nuisance had costs spinning out of control, just as the situation in the airports had spun out of control. Statements by INS officials at the time of the increase in the fines indicated that the Service had decided to take a harder line with the industry. In an effort to tighten its procedures, the Service centralized its fines process on October 1, 1988, in a National Fines Office (NFO) located in Falls Church, Virginia.\textsuperscript{24}

At about the time of the trebling of the fines, the INS, as discussed below, began fining carriers for "offenses" for which there was no statutory or regulatory basis.\textsuperscript{25} In the course of imposing these huge fines, the Service has erred in its interpretation of the statute and BIA prece-

\textsuperscript{24} Previously fines were imposed, administered, and adjudicated at the initial level at the individual ports by the District Director. The NFO was created on October 1, 1988.

The fines procedure is as follows. When a problem alien arrives at a port, he or she is sent to "secondary" inspection where the individual's own immigration status is determined and where an "Airport Fines Detection Record" (Form NFO-1) is prepared. This form includes a record of standard questions asked the alien about the flight and about pre-boarding inspection. The port forwards the paperwork to the NFO, which, if it decides to go forward with the case against the carrier, issues a "Notice of Intention to Fine Under Immigration and Nationality Act" (Form I-79). This notice informs the carrier that it has "30 days from the service of this notice to file a written defense." If no defense is filed, the I-79 is followed in a month by a "Decision to Impose Administrative Fine." These "decisions" order that the $3,000 penalty "be imposed in full." \textit{See generally Imposition and Collection Fines, 8 C.F.R.} \textsuperscript{25} § 280 (1993). In some cases, the NFO allows an additional period of thirty days for the filing of a written defense. \textit{See id.} Attorneys representing clients in cases before the NFO must file a Notice of Appearance (Form G-28). \textit{Id.} § 292.4.

If a carrier files a defense the NFO accepts, the case ends with a simple notice of cancellation from the NFO. If the NFO does not accept a defense, it issues a "Decision" and "Order." The Decision includes information on how to appeal the case to the BIA. \textit{Id.} §§ 3.1, 280.14. Motions to reopen are another procedural option. \textit{Id.} § 103.5. Both appeals and motions to reopen must be accompanied by $110 filing fees. \textit{See id.} § 103.7.

\textsuperscript{25} Since 1991, amounts collected in fines are deposited in the user fee account, which funds INS operations. \textit{See INA} § 286(h)(1)(B); \textit{see also} 8 C.F.R. § 280.52(b) (stating that "[a]ll fines collected pursuant to Sections 271(a) and 273 of the Act shall be deposited in the Immigration User Fee Account established in accordance with the provisions of Section 286 of the Act").
dents and overreached in its interpretation of its regulations. It also relied on an agreement with the carriers last revised in 1965. The typical fine scenarios are discussed below.

B. DOCUMENT DESTROYING ASYLUM SEEKERS

Carriers face a serious problem in attempting to deal with properly inspected, properly (or seemingly proper) documented passengers who either destroy or pass off their documents en route and request political asylum upon arrival at United States airports. The INS has published no regulations or other official guidance for the carriers on how to deal with such aliens and how to avoid fines in these situations.

Only one BIA case, In re Scandinavian Airlines, "Flight #SK 911"26 deals with the now common problem of document destroyers. The case revolves around a 1983 incident on SAS flights from Calcutta to New York, via Copenhagen. SAS contended that the eight passengers in question presented Sudanese passports with United States visas when they boarded in India. Upon arrival in Copenhagen, the Government of Denmark issued them transit visas in the names listed on the Sudanese passports, and they boarded the flight for New York. When the passengers disembarked at JFK, however, they produced Afghan passports (with no visas for the United States), with different names, and requested political asylum. SAS produced evidence of the through tickets and copies of the transit visas issued in Denmark as well as an affidavit from an Indian travel agency that issued tickets to the eight “Sudanese” passengers who presented proper documents for a flight to the United States.

The INS took the position that SAS had “failed to prove that these [Sudanese] passengers were the aliens in question.”27 The BIA upheld the Service, holding that SAS

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26 N.Y.C. 10/52.6793 (Interim Decision 3159, 1991 BIA LEXIS 10 (Feb. 26, 1991)).
27 Id. at 3.
failed to prove its case:

The evidence the carrier has submitted in this regard shows that eight alien passengers had passports with visas in them. The names on the documents presented by the eight alien passengers with visas, however, are not the same as the names of the aliens in question, and the carrier has failed to show by any other means that the aliens in question are the ones who presented the visas.\(^\text{28}\)

Because SAS could not positively "match" the eight passengers who boarded in Calcutta with the eight passengers who disembarked in New York, the fine was upheld. The SAS Case was argued before the BIA in 1984 but not decided until 1991. This decision in favor of the Service has been selected for publication.\(^\text{29}\)

The INS did, however, acknowledge the smuggling problem in a wire sent in late 1989 from Michael D. Cronin, Assistant Commissioner of Inspections, to INS district directors and ports. This wire has been widely distributed in the industry.\(^\text{30}\) "The activities of these violators constitute a mutual problem for the carriers and for the immigration services of the United States and other countries."\(^\text{31}\) The 1989 Wire stated that "carriers have

\(^{28}\) Id. at 4.

\(^{29}\) See supra note 19.


\(^{31}\) Id. Again and again, the 1989 Wire refers to document-destroying passengers as "stowaways." When this problem first began escalating, it was quite common for the Service to insist that document destroyers who emerged from planes requesting political asylum and claiming they had no paper were indeed "stowaways." Although this groundless position of the Service has some effect on the issue of fines, it is much more significant, as described below, in the detention context.

In early 1991, a legal opinion prepared by the INS Office of the General Counsel concluded that "[t]he Service may not declare an alien arriving in the United States to be a 'stowaway' solely for lack of travel documents." Legal Opinion (Ref. CO 235-C; CO 237-C; CO 273-C) of January 11, 1991, reprinted in Hearing Report, supra note 23, at 57. The opinion noted that "stowaway" is not defined in either the INA nor the applicable regulations and went on to explore case law on stowaways, concluding, in the case of document destroyers, that the following was "evident":

First, the aliens do board or enter the aircraft abroad. There is no
been encouraged to adopt or continue the practice of photocopying the documents and tickets of persons who are profiled as possible [document destroyers],” in order “to protect themselves in fines proceedings.”

The Service now generally continues, still without formal notice, to accept photocopies or retained documents\(^{32}\) from carriers as evidence of reasonable diligence sufficient to justify cancellation of fines.\(^{33}\) However, it

indication, however, that they conceal their presence. On the contrary, the airlines claim that they have full knowledge of the presence of the aliens on board the aircraft from the beginning of the flight. Second, the intent of the aliens who board the aircraft is to obtain transportation to the United States. The airlines, however, claim that they consent to the transportation of the aliens to the United States after inspecting documents presented by the aliens of evidence of their admissibility to the United States. Therefore, the aliens obtain transportation with the consent of the owner or operator of the carrier. Consequently, aliens who arrive in the United States on commercial aircraft with no travel documentation fail to meet the criteria necessary to be classified as a stowaway. While they board the aircraft abroad with intent to obtain transportation, they do so with the knowledge and consent of the owner or operator.

Hearing Report, supra note 23, at 59. The existence of this opinion, while widely rumored (see AVIATION DAILY, Jan. 24, 1992, at 145; AVIATION DAILY, Jan. 27, 1992, at 153), was never acknowledged by the INS until then-Commissioner McNary was asked about it by Congressman Oberstar at a July 9, 1992, hearing before the Aviation Subcommittee of the House Committee on Public Works and Transportation. Hearing Report, supra note 23, at 46, 85. On September 14, 1992, when Commissioner McNary responded further in writing to the questions asked him that day, he forwarded not only the January 1991 opinion, but also a second legal opinion prepared after the July hearing (on August 10, 1992) that emphasized the circumstances in which the Service can force detention of aliens on carriers. Id. at 57, 67; see infra part III.

\(^{32}\) See Routine Unclassified Wire: Aliens Arriving on Commercial Airline Flights Without Boarding/Travel Documents (May 15, 1992), reprinted in Hearing Report, supra note 23, at 79 (stating that the “presumption is that the alien was properly boarded . . . if the carrier can produce photocopies made at the port of embarkation of boarding and/or travel documents”). Some carriers collect and retain passenger documents. Canadian immigration law specifically permits this practice. The immigration regulations of Canada provide:

A transportation company bringing persons into Canada may hold the visa, passport or other travel documents of any passenger carried or to be carried by it in order to ensure that the visa, passport or travel document is available for examination by an immigration officer at the port of entry if the transportation company issues to the passenger a receipt therefore in a form established by the Minister.

Can. Immigration Reg. § 50.1(1). There is no such provision in the INA.

\(^{33}\) Cancellation, however, is not automatic. In most cases, the NFO still im-
provides no relief or guidance for carriers with respect to passengers who are checked before boarding but whose documents are not photocopied or retained during flight. Carriers continue to be fined in these cases. The Service rejects any evidence of reasonable diligence of the carriers at foreign boarding points other than that provided by photocopies or retained documents. Therefore, to protect itself, a carrier would have to photocopy or retain the travel documents of every passenger — clearly an unreasonable procedure and, in any event, not one required by any statute, regulations, or contract.

Although the SAS Case is recent, the industry’s techniques for managing this problem have changed a great deal since 1983, as the problem has escalated and as the schemes of the smugglers have grown more sophisticated. The Service, however, has not changed its position since its 1989 Wire and has offered the carriers no additional relief.\(^{34}\) In response, the carriers have begun to appeal the negative decisions of the NFO to the BIA in increasing numbers. At an April 1, 1993 industry meeting with INS officials, the Director of the National Fines Office reported that since the NFO came into existence, carriers have appealed 550-600 cases to the BIA, approximately 300 of which are document destroyer cases.\(^{35}\)

In one final twist, presumably in response to this flood of appeals, the NFO, at least for a period in 1992, included a naked threat against the carriers when informing them that it has decided a case against them. A “Notice poses the fines and they are only canceled if carriers submit defenses. In most cases, carriers have to supply copies of the photocopied documents.

\(^{34}\) At an April, 1993 meeting with industry representatives, an INS official was asked the following question by a frustrated carrier regarding the document-destroying asylum-seeker issue: “Isn’t it apparent to the INS that these passengers are perpetrating a scam on the carriers in that they had documents when they checked in but subsequently destroyed them or returned them to their smuggler?” The INS official responded that “[t]he INS is aware that it and the carriers are subject to organized schemes of fraud,” and explained that this was the reason that the INS established the photocopy rule. Personal notes of meeting (Apr. 1, 1993) (on file with the SMU Law Review Association) [hereinafter April 1, 1993 Notes].

\(^{35}\) Id.
Concerning Appeals to the Board of Immigration Appeals” over the signature of the Director of the NFO included with information on appeals stated, in underlined, bold-faced capital letters:

Please be advised that the INS General Counsel has determined that interest, penalties and handling charges will continue to accrue during the time that your case is on appeal at the BIA. If the BIA affirms the decision to impose the fine, the principal amount of the fine and all interest, penalties and handling charges will be due and payable.

The Notice concluded with this ominous sentence: “You can expect that the case will be at BIA from one to three years, possibly longer, before a decision is rendered.”

C. “TWOV” AND TRANSIT PASSENGER ISSUES

The right to transit without visa (TWOV) is generally available to all passengers traveling through the United States as long as: (1) the passenger’s travel documents establish his or her identity and ability to enter some country other than the United States; and (2) if the carrier is a signatory to a Transit Agreement with the INS.

There are restrictions on TWOVing by some nationalities and differences in rights accorded to passengers depending upon the type of TWOV travel — transit can be either on a direct flight on the same carrier or by means of an interline transfer from one carrier to another.

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36 In his written responses to Congressman Oberstar, then-Commissioner McNary explained that “[t]he BIA has completed review of relatively few NFO decisions, because the BIA’s fines appeals are mixed with other types of cases in an approximately two-year backlog, worked in chronological order by filing date. Most of the appeals from NFO decisions were sent to the BIA comparatively recently.” Hearing Report, supra note 23, at 87. The current status of the interest issue is unclear. Industry requests for a copy of a General Counsel’s opinion on this issue were never honored.


38 An example is stopping in Los Angeles on a JAL or VARIG Tokyo-Rio de Janeiro flight.

39 Examples include transferring in Miami after arriving from Buenos Aires on Aerolineas Argentina for a flight to Paris on American or transferring in San Juan after arriving from Frankfurt on Lufthansa for a flight to Mexico City on Mexi-
Certain individuals (e.g., citizens of France) are eligible to transit the United States without visa in any circumstances; others (e.g., citizens of the People's Republic of China) are eligible to transit the United States without visa only in certain circumstances (e.g., on direct, continuous flights); and yet others (e.g., citizens of Iraq) are not eligible to transit the United States without visa under any circumstances. Finally, passengers can only travel through the United States in TWOV status if the carrier on which they are travelling has entered into an "Immediate and Continuous Transit Agreement" with the Service on Form I-426 (TWOV Agreement).

Travelling as a TWOV is one of the easiest ways to gain access to the United States without obtaining a visa or qualifying for the visa waiver program. Nationals of Albania, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, the Mongolian People's Republic, the People's Republic of China, Poland, Romania, or the former Soviet Union can TWOV only on direct-through flights that depart directly to a foreign place from the port of arrival. 8 C.F.R. § 212.1(f)(2) (1993). Nationals of any of these countries who can prove residence in unrestricted countries are eligible to TWOV as if they were citizens of unrestricted countries. Id.

Citizens of Afghanistan, Bangladesh, Cuba, India, Iran, Iraq, Libya, Pakistan, and Sri Lanka and citizens or nationals of North Korea and Vietnam are never eligible for TWOV and must always obtain visas. Id. § 212.1(f)(3). The INS is in the process of denying TWOV privileges to citizens of the former Yugoslavia. See 58 Fed. Reg. 4891 (1993); 58 Fed. Reg. 43,438 (1993); 58 Fed. Reg. 58,568 (1993). In addition, according to INS's most recent Regulatory Agenda, Haiti, Honduras, the People's Republic of China, and Somalia are scheduled to be added to the list of countries for whose citizens the TWOV privilege is not available. 58 Fed. Reg. 56,571 (1993). This new rule, most recently scheduled to appear in October, 1993, remains unpublished. The INS describes the rule as designed to "eliminate the abuse of the TWOV procedure by the above aliens misrepresenting themselves as transit passengers." Id.

See 8 C.F.R. § 212.1(f)(1) (1993). Section 238(c) of the INA empowers the Attorney General "to enter into contracts . . . with transportation lines to guarantee the passage through the United States in immediate and continuous transit of aliens destined to foreign countries." INA § 238(c), 8 U.S.C. § 1228(c) (1988). The only section of the regulations that relates to such contracts provides that "[a] transportation line bringing aliens to the United States . . . [as transit passengers] shall enter into an agreement on Form I-426. Such agreement shall be negotiated directly by the Central Office and the head offices of the transportation lines." 8 C.F.R. § 238.3(a) (1993). The INS Form I-426 was last revised on May 1, 1965. See 8 C.F.R. § 299.1 (1993).
1. TWOVs Not Presented

One of the Service's most outrageous scenarios for fining arose at about the time of the trebling of the fines from $1,000 to $3,000. The TWOV process is cumbersome and is generally viewed by the Service as a nuisance it would like to eliminate.\(^4\) Several years ago, the Service requested, by letter entitled "Notification to Carriers and Request for Carrier Cooperation," that the carriers adopt certain procedures for processing interline TWOV passengers. The INS asked that the airlines segregate TWOV passengers and retain their documents. The airlines were asked to group the TWOVs together physically and to have an airline agent present all of their documents together, at one time, to a particular INS inspector for processing. Once inspected, the airlines were asked to "continue the safeguarding of the TWOV passengers until departure from the United States has been effected."\(^4\)

It is not hard to imagine how such procedures can go awry. Passengers disembarking from a transoceanic international flight are tired and jet lagged. Entry and exit procedures of various countries are quite different and confusing, even to the most sophisticated traveler. A tired, confused, jet-lagged, non-English speaking passenger emerging from an international flight with as many as 350 other passengers at an unfamiliar airport will not necessarily hear or understand the carrier's announcement that all transit passengers should assemble in a particular place. Yet, if one of those passengers missed such an announcement and accidently entered a regular INS inspection line, the Service would impose a $3,000 section 273 fine on the carrier.

There is no statutory or regulatory requirement that the

\(^{4}\) Canada has eliminated TWOV completely. Informal suggestions by the INS in the late 1980's to eliminate TWOV in the United States were met with stiff carrier resistance.

\(^{4}\) "Notification to Carriers and Request for Carrier Cooperation" from the Associate INS Commission for Examinations, reprinted in Hearing Report, supra note 23, at 323.
carriers adopt these procedures. The Service merely requested their adoption. Despite the lack of any basis in law or regulation for fines on carriers for failure to "present" TWOVs, the Service indeed imposed such fines on carriers. There is no question that this was a planned and deliberate policy of the Service: Even the forms prepared for airport INS inspectors listed "Transit passenger not presented as a TWOV" as one of the routine bases for section 273 fines. While the INS finally, after sustained attacks on both the legal and policy fronts, withdrew this category of fines late in 1991, it has never acknowledged the illegality of the position it asserted or refunded (as required by section 273(c)) the fines already collected.\(^4\)

\(^4\) See the NFO-I Form, 8 C.F.R. § 280 (1993); see also supra note 24.

\(^5\) In canceling pending cases of this type, the NFO referred to a November 12, 1991 policy directive from INS Headquarters, Inspections Division, on section 273 fines. According to the NFO notice, in cases where a carrier "fails to escort and present an intending transit-without-visa (TWOV) passenger," no fine will be imposed if the "Service ultimately processes such passengers as TWOVs."

The INS did not concede, however, that there is no "presentation" requirement. In a March 12, 1992 letter, the Assistant INS Commissioner for Inspections described the Service's position as follows:

We agreed that there remained a need to assess a penalty for "failure to present" and decided that the better and more equitable mechanism would be to create a TWOV liquidated damage for such failure. Until such time as a new TWOV contract is established, we decided to suspend the issuance of Section 273 fines. This was a prospective action and was in no way intended to imply that INS was incorrect in finding for these cases in the past. We may decide to reinstitute the policy if the violation cannot be incorporated into a new TWOV agreement and/or if there is a noticeable increase in this type of problem at our Ports of Entry.


Despite its shaky legal basis, the Service is very attached to the idea that carriers are required to present TWOVs. It is probably related to the fact that processing interline TWOV passengers is a nuisance that the Service, quite properly, believes requires special procedures. Belief in the "presentation" requirement is an article of faith with many inspectors, who generally have a rather limited and unsophisticated understanding of the law or regulations that they must interpret. It also exerts a powerful attraction at INS headquarters, which continues to try policies that seem to be rooted in this belief.

While section 271 (the mitigable fine section usually applied in cases when the aliens come to the United States from Mexico, Canada, or other contiguous terri-
2. Transit Asylum Seekers

As noted above, the ability of an alien to transit the United States without visa depends on the nature of the transit (whether online, on a "direct, continuous flight," or interline) and on the citizenship, nationality or residence of the transiting alien. Thus, in section 273 terms, the only diligence possible is to check passengers before embarking them to be sure that they meet the TWOV standards that apply to them:

— that they have the proper citizenship, nationality or residence for the type of transit they are going to make during their journey; and

— that they have valid onward tickets for travel beyond the United States as required by the regulations.

But the INS, with respect to such passengers, again overstepped its legal authority under section 273, by fining carriers who had properly boarded such passengers if those passengers requested political asylum. These fines were imposed despite the fact that the carriers met all statutory requirements by checking the passengers before boarding them at the "last port outside the United States," as well as all regulatory requirements, by confirming the citizenship of the aliens and ensuring that they were properly ticketed for a point beyond the United States. Again, the Service eventually relented and canceled the fines it imposed when carriers provided documentary evidence of citizenship and ticket status of these aliens. (Tories) requires the airlines to "present" the passengers for inspection at the point of arrival in the United States, the probable basis for the widespread view within the INS about a "TWOV presentation" requirement is language in the TWOV Agreement, which, at paragraph two, provides that "the line shall present such documents for each alien transported under the agreement as may be required by Title 8, Code of Federal Regulations." Sample Immediate & Continuous Transit Agreement (on file with the SMU Law Review Association). The Service, however, has never gotten around to writing any carrier requirements into the C.F.R. with respect to TWOVs. The only requirements with respect to TWOVs that appear in the regulations concern the requirements for the individual alien to TWOV. See 8 C.F.R. § 212.1(f) (1993). This belief in a TWOV presentation requirement has also had a powerful effect on the detention issue. See discussion infra part III.
passengers.\(^{47}\)

D. "**CATCH 22" FINES**

About five percent of the section 273 fines imposed by the NFO fall into a maddening category in which the carriers simply can do nothing right. Examples include the following:

- A carrier boards a Canadian citizen for a flight to the United States (no visa is required — a Canadian passport is sufficient). Upon inspection, the INS learns that the Canadian is a permanent resident of the United States who has neglected to carry his "green card" with him.

- A carrier boards an alien who meets all the requirements of the visa waiver program.\(^{48}\) Upon inspection, the alien requests admission in another non-immigrant status, such as student (F-1), temporary worker (H-1), or intra-company transferee (L-1).

In November 1992, again in response to legal challenges directed at the NFO and to policy arguments by the industry to INS headquarters, the Service agreed that the NFO would “take another look” at fines in these categories.\(^{49}\) Although the airports will continue to write these up, the NFO states that it expects that 95% of such fines will not

\(^{47}\) In the March 12, 1992 letter (see supra note 46) describing the November 1991 “policy shift,” the Assistant Commissioner stated:

> [W]e agreed that the INS would temporarily suspend issuing Section 273 fines if the carrier properly boarded the passenger as a TWOV. The carrier must substantiate that the passenger was properly boarded a TWOV, to wit, eligible for the TWOV privilege by nationality, properly ticketed, carrying an identity document, eligible for entry into the onward country, etc.

The INS has issued no subsequent clarification or guidance, and the TWOV issue remains extremely controversial in the detention context.

\(^{48}\) Those currently eligible to travel to the United States without visa under the "visa waiver" program include citizens of the United Kingdom, Japan, France, Switzerland, Germany, Sweden, Italy, the Netherlands, Andorra, Austria, Belgium, Denmark, Finland, Iceland, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, San Marino, Spain, and Brunei. Visa Pilot Program, 8 C.F.R. § 217.5 (1993); see also 58 Fed. Reg. 40,581 (1993).

\(^{49}\) Those fines were also reviewed in the March 12, 1992 Letter of the Assistant Comm’r for Inspections. See supra note 46.
The Service's new position on the "Catch 22" fines was confirmed during an April 1993 meeting with industry representatives, during which INS officials stated that since the November 1992 policy change, more than $600,000 in fines in categories recommended by the ports have been canceled by the NFO without sending notices to the carriers.\footnote{April 1, 1993 Notes, supra note 34.}

E. "GARDEN VARIETY" FINES

Carriers are still liable for the "cost of doing business" type fines that have always been imposed upon them. These arise in situations such as the following:

- boarding a passenger whose passport or visa for the United States has expired;
- boarding a passenger as a visa waiver or TWOV passenger who is not eligible by nationality for that status;
- boarding an alien permanent resident of the United States who does not have his or her green card.\footnote{Although there is no unequivocal statutory basis for a fine in such circumstances, a 1989 BIA decision held that section 273 liability applies to carriers who transport lawful legal permanent residents (LPR's) who do not have their green cards in their possession. It was not enough that the passenger was an LPR and was ultimately admitted. The key, in the view of the Board, was that "the alien passenger did not have documents in her possession that would entitle her to enter." In re Eastern Airlines, Inc., Flight \#798, 1989 BIA LEXIS 16, at *5 (Int. Dec. 3110 Jan. 23, 1989).}

There is virtually no defense against fines imposed in cases such as these. The best advice for airlines is to pay if there is no question that the boarding station "goofed."\footnote{In cases where the passenger's documents are forged, the Service generally...}
F. A Worldwide Problem

The free movement of people is emerging as one of the great post-Cold War issues. Refugee and asylum issues will continue to be pressing problems for all of the developed countries. In the United States, the World Trade Center bombing and the grounding of the Golden Venture have served as catalysts for public attention to this issue. As a result, there is a chance that a “summary exclusion” provision will be added to the INA that will essentially allow the INS to turn “frivolous” asylum-seekers around at the airports and send them back to their points of embarkation or home countries.54

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54 Even before the President's announcement of a new immigration policy, various proposals were pending before the Congress. Many of them include provisions for some sort of “summary exclusion” of those who arrive without documents or with false documents and request political asylum. H.R. 2602 established a "provisional asylum" process for those who demonstrate a "credible fear of persecution" upon arrival at a port without the requisite documentation. H.R. 2602, 103d Cong., 1st Sess. (1993). Aliens who request asylum at a port and fail, in the opinion of the examining officer, to meet the "credible fear" standard, are to be ordered excluded without further hearing or review. Id. H.R. 1355 would bar asylum claims by such passengers unless the alien arrived directly from a country where he or she "has a credible fear of persecution," or "there is significant danger that the alien would be returned to a country in which the alien would have a credible fear of persecution." H.R. 1355, 103d Cong., 1st Sess. § 2 (1993). In addition to the summary exclusion provisions, H.R. 2602 and H.R. 1355 would also increase jail terms for smugglers from five to ten years. Id. § 6. S. 667 is essentially the same as H.R. 1355. H.R. 1679 provides for a complete overhaul of asylum law, and includes presumptions, based on previous cases, for which aliens should be granted protection from refoulement, or return to their country of nationality or last habitual residence. H.R. 1679, 103d Cong., 1st Sess. § 2 (1993). H.R. 1153 would provide for expanded preinspection at foreign airports, provide for a
Asylum and refugee issues make headlines everyday in Europe: the situation in Germany is probably the most dramatic. The European Community (EC) has failed to achieve the free movement of people that is an essential element of the borderless union that was supposed to come into effect on January 1, 1993. The EC continues to squabble on this issue and EC citizens complain about the travel restrictions that still apply in Europe. Meanwhile, permanent visa waiver program, and expedite airport immigration processing. H.R. 1153, 103d Cong., 1st Sess. §§ 2-4 (1993). H.R. 2602 also included similar technical and administrative measures.


At an October 20, 1993 Mark-Up by the Subcommittee on International Law, Immigration and Refugees of the House Committee on Judiciary, an amendment adding a mitigation provision to section 273 of the INA was inserted in H.R. 2602. This provision would allow mitigation "under such regulations as the Attorney General shall prescribe in cases in which (1) the carrier demonstrates that it had screened all passengers on the vessel or aircraft in accordance with procedures prescribed by the Attorney General, or (2) there exist other circumstances that the Attorney General determines would justify the remission or mitigation of the penalty." H.R. 2602, 103d Cong., 1st Sess. (1993). This provision, if it becomes law, will thus be significant, not only because it will allow mitigation of section 273 fines, but also because it makes regulatory guidance for carriers on "reasonable diligence" a possibility. After the Mark-Up, H.R. 2602 was renumbered H.R. 3363. See supra notes 17, 20.

With laws that went into effect July 1, 1993, Germany amended its constitution, the Basic Law of 1949, to limit the grant of political asylum in Germany. Now, persons entering Germany from "safe countries" (which include the entire EC and the eastern European countries that border on Germany as well as others, such as India, Ghana, and Senegal) will automatically be denied political asylum. German Information Center, Bundestag (Again) Debates Proposed New Laws on Foreigners and Asylum Seekers: Majority Support Unlikely, THE WEEK IN GERMANY, Mar. 5, 1993. This was designed to reduce the huge numbers who had flocked to Germany (in January 1993, Germany had 400,000 unresolved asylum-seeker cases) in response to the guarantee in Article 16 of the Basic Law, which states that "persons persecuted on political grounds shall enjoy the right to asylum," and which previously had been completely unqualified. German Information Center, German Bundestag Votes to Restrict the Right to Asylum; Bonn in a State of Siege, THE WEEK IN GERMANY, May 28, 1993.
the Schengen Agreement\(^5^6\) provides for new methods of managing travel in Europe, requiring signatories "in accordance with their constitutional law, to impose penalties on carriers who transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories."\(^5^7\) While the International Air Transport Association (IATA) and individual carriers have fought new fines schemes, country after country has implemented them.\(^5^8\)

**G. Possibility of Carrier Compliance Program**

The U.K. and Canada recently implemented carrier compliance programs, designed primarily to cope with the document-destroying asylum-seekers. Under these programs, fines against carriers are waived in certain circumstances and upon evidence of carrier compliance with prescribed standards.\(^5^9\) Until recently, the INS expressed

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\(^{5^6}\) Art. 26, concluded June 14, 1985, signed June 19, 1990 (the Schengen Implementation Agreement). The Benelux countries (Belgium, the Netherlands, and Luxembourg), Germany, France, Spain, and Portugal are signatories.

\(^{5^7}\) Id.

\(^{5^8}\) Countries imposing fines on carriers include the United Kingdom, Belgium, Canada, Australia, Bolivia, Brazil, Denmark, Germany, Argentina, Uruguay, and Venezuela. See No Entry, AIR TRANSPORT WORLD, Oct. 1992, at 53; see also Maryellen Fullerton, Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights, 29 VA. J. INT'L L. 35 (1988).

\(^{5^9}\) Canada implemented new immigration laws on January 31, 1993. The new law eliminated carrier fines for bringing improperly documented aliens to Canada and replaced the fines with a new system of administrative fees. These new fees of $3,200 per offense can be mitigated if the carrier involved has signed a memorandum of understanding with the Canadian immigration authorities. See Letter to Carriers from Employment and Immigration Canada, Appendix A: Implementation of the Administration Fee system, Appendix B: Backgrounder, 2; Unofficial Consolidation of Immigration Regulations § 42.3 (on file with SMU Law Review Association). The MOU commits the carrier to certain passenger screening procedures, and commits the Canadian Government to offering training and technical support for such screening. Id. The new law requires that, as of March 1, 1993, all carriers operating into Canada post security deposits to guarantee payment of the administrative fees. Id. The new immigration law also includes provisions making it harder for document destroyers to qualify for political asylum. Id.

The British have instituted a program of "Approved gate check (AGC) status": an arrangement whereby the Immigration Service agrees that it will not normally enforce charges [U.K. fines are 2,000 pounds per of-
no interest whatsoever in such an accommodation.\textsuperscript{60} Early in 1993, however, the Service began informal discussion with industry representatives and, by mid-August, 1993, ATA and IATA were circulating a draft Carrier Compliance Initiative (CCI).\textsuperscript{61} This CCI draws heavily on the U.K. and Canadian models and promises exercise of INS "prosecutorial discretion" in not imposing fines against carriers that undertake and maintain specified passenger screening and fraud detection techniques. The CCI would also require the INS to provide guidelines, training, and advice to carriers. The carriers would be required to follow the guidelines established by the INS in checking documents, screening, and, in some cases, interrogating passengers. Although the CCI does not include provisions for mitigation of section 273 fines, it is hoped that mitigation will be included in any immigration legislation passed by the current Congress.\textsuperscript{62}

\textsuperscript{60} The INS rebuffed an April, 19, 1991 Petition for Rulemaking by the Air Transport Association (ATA) on this very topic. Letter from James L. Hogan, Executive Associate Commissioner for Operations, to Richard G. Norton, Senior Director, Facilitation, Air Transp. Ass'n of Am. 1 (July 8, 1992) (on file with the SMU Law Review Association).

\textsuperscript{61} ATA Facilitation Memorandum No. 93/63 (FAL 93/63) (Aug. 17, 1993); IATA Memorandum to FAL Representatives of Carriers Operating to/from the U.S. (Nov. 1993); ATA Facilitation Memorandum No. 93/82 (FAL 93/82) (Nov. 23, 1993).

\textsuperscript{62} Richard E. Norton, ATA's Managing Director, Facilitation, suggested an amendment to section 273 to allow for mitigation in April 27, 1993 testimony before the Subcommittee on International Law, Immigration, and Refugees of the House Committee on the Judiciary, Immigra
III. DETENTION

Carriers believed they were generally relieved of the obligations to detain problem aliens with the passage of the 1986 user fee amendments to the INA.63 This shift in responsibility for detention of aliens was part of the com-

63 These amendments were included in the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-59, 100 Stat. 3241 (1986). Before 1986, the INA made carriers liable for all detention costs of problem aliens they brought to the United States. Former section 233 of the INA empowered the Attorney General to order the temporary removal of any alien for later examination at a designated time and place, with the temporary removal and attendant detention being at the expense of the carrier. 8 U.S.C. § 1223 (repealed Pub. L. No. 99-500, 100 Stat. 1723-39, 1783-56 (1986)). In addition, section 232 of the INA, which provided for physical examination of aliens suspected of being inadmissible on medical grounds, allowed the Service to order the detention of aliens "on board the vessel or at the airport of arrival . . . unless the Attorney General directs their detention in a United States immigration station or other place specified by him at the expense of such vessel or aircraft." INA § 232, 8 U.S.C. § 1222 (1988). Section 233 was repealed by the user fee amendments of 1986, and section 232 was amended to add the following limit on the detention: "such aliens shall be detained by the Attorney General for a sufficient time to enable the immigration officers and medical officers to subject such aliens to observation and an examination sufficient to determine whether or not they belong to the excluded classes." INA § 232.

It is reasonable to believe that there are still some circumstances in which the airlines are responsible for detention of aliens. One of these involves "excluded" aliens who are about to be deported. INA § 237, 8 U.S.C. § 1227. In the words of the Legal Opinion of the Office of the INS General Counsel of August 10, 1992: "Pursuant to § 237(a)(1) . . . the Service may charge carriers for the detention-related expenses of inadmissible aliens who are subject to an order of exclusion under the INA, but generally may not charge carriers for the detention costs of inadmissible aliens who are not subject to an order of exclusion." Legal Opinion of the Office of the INS General Counsel (Aug. 10, 1992) (on file with SMU Law Review Association); Hearing Report, supra note 23, at 67. This is a very old obligation. The Act of 1882, ch. 376, § 4, 22 Stat. 214, provided (in section 4) that:

All foreign convicts except those convicted of political offenses, upon arrival, shall be sent back to the nations to which they belong and from whence they came. . . . The expense of such return of the aforesaid persons not permitted to land shall be borne by the owners of the vessels in which they came.

Id. at 215.

Carriers are also required to return problem passengers who are excluded upon withdrawal of their application for admission and their assent to immediate "voluntary departure." Legal Opinion of the Office of the INS General Counsel (Aug. 10, 1992) (on file with SMU Law Review Association); Hearing Report, supra note 23, at 67. These are not the cases the industry is disputing.

In this same Legal Opinion, the Office of the General Counsel also takes the position that:

1) the Service "may charge carriers for the detention-related expenses of stowaways under §§ 237(a) and 273(d) of the INA";
promise whereby the carriers agreed to support implementation of the immigration user fee.\textsuperscript{64} The statute specifically provides that user fee revenues are to be used for “providing detention and deportation services for excludable aliens arriving on commercial aircraft and vessels.”\textsuperscript{65}

But, as with the fines, the Service has sought confrontation. In a fashion that reveals no rational scheme, the Service has forced carriers to keep some asylum-seekers in airline custody as they await disposition of their asylum claims. Again, the controversy revolves around “stowaway” and TWOV passengers. Before the January 1991 legal opinion stating that document destroyers could not be classified as stowaways,\textsuperscript{66} the INS forced carriers to keep document destroyers in custody, but then quietly dropped this practice. It still maintains that carriers are required to keep custody of true stowaways (rare as they are on airlines) and TWOV passengers who ask for political asylum. Disposition of asylum claims often takes months, if not years. The total costs of some carriers have approached the $1 million mark.

The industry, after reported approaches to the Service, all of which were either ignored or rebuffed,\textsuperscript{67} sued the

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\textsuperscript{2} “the Service may charge air carriers for the detention-related expenses of TWOV’s”; and

\textsuperscript{3} the user fee provisions “do not prevent the Service from imposing upon carriers the costs of detention for stowaways and TWOV passengers who seek political asylum.”

\textit{Hearing Report, supra} note 23, at 67-68. The industry disagrees with these three conclusions, and believes that only the requirement to deport aliens subject to orders of exclusion has survived the user fee amendments to the INA.


\textsuperscript{65} \textit{Id.} § 1356(h)(2)(A)(v).

\textsuperscript{66} See \textit{Hearing Report, supra} note 23.

\textsuperscript{67} The industry had been seeking relief from the INS for well over a year: Lawsuit, to be filed in United States District Court in Washington, comes after months of efforts by ATA to convince INS to change the policy voluntarily. Failure of agency lawyers to provide ATA with a promised response as to whether the policy would be changed may, as much as any aspect of the issue, have been the final blow that caused the airline group to seek relief from the courts.
Motions for summary judgment have been pending for more than a year. Emphasizing the lack of legal basis for the INS's position, the industry is arguing that the United States Government decision to grant asylum-seeking rights to all aliens is not one that the carriers should have to pay for by holding certain asylum seekers in their custody until the asylum claims are decided. The legislative history supports the carrier position that all detention is now the responsibility of the Service. The House Conference Committee report on the user fee statute explained that it "would release scheduled passenger airlines and vessels from the responsibility to assume custody or financial responsibility for aliens who arrive by plane or commercial vessel in the United States without proper documentation."

The Service advances different reasons in defense of its policies with respect to stowaways and TWOV passengers. In its pleadings in the lawsuit, as in its Legal Opinions, the Service has taken the position that stowaways are "excluded" rather than "excludable," and therefore the obligation of the carriers rather than the Service to detain. To make this argument, the Service in effect creates a new category of alien — one that is neither


There is some belief that the INS itself is relying merely on "executive discretion," in part out of its frustration with the TWOV program. See supra notes 37-42 and accompanying text.


Several other cases on related issues are also pending. In Ceskoslovenske Aeroline a/k/a Czechoslovak Airlines, No. 92-6760 (S.D.N.Y. filed Aug. 27, 1992), the carrier is contesting INS demands that it pay for ten months of detention costs for an asylum-seeker who arrived as a stowaway and whose asylum claim was denied, presumably because he already had been granted asylum in Czechoslovakia (which was known by the INS immediately upon his arrival). In Pakistan Int'l Airlines v. United States, No. 92-481C (Cl. Ct. filed July 14, 1992), the carrier seeks return of detention expenses under the Tucker Act.


excludable nor excluded (in the section 237 sense — see supra note 63) but rather excluded ab initio:

The use of the term “excludable” is significant. There is a clear distinction between those aliens who are deemed “excludable” and are detained pending a final decision on their exclusion, and those who are “excluded” ab initio . . . . The INA, therefore, divides responsibility for cost of detention based upon whether the alien is “excludable,” i.e., is susceptible to exclusion but is not yet subject to an order of exclusion, or is “excluded,” i.e., is subject to an order of exclusion under INA § 236, 8 U.S.C. § 1226, or is deemed excluded without necessity of such an order, as is the case with stowaways.72

Despite its reliance on a conclusion that stowaways are excluded ab initio and can be excluded (and presumably removed from the United States) without an order of exclusion, the Service points to sections 212(a)(6)(D) and 273(d) of the Act for support of its position on stowaways. Section 212, however, without defining the term, specifically declares stowaways “excludable.”73 The Service insists, however, that a stowaway is “immediately excludable,” and, “[u]nlke other ‘excludable’ aliens who arrive in the United States, a stowaway is not entitled to a hearing before an Immigration Judge, and does not have any rights of appeal.”74 The Service draws this “distinction” and takes the position that stowaways are immedi-

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72 Motion in Opposition, supra note 71, at 3.
73 8 U.S.C. § 1182(a)(6)(d) (Supp. IV 1992). Section 273(d) includes special provisions on stowaways, making them ineligible to appeal negative decisions on asylum claims by INS district directors to immigration judges, and requiring carriers to detain stowaways “on board or at such other place as may be designated by an immigration officer . . . . until such stowaway has been inspected.” Id. § 1323(d). It also allows the INS to order similar detention “after inspection,” and allows the INS to fine the carrier for failing to carry out the detention or to deport a stowaway. Id. § 1323(d). Czechoslovak Airlines argues that the Service’s exclusive remedy for failure to detain a stowaway is thus a $3,000 fine. See supra note 69.
74 Motion in Opposition, supra note 71, at 21; see also supra note 54. The Court of Appeals for the Second Circuit, relying on the broad-sweeping asylum provisions of section 208 of the INA, has specifically rejected the theory that stowaways have no rights of appeal. Yiu Sing Chun v. Sava, 708 F.2d 869, 875-76 (2d Cir. 1983).
ately excluded so as to be able to rely on the carrier
detention requirement of section 237 of the Act. Accord-
ing to the Service:

That distinction is significant. From the time of his arrival
in the United States, a stowaway is considered excluded (i.e.,
not merely “excludable”) for purposes of INA § 237(a)(1).
That provision has, since 1952, unequivocally required
that in the case of any alien “who is excluded . . . [t]he cost
of the maintenance including detention expenses and exp-
penses incident to detention” shall be borne by the car-

The industry argues that, aside from the obvious dis-
crepancy between the actual language of the statute and
the INS’s gloss on it, the INS position ignores the effect of
the Refugee Act. Stowaways who request political asylum,
like every other alien present in the United States or at a
port of entry, are entitled to have that request fully con-
sidered. Stowaways who request political asylum are not
subject to immediate deportation. No determination of a
stowaway’s excludability, i.e., no finding that an “excluda-
ble” alien should indeed be “excluded,” and therefore
deported, can be made until his or her request for polit-
ical asylum is adjudicated. Only upon a full exclusion
hearing can such a determination be made, and only upon
a finding that an “excludable” alien is not eligible for ad-
mission to the United States is such an alien ordered ex-
cluded. It is upon such orders that deportations are
effectuated, and it is only at this point that carrier respon-
sibilities under section 237 are applicable — responsibili-
ties for the immediate deportation of aliens excluded
from the United States under the INA.76 A stowaway who
requests political asylum is not, at the time the asylum re-
quest is made, “immediately excludable” or “excluded ab
initio,” and he or she is not subject to deportation.77

75 Motion in Opposition, supra note 71, at 21.
76 See supra note 54.
77 The same arguments the airline industry has used on this “excludable” vs.
“excluded ab initio” issue were advanced by the shipping industry in a recent case
With respect to TWOV passengers who request political asylum, the INS relies on the TWOV Agreement and on the user fee regulations. The Service eschews the "excludable versus excluded" argument it relies on with stowaways and admits that TWOV asylum seekers are excludable and subject to exclusion proceedings to determine whether they are to be excluded. But as it did on the question of how and why a stowaway is excluded, the Service errs in defining the basis for exclusion of TWOV asylum seekers. The Service states that they are "excluded pursuant to 8 C.F.R. § 238.3." As explained below, this section of the regulations merely authorizes the Service to enter into TWOV Agreements. Exclusion of TWOV asylum seekers, as the Service itself notes, only follows a finding of no basis for the grant of political asylum, and is most likely to be made pursuant to section 212(a)(6)(C)(i) of the INA, which provides that aliens who "by fraud or willfully misrepresenting a material fact, [seek] . . . entry into the United States" are to be excluded.

The Service argues that, in the wake of the adoption of the user fee amendments to the INA, it has consistently relied upon the TWOV Agreement to justify a requirement for carrier detention of TWOV asylum seekers and that the regulations adopted to implement the user fee involving a stowaway on board a cargo vessel. In a decision on a summary judgment motion that the judge characterized as "one of first impression not just in this Circuit, but on a national basis," the Service prevailed. Dia Navigation Co. v. Reno, No. 93-1366, letter op. (not for publication) at 19 (D.N.J. 1993). The judge emphasized the "substantial deference" due the interpretation of the agency administering the statute, id. at 22 n.15, concluding that "[a]lthough the INS does not specifically describe stowaways as excluded aliens, the statute implicitly recognizes that stowaways constitute a 'disfavored' category of aliens . . . ." Id.

The INS has stated that the "single ground" for its policy is that "it is consistent with the terms of the TWOV Agreements." Motion in Opposition, supra note 71, at 18.

78 The INS has stated that the "single ground" for its policy is that "it is consistent with the terms of the TWOV Agreements." Motion in Opposition, supra note 71, at 18.

79 Id. at 8, 9 n.2.

80 Id. at 9.

81 See infra note 87.

82 Motion in Opposition, supra note 71, at 8.

amendments support that reliance. For the purposes of the INS' argument, the relevant sections of the TWOV Agreement are paragraphs two and four. Paragraph two refers to the "presentation" requirement.\(^8^4\) Paragraph four provides:

\[
\text{[A]ll alien passengers brought to the United States under this agreement shall be detained in quarters provided or arranged for by the line, in the custody of immigration officers of the United States or such other custody as the Commissioner may approve. Provided, that the line shall reimburse the United States for salaries and expenses of immigration officers of the United States during such times as they are actually employed in maintaining custody of such alien passengers. The line shall maintain supervision of all such passengers at all times while they are in the United States and not in the actual custody of immigration officers or other custody approved by the Commissioner.} \(^8^5\)
\]

The INS also relies on regulations it promulgated to implement user fee procedures. During the user fee rulemaking process, the INS initially proposed that "[t]he Service will assume custody of any alien."\(^8^6\) The INS altered the final version of the rule, with no explanation of its rationale, to read: "[t]he Service will assume custody

\(^{8^4}\) See supra note 42.

\(^{8^5}\) Id.

\(^{8^6}\) Notice of Proposed Rulemaking, 53 Fed. Reg. 1791 (1988) (to be codified at 8 C.F.R. § 235.3(d)) [hereinafter NPRM]. This was proposed as a revision to 8 C.F.R. § 235.3(d). (Part 235 is entitled "Inspection of Persons Applying for Admission."). According to the NPRM, this section was to be amended to read: ".(d) Service custody. The Service will assume custody of any alien subject to detention under § 235.3(b) or (c) of this section." NPRM, 53 Fed. Reg. 1791 (1988). Subsection (b) of section 235.3 pertains to aliens with no documentation or false documentation, and subsection (c) pertains to aliens who have documents but who appear to an INS officer to nevertheless be inadmissible. See 8 C.F.R. § 235(b), (c) (1993).

The NPRM also proposed an addition of a new paragraph to one of the sections of part 238, "Contracts with Transportation Lines." NPRM, supra. As proposed by the NPRM, the new subsection of section 238.3 would read: "(c) Carrier responsibility. Nothing contained with the provisions of section 286 of the Act shall be deemed to waive the carrier's liability for detention, transportation, and other expenses incurred in the bringing of aliens to the United States under the terms of this section." Id.
of any alien . . . except in the case of an alien who is presented as a Transit Without Visa (TWOV) passenger." The INS relies on the presentation and detention provisions of the TWOV Agreement to support this change, arguing that section 238 of the Act authorizes this interpretation. Such reliance is misplaced for three reasons.

First, section 238 supports no such interpretation. It

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87 Final Rule, 54 Fed. Reg. 100 (1989) (to be codified at 8 C.F.R. § 235.3(d)) (emphasis added). The INS stated that the Final Rule version of § 235.3 "amends the regulations to address the change from carrier responsibility to Immigration and Service . . . responsibility for the custody and detention of excludable aliens." Id.

The provision of section 238.3 with respect to carrier responsibility for detention of aliens brought to the United States under TWOV agreements remained unchanged from the NPRM. In its analysis, the INS stated:

Although the issue of carrier responsibility for TWOV passengers may be a thorny one, the rules and regulations are very clear. Pub. L. 99-591 did not repeal § 238 of the Act; thus, contracts entered into pursuant to § 238, and in this particular instance we are concerned with carrier financial responsibility for detained TWOV passengers, are valid and enforceable. In sum, carriers are responsible for the detention expenses of detained TWOV passengers while in Service custody as well as having financial responsibility for return transportation to TWOV passengers point to embarkation following a deportation/exclusion order. Id.

It is important to note that the INS commentary does not label this as justification for the further amendment of section 235.3 and its specific TWOV provision. Indeed, that amendment was inserted into the Final Rule with no commentary or explanation whatsoever. At one point in its pleadings, the Service argues, again demonstrating its conviction about "presentation," that "Section 235.3(d) provides that the INS will assume custody of aliens who arrive with no documents or false documents, or otherwise appear to be inadmissible, 'except in the case of an alien who is presented as a [TWOV] passenger.'" Motion in Opposition, supra note 71, at 20. Leaving aside the fact that TWOV asylum seekers are not seeking admission as TWOVs and that they do not have other documentation to justify admission and therefore should logically "appear inadmissible," it should be noted that the Service's reliance on presentation in this argument raises another question: Is the Service conceding that TWOV asylum seekers not presented by the carriers are to be detained by the INS rather than by the carriers pending determination of their asylum claims?

88 The INS has demonstrated its own lack of faith in its position by attempting to force the carriers to sign new and different versions of the agreement at various ports. Carriers were told that unless they signed immediately, their rights to use joint transit lounge facilities would be revoked. This would seem to violate the regulations that authorize the Service to enter into such agreements with the carriers: "[s]uch agreement shall be negotiated directly by the Central Office and the head offices of the transportation lines." 8 C.F.R. § 238.3 (1993).
merely authorizes the Service to enter into contracts with carriers to facilitate passage of transit without visa passengers through the United States. There is no contract provision requiring long term detention of aliens. The TWOV Agreement, which the Service last amended in 1965, provides only for carrier custody of passengers as they await their outbound flight. This was the intent of the parties in making the TWOV Agreement and is how the detention and custody requirements of paragraph four have always been understood. Surely, aliens waiting months for asylum hearings are no longer “passengers.”

Second, in these circumstances, the airlines do not present asylum seekers to the INS as TWOV passengers; the aliens present themselves to the INS as asylum seekers and thereby abandon their status as TWOV passengers. As a practical matter, interline TWOVs often make the asylum request immediately upon disembarkation, before the airline has an opportunity to present the passenger to the INS. With direct-flight-transit TWOV passengers, there is often no INS review of the passengers held in transit lounges and thus no presentation by the carriers. In cases where there is some sort of review, the asylum requests are often made before that process is undertaken. TWOV passengers presenting themselves and requesting political asylum are fully within their rights under applicable international law and under section 208 of the Act. Such circumstances were clearly not contemplated by the parties to the contract when the TWOV Agreement was signed prior to the passage of section 208 of the Act. It is significant that at no point during the user fee rulemaking process did the INS specifically discuss long term detention of asylum seekers.

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89 See supra notes 42, 87. The implementing regulations (8 C.F.R. § 238.3) merely confirm that authorization to enter into agreements with the head offices of the transportation lines and list the lines with which such agreements have been concluded. Id.

90 See supra note 42.

91 Motion in Opposition, supra note 71, at 8.
Finally, if the Service is determined to rely on the TWOV Agreement, it should rely on the sole remedy available to it under the TWOV Agreement — the remedy of having the carrier immediately remove any aliens not eligible for TWOV status. The Service, however, because the United States is required to afford them all the rights guaranteed by the Refugee Act, prevents carriers from removing TWOVs who abandon their status by requesting political asylum.

Astonishingly, while all this is taking place, the INS has revised and liberalized its own standards for detaining asylum seekers. Throughout the course of the lawsuit, INS has ignored the policy issue — the question of whether airlines should be private jailers. Again, particulars of the legislative history seem to support the position of the industry:

The Committee is concerned about the policy of the Immigration and Naturalization Service which requires scheduled passenger airlines to assume custody and financial responsibility for aliens who arrive by plane in the United States without proper documentation . . . . The Committee believes this policy raises significant questions about the equity and legal propriety of requiring private entities to assume the financial burdens of maintaining . . . .

Paragraph five of the TWOV Agreement provides:

the line shall, without expense to the Government of the United States, remove to the foreign port from which the alien embarked to the United States any alien brought to the United States under this agreement whenever such alien is found by the proper official not to be eligible for passage through the United States in immediate and continuous transit.


"'This is a human rights outrage and it's unconstitutional,' said Arthur Helton of the Lawyers Committee for Human Rights . . . . 'No court has ever accepted that people can be subject to unconstitutional conditions of confinement.' “ Al Kamen, Private Prison Holds Airline Passengers Seeking U.S. Asylum, WASH. POST, Jan 19, 1992, at A-1.
and, at times, exercising physical custody over excludable aliens for extended periods of time. Specifically, the Committee is concerned about the possible ramifications of detention of aliens by airline personnel or their agents who are not, of course, law enforcement officials.\footnote{H.R. Rep. No. 197, 99th Cong., 1st Sess. 38 (1985).}

The INS has also ignored the foreign policy issues its policies have raised. Its fines and detention policies have been raised in bilateral aviation negotiations, and several countries have filed diplomatic protests with the State Department. Failure to acknowledge and address these issues serves no constructive purpose.

Although there is some hope for optimism about the positions of the INS in the future, both the litigation and the outrageous overuse of INS fines under section 273 could and should have been avoided. The history of the approach of the INS makes it clear that immigration issues will continue to be a high priority concern for all international air carriers.
Book Review