

PROXY MARRIAGES AND THE MILITARY WIDOW PENALTY: EXCLUDING ALIEN-WIDOWS OF FALLEN SOLDIERS

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*Our duty to soldiers who give their lives does not depend on how their parents or spouses or children entered the United States. Deportation is never fair pay for the death of a family member.*¹

I. INSULT TO INJURY: SERGEANT FERSCHKE AND HOTARU NAKAMA

In August 2008, Marine Corps Sergeant Michael Ferschke Jr. died from combat injuries in the Salah ad Din Province of Iraq; he was twenty-two years old.² Prior to his deployment to Iraq, Sergeant Ferschke was stationed in Okinawa, Japan, where he met Hotaru Nakama, a Japanese woman in her early twenties.³ The couple met at a birthday party: Hotaru was attracted to Sergeant Ferschke's smile and was surprised to meet a man who was so respectful.⁴ Their relationship blossomed, and within

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¹ 149 CONG. REC. 13,588 (2003) (statement of Senator Kennedy).

² *Three Enlisted Marines Killed in Iraq; Deaths Occur Within Four Days of One Another*, MARINE CORPS TIMES, Aug. 25, 2008, at 17 [hereinafter *Marines Killed in Iraq*].

³ Philip Marcello, *R.I. Native, 22, Killed While Serving in Iraq*, PROVIDENCE J.-BULL., Aug. 13, 2008, at 1.

⁴ IN THEIR BOOTS: SECOND BATTLE, <http://www.intheirboots.com/itb/shows/public-television-series/second-battle.html> (last visited Sept. 4, 2011) [hereinafter IN THEIR BOOTS].

months he brought her home to Tennessee to meet his family for Christmas.⁵

After dating for over a year, Sergeant Ferschke took Hotaru to pick out a ring and asked her to be his wife.⁶ Two days after the engagement, Sergeant Ferschke was deployed to Iraq.⁷ Two weeks after his deployment, Hotaru discovered she was pregnant with his baby.⁸ Sergeant Ferschke, excited to learn about the pregnancy, immediately arranged⁹ for a proxy marriage to be conducted through a video conference with Hotaru in Okinawa.¹⁰ Sergeant Ferschke opted to be married by proxy to ensure that Hotaru and their baby would be provided for while he was deployed.¹¹ After all, war required Sergeant Ferschke to stay in Iraq, and a traditional marriage was not an option until after his return.¹² Sergeant Ferschke and Hotaru planned on raising their son in Ferschke's hometown, as an American.¹³ Tragically, however, Sergeant Ferschke was killed in combat one month after the wedding; his wife was five months pregnant with his son Mikey.¹⁴

The U.S. military recognizes proxy marriage and is currently providing Hotaru with survivor benefits; however, under the Immigration and Nationality Act (INA),¹⁵ the U.S. Citizenship and Immigration Services (USCIS) does not recognize an unconsummated proxy marriage for immigration purposes.¹⁶ Accordingly, the USCIS has denied Hotaru the ability to immigrate to the United States to raise their child with her husband's family in Tennessee.¹⁷ Tragically, if the proxy marriage were consummated after the ceremony, Hotaru would be eligible to immigrate to the United States as an immediate relative of a U.S. citizen.¹⁸ However,

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Marcelo, *supra* note 3, at 1.

¹¹ IN THEIR BOOTS, *supra* note 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Marines Killed in Iraq*, *supra* note 2, at 17.

¹⁵ Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101–1537 (2006).

¹⁶ *No Way to Treat a Fallen Marine*, THE VIRGINIAN-PILOT, Nov. 2, 2009, at B8.

¹⁷ *Id.*

¹⁸ U.S. DEP'T OF STATE, VISAS, 9 FOREIGN AFFAIRS MANUAL 40.1 n1.3 (2008) [hereinafter VISAS 2008], available at <http://www.state.gov/documents/organization/86920.pdf>.

because Sergeant Ferschke was serving in Iraq at the time of his marriage, consummation was impossible.¹⁹ Thus, their marriage is not considered valid for immigration purposes, and Hotaru is not eligible to immigrate to the United States based on her marriage to a U.S. citizen.²⁰

The injustice that Hotaru and her family experienced is a result of what this Note calls the “military widow²¹ penalty.” The military widow penalty arises when a deployed member of the U.S. military, who is a U.S. citizen, dies in combat or by accident or disease, which results in an alien-widow immediately losing eligibility to immigrate solely because a proxy marriage had not been consummated, despite evidence of a genuine spousal relationship. Accordingly, the eligibility to immigrate ceases upon the death of the U.S. citizen-spouse, and the USCIS automatically denies the issuance of an immigrant visa to the alien-widow.

This Note argues that Congress should terminate the military widow penalty. Part II of this Note describes the process of securing legal permanent residence status by marrying a U.S. citizen and defines a valid marriage under immigration law. Part III then evaluates the history and formation of the military widow penalty in the United States. Part IV argues that proxy marriages are a defensible form of marriage and, specifically, that Congress should end the military widow penalty for three reasons: (1) unconsummated proxy marriages are recognized for insurance purposes; (2) Congress has recently ended a similar widow penalty for immigrants; and (3) Congress has previously provided similar exceptions for the alien-spouses of members of the military. Finally, Part V argues that private bills are inadequate to prevent future injustice resulting from the military widow penalty, and proposes a modification to the INA.

II. MARRIAGE-BASED IMMIGRATION

Congress has plenary power over the admission of non-citizens to the United States.²² Accordingly, the judiciary’s power is limited when

¹⁹ *No Way to Treat a Fallen Marine*, *supra* note 16, at B8.

²⁰ 155 CONG. REC. S. 10363, 10366 (2009).

²¹ The term *widow* is a gender-specific reference to “[a] woman whose husband has died and who has not remarried.” BLACK’S LAW DICTIONARY 1329 (8th ed. 2004). *Widower* has the same meaning but refers to a man. The “military widow penalty,” as discussed in this Note, could apply to men to the same extent that it applies to women. However, rather than use both terms (*widow* and *widower*) together in each case, this Note uses *widow* as an umbrella term intended to include both men and women.

²² *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889); RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 19 (Stephanie L. Browning ed., 2006).

interpreting immigration laws authorized by Congress.²³ In 1921, pursuant to its plenary power, Congress established a national origins quota system to limit the number of aliens²⁴ immigrating to the United States.²⁵ Thirty-one years later, Congress enacted the INA, also known as the McCarran-Walter Act,²⁶ which provides that the term *immigrant* applies to every alien, except an alien who is eligible for a non-immigrant classification.²⁷

One of the most common avenues for aliens to immigrate to the United States is through a relationship with an immediate relative who is a U.S. citizen (an “immediate relative relationship”).²⁸ Annually, over one-third of immigrants who gain admission to the United States are admissible due to marriage to a U.S. citizen or Legal Permanent Resident (LPR).²⁹ The number of spouses of U.S. citizens admitted to the United States increased from approximately 127,000 in 1999 to 339,000 in 2006,³⁰ while the number of spouses of LPRs increased from 50,000 to 112,000 over the same period.³¹ Women typically comprise the majority of immigrating spouses; for instance in 2008, females made up approximately sixty percent of persons obtaining LPR status through an immediate relative relationship with a U.S. citizen.³²

The immediate relative category was established in 1952 when Congress enacted the INA.³³ The INA provides immigration eligibility through three different types of immediate relatives: (1) children of U.S. citizens; (2) spouses of U.S. citizens; and (3) parents of U.S. citizens, if

²³ BOSWELL, *supra* note 22, at 19.

²⁴ The INA defines the term *alien* as any person that is not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3) (2006).

²⁵ Alien Immigration Limited Emergency Immigration Act, Pub. L. No. 67-5, 42 Stat. 5 (1921).

²⁶ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)) [hereinafter INA].

²⁷ 8 U.S.C. § 1101(a)(15) (2006).

²⁸ For example, in 2005, more than half of all legal immigration to the United States was through a family relationship. Nicole Lawrence Ezer, *The Intersection of Immigration Law and Family Law*, 40 FAM. L.Q. 339, 340 (2006).

²⁹ THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 327 (Thomson West 2008).

³⁰ U.S. DEP’T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2008 YEARBOOK OF IMMIGRATION STATISTICS 18 (2009).

³¹ *Id.*

³² *Id.*

³³ INA § 205(c).

the U.S. citizen child is at least twenty-one years old.³⁴ Unlike other family preference categories defined by the INA, aliens immigrating through an immediate relative are not subject to the worldwide quota restrictions and do not have to face the substantial wait time as do other classifications.³⁵ The INA also provides for the issuance of visas to fiancés of U.S. citizens to allow for the couple to be married in the United States within ninety days of admission.³⁶

To begin the process of securing a family-based immigrant visa, the citizen-spouse may submit a petition to the USCIS to establish the validity of the relationship and the status of the U.S. citizen.³⁷ If the U.S. citizen dies after filing the petition and the couple was validly married for at least two years, the previously filed petition is automatically converted to a widow petition.³⁸ If the U.S. citizen-spouse dies before filing the petition, then the alien-spouse may, if eligible, file a self-petition as an immediate relative.³⁹ To be eligible to self-petition, the alien-spouse, at the time of the death of the U.S. citizen-spouse, cannot be divorced or legally separated from the U.S. citizen-spouse and cannot be remarried. Additionally, the alien-spouse must file the self-petition within two years of the death of the U.S. citizen-spouse.⁴⁰

After the petition is filed, the USCIS will determine if the underlying spousal relationship was genuine.⁴¹ If the alien-widow is residing in the United States and the family immigrant petition is approved, he or she may apply to adjust his or her status to a Lawful Permanent Resident.⁴²

³⁴ 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(i) (2006).

³⁵ *Id.* § 1151(b).

³⁶ *Id.* § 1101(a)(15)(K).

³⁷ *Id.* § 1154(a)(1)(A)(i) (“[A]ny citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 203(a) [8 USCS § 1153(a)] or to an immediate relative status under section 201(b)(2)(A)(i) [8 USCS § 1151(b)(2)(A)(i)] may file a petition with the Attorney General for such classification.”); § 1154(a)(1)(B)(i) (“[A]ny alien lawfully admitted for permanent residence claiming that an alien is entitled to a classification by reason of the relationship described in section 203(a)(2) [8 USCS § 1153(a)(2)] may file a petition with the Attorney General for such classification.”).

³⁸ *See supra* note 37; 8 C.F.R. § 204.2(i)(1)(iv) (2010); *id.* § 205.1(a)(3)(i)(C)(1).

³⁹ 8 C.F.R. § 204.2(b).

⁴⁰ *Id.*; *see also* 8 U.S.C. § 1154(a)(1)(A)(ii) (“An alien spouse . . . may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien’s children) under such section.”).

⁴¹ 8 C.F.R. § 204.2.

⁴² *See* 8 U.S.C. § 1201(a)(1) (stating that a consular officer may issue an immigrant visa to an applicant who has made proper application).

LPR status is advantageous because an LPR-spouse is eligible to become a naturalized citizen after three years⁴³ and can reside and work in the United States while in LPR status.⁴⁴

If the alien is living outside of the U.S., after lawful admission on an immigrant visa, the alien-spouse may then file an application for adjustment of status to LPR,⁴⁵ or if eligible, apply to adjust status to an LPR if currently residing in the U.S.⁴⁶ Once the adjustment-of-status petition is approved, and if the marriage was celebrated within two years, the alien-spouse is granted conditional permanent resident (CPR) status.⁴⁷ If, within two years, it is determined that the marriage was "entered into for the purpose of procuring an alien's admission as an immigrant, or has been judicially annulled or terminated, other than through the death of a spouse," or was otherwise fraudulent, then the CPR status is terminated.⁴⁸ To remove the conditional status, the couple is required to appear for an interview with the USCIS to evaluate the marriage for fraud and eligibility for LPR status.⁴⁹

A. DEFINING MARRIAGE UNDER IMMIGRATION LAW: WHO IS MARRIED?

Generally, the USCIS will determine the validity of a marriage by the laws of the state or country of celebration.⁵⁰ "[M]arriages in foreign countries or in a state or territory of the United States,"⁵¹ must be legally valid, must comply with U.S. public policy, and must not have been entered into for the sole purpose of obtaining an immigration benefit.⁵² For

⁴³ *Id.* § 1430(a). However, a spouse of an LPR is included in the quota system. *Id.* § 1153(a).

⁴⁴ BOSWELL, *supra* note 22, at 125.

⁴⁵ *Id.*

⁴⁶ § 1255(a) ("[An alien may be adjusted to status to an LPR if] (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.").

⁴⁷ 8 U.S.C. § 1186a(a).

⁴⁸ § 1186a(b)(1).

⁴⁹ § 1186a(c)(1)(B).

⁵⁰ *See, e.g., In re Luna*, 18 I. & N. Dec. 385, 386 (B.I.A. 1983) ("[T]he validity of a marriage generally is determined according to the law of the place of celebration."); *In re Gamero*, 14 I. & N. Dec. 674 (B.I.A. 1974) ("Generally, the validity of a marriage is determined according to the law of the place of celebration.").

⁵¹ *See supra* note 50.

⁵² ALEINIKOFF ET AL., *supra* note 29, at 327.

example, common law marriages are considered legal marriages for immigration purposes if legal in the country or state where the marriage was entered.⁵³ However, if a marriage was performed in a particular state or country in order to avoid the marriage laws of the couple's state of residence, then that marriage will be recognized only to the same extent it would be recognized in the state of residence.⁵⁴

As noted above, a valid marriage for immigration purposes cannot be in conflict with public policy.⁵⁵ This is generally understood to mean that a marriage must be lawful in a couple's intended residence within the United States.⁵⁶ Marriages that are not recognized for immigration purposes because they violate public policy, despite being legal in the place of celebration, include incestuous marriages,⁵⁷ polygamous marriages,⁵⁸ and same-sex marriages.⁵⁹

For instance, polygamous marriages are not recognized and the INA states that "[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible."⁶⁰ Currently, the INA will recognize only one marriage and will not recognize a subsequent marriage without termination of the first.⁶¹ Additionally, Congress has also excluded homosexuals from the definition of marriage as the Defense of Marriage Act provides that the term *spouse* "refer[s] only to a person of the opposite

⁵³ See, e.g., *In re Hernandez*, 14 I. & N. Dec. 608, 611 (B.I.A. 1973) (the legitimacy of a child born in Mexico was determined for immigration purposes based on provisions of the Mexican Civil Code, which permitted common law marriages); *In re Garcia*, 16 I. & N. Dec. 623 (B.I.A. 1978) (considering common law marriage under Texas law to be valid for immigration purposes).

⁵⁴ *In re Zappia*, 12 I. & N. Dec. 439 (B.I.A. 1967) (not recognizing an incest marriage because the couple's state of residence did not recognize such marriages, and because the marriage was conducted in South Carolina during a short trip out of state to avoid marriage laws). *But cf. In re E*, 4 I. & N. Dec. 239 (B.I.A. 1951) (recognizing an incest marriage, despite California law voiding such marriages, because California, the couple's place of residence, recognized marriages legally performed in other states and countries).

⁵⁵ ALEINIKOFF ET AL., *supra* note 29, at 327 (citing *In re Darwish*, 14 I. & N. Dec. 307 (B.I.A. 1973) ("plural marriages offend the public policy of the United States)).

⁵⁶ *Id.* at 327.

⁵⁷ *In re Zappia*, 12 I. & N. Dec. 439, 441 (B.I.A. 1967).

⁵⁸ *In re Darwish*, 14 I. & N. Dec. 307, 308 (B.I.A. 1973).

⁵⁹ *Adams v. Howerton*, 673 F.2d 1036, 1041 (9th Cir. 1982) ("[W]e can only conclude that Congress intended that only partners in heterosexual marriages be considered spouses.").

⁶⁰ 8 U.S.C. § 1182 (a)(10)(A) (2006).

⁶¹ *Egan v. Weiss*, 119 F.3d 106, 108–09 (2d Cir. 1997) (denying petition because divorce decree was not final); see also SARAH B. IGNATIUS & ELISABETH S. STICKNEY, IMMIGRATION LAW AND THE FAMILY 4:25 (2002).

sex who is a husband or a wife.”⁶² Thus, the Defense of Marriage Act mandates that the USCIS cannot recognize same-sex marriage, even if same-sex marriage is legal in the place where the marriage was entered.

Congress has also barred proxy marriage for immigration purposes, unless the marriage has been consummated.⁶³ Section 1101(a)(35) provides that the terms “‘spouse,’ ‘wife,’ or ‘husband’ do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”⁶⁴ Thus, generally, “proxy, picture, television, radio, telephone, and other such marriages where the parties were not physically present together are not to be recognized for immigration and naturalization purposes.”⁶⁵ Although unconsummated proxy marriages are specifically excluded by the INA, the USCIS may issue a visa to an alien-spouse who was married by proxy so that the alien-spouse may enter the United States to consummate the marriage.⁶⁶

The U.S. Department of State Foreign Affairs Manual details when a proxy marriage may be recognized for immigration purposes:

For the purpose of issuing an immigrant visa (IV) to a “spouse”, a proxy marriage that has been subsequently consummated is deemed to have been valid as of the date of the proxy ceremony. Proxy marriages consummated prior to the proxy ceremony cannot serve as a basis for the valid marriage for immigration purposes. . . . A proxy marriage, that has not been subsequently consummated, does not create or confer the status of “spouse” for immigration purposes pursuant to INA 101(a)(35).⁶⁷

Thus, the consummation of a proxy marriage will legalize the marriage for immigration purposes and allows the marriage to serve as a basis for immigration.⁶⁸ However, consummation prior to the proxy

⁶² 1 U.S.C. § 7 (2006).

⁶³ 8 U.S.C. § 1101(a)(35).

⁶⁴ *Id.*

⁶⁵ H.R. Rep. No. 82-1365, at 33 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1685.

⁶⁶ See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not Its Demise*, 24 N. Ill. U. L. Rev. 153, 158 n.25 (2004) (citing 9 Foreign Aff. Manual n.10.1 to 22 C.F.R. § 42.41 (2003)).

⁶⁷ VISAS 2008, *supra* note 18, at 40.1, n.1.3-1; U.S. DEP'T OF STATE, VISAS, 9 FOREIGN AFFAIRS MANUAL 40.1, n1.3-1 n1.3-2 (2009), *available at* <http://www.state.gov/documents/organization/86920.pdf>.

⁶⁸ See *id.* (“A party to an unconsummated proxy marriage may be processed as a nonimmigrant fiancé. A proxy marriage celebrated in a jurisdiction recognizing such marriage is

marriage ceremony, as in the case of Sergeant Ferschke and Hotaru, does not validate the marriage for immigration purposes.

Even after the USCIS determines that a marriage is legal and not against public policy the marriage may not be recognized, if it was entered into solely to obtain immigration benefits.⁶⁹ The petitioner bears the burden of proof in establishing that the underlying marriage was entered into in good faith.⁷⁰ Hotaru Ferschke did not appeal the USCIS determination that she was ineligible to immigrate based on her marriage to a U.S. citizen; however, it is evident that, because the proxy marriage was not subsequently consummated, she does not meet the current INA definition of marriage,⁷¹ despite her proxy marriage being legal under Japanese law. Moreover, evidence of pre-consummation, such as the birth of a child, does not make the marriage valid under the INA.⁷² Thus, Hotaru's case demonstrates what this Note has termed the military widow penalty.

The military widow penalty exists when a deployed active-duty member of the U.S. armed forces enters into a legally valid proxy marriage and subsequently dies in combat or by disease or accident while on deployment, thus leaving the proxy marriage unconsummated. This same problem also exists for U.S. citizen-civilian (*i.e.* non-military) petitioners; however, this Note argues that a narrow exception should be added to the INA for proxy marriages involving members of the military due to the unique circumstances of military deaths.

generally considered to be valid, thus, an actual marriage in the United States is not necessary if such alien is admitted to the United States under INA provisions other than as a spouse.”).

⁶⁹ *Skelly v. INS*, 630 F.2d 1375, 1382 (10th Cir. 1980) (“When an alien goes through a marriage ceremony without ever intending to enter into a bona fide marital relationship but solely to facilitate his receipt of a visa, the marriage for immigration purposes is deemed to have been fraudulent and invalid.” (quoting *Kokkinis v. INS*, 429 F.2d 938, 941 (2d Cir. 1970))).

⁷⁰ *See Lutwak v. United States*, 344 U.S. 604, 612 (1953).

⁷¹ Hotaru lived in the United States in limbo on a visitor's visa, while she lobbied Congress to grant her LPR status through a private bill. Correy Stephenson, *Proxy Marriage Leaves Wife, Baby in Limbo*, LAWYERS USA, Oct. 23, 2009, available at <http://lawyersusaonline.com/blog/2009/10/23/proxy-marriage-leaves-wife-baby-in-limbo/>.

⁷² *See VISAS 2008*, *supra* note 18.

III. THE DEVELOPMENT OF EXCLUDING UNCONSUMMATED PROXY MARRIAGES: JAPANESE PICTURE BRIDES AND PROXY MARRIAGES IN THE EARLY 1900S

Immigration authorities in the United States have traditionally been suspicious of proxy marriages. In the early 1900s, Pacific coast immigration port officials did not recognize proxy marriages for purposes of immigration.⁷³ Rather, alien brides who were married by proxy were allowed to enter the United States to legalize their marriages by immediately remarrying their husbands at the port.⁷⁴

The development of the statutory exclusion of proxy marriages for immigration purposes started with the increased number of Japanese “picture brides” immigrating to the United States through the Gentleman’s Agreement of 1907 with Japan.⁷⁵ The Gentleman’s Agreement halted Japanese immigration but provided that Japanese men within the United States could continue to send for a wife or bring a wife into the country.⁷⁶ Some Japanese men returned to Japan to marry, but those with fewer resources exchanged photographs and had their families arrange for picture brides and proxy marriages.⁷⁷

Japanese picture-bride marriages were arranged and brokered by friends and relatives, who provided the bride’s parents in Japan with a picture and description of a potential Japanese groom residing in the United States.⁷⁸ If the families reached an agreement, the couple would marry by proxy in Japan, and the bride would then immigrate to the United States to meet and reside with her husband.⁷⁹ From 1900 to 1924,

⁷³ MARTHA MABIE GARDNER, *THE QUALIFICATION OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP IN THE UNITED STATES, 1870–1965*, 166 (UMI 2001).

⁷⁴ *Id.*

⁷⁵ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 145–47, 151 (Harvard Univ. Press 2000).

⁷⁶ *Id.* at 150–55.

⁷⁷ *Id.* at 151. From 1910 to 1913, 3,156 Japanese women were admitted to the United States as picture brides. GARDNER, *supra* note 73, at 171. During the same period, eighteen Japanese picture brides were denied admission. *Id.* Additionally, from 1910 to 1913, 1,408 Japanese women who had been married through a traditional ceremony were admitted to the United States, while over that same period 7 such women were denied admission. *Id.*

⁷⁸ COTT, *supra* note 75, at 151. Most picture brides were married by proxy to a man that they had seen only in a photograph. ALEINIKOFF ET AL., *supra* note 29, at 639.

⁷⁹ *Id.*

approximately 22,000 picture brides immigrated to the United States from Japan, Okinawa, and Korea.⁸⁰

West Coast port officials who admitted picture brides defended the practice by arguing that marriage is a negotiated act, based on the consent of the parties.⁸¹ Immigration officials in Hawaii were the first to institute the practice of requiring “proxy brides [to] remarry their ‘alleged husbands’ right away, in an American ceremony at the port.”⁸² Immigration officials on the East Coast also questioned the admissibility of brides married by proxy, but the Commissioner General of Immigration continued to allow the requirement of remarriage in U.S. ports.⁸³ However, Japanese picture brides soon became the subject of public criticism and congressional debate.⁸⁴ For instance, Senator James D. Phelan of California, on the floor of Congress, claimed that marriage by proxy where “the parties are separated by an ocean and merely exchange photographs is no marriage at all.”⁸⁵

In the Western states, racist sentiments against the Japanese resulted in the public labeling of picture brides as prostitutes, illegal laborers, and a threat to the morality of the community.⁸⁶ Opponents of Japanese immigration argued that recognizing picture-bride marriages, as a valid means of immigration would open the floodgates for Japanese women to become prostitutes in order to gain U.S. citizenship.⁸⁷ Moreover, San Francisco immigration authorities claimed that half of all Japanese picture brides led immoral lives in the United States.⁸⁸ Opponents also feared that Japanese couples would reproduce faster than white couples, which would result in the indefinite expansion of the Japanese race in the United States.⁸⁹

In 1912, organized labor in San Francisco urged President Wilson to prevent picture brides from immigrating to the United States.⁹⁰ They

⁸⁰ Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides”*, 70 GEO. WASH. L. REV. 475, 485 (2002).

⁸¹ COTT, *supra* note 75, at 151.

⁸² *Id.*

⁸³ *Id.* at 152.

⁸⁴ GARDNER, *supra* note 73, at 165; COTT, *supra* note 75, at 153–55.

⁸⁵ COTT, *supra* note 75, at 153.

⁸⁶ GARDNER, *supra* note 73, at 165–66.

⁸⁷ *Id.* at 167–68.

⁸⁸ *Id.* at 171.

⁸⁹ *See* COTT, *supra* note 75, at 152.

⁹⁰ *Id.*

argued that picture brides were not wives but rather laborers, “working as horticulturists with their husbands, thus displacing white farmers.”⁹¹ Immigration officials agreed and claimed that picture brides were brought to the United States as laborers under the false pretense of wives, since Japanese picture brides often worked in family-owned businesses.⁹²

In 1917, immigration authorities recognized the validity of proxy marriages for Japanese men residing in the United States, due in part to Japan’s status as an associate to the Allies during World War I.⁹³ However, as racial tension and anti-Japanese sentiment grew in the Western states, Congress enacted the Immigration Act of 1924, ending any debate over the validity of proxy marriages. Specifically, the Immigration Act of 1924 authorized a broad statutory ban on proxy marriages by defining *husband* and *wife* for immigration purposes.⁹⁴ The Immigration Act provided that “the terms ‘wife’ and ‘husband’ do not include a wife or a husband by reason of proxy or picture marriage.”⁹⁵

Following World War II, the debate surrounding proxy marriages reopened with the passage of the War Brides Act of 1945.⁹⁶ The War Brides Act provided expedited admission to the United States for alien-spouses and alien-minor children of U.S. citizens in the armed forces.⁹⁷ The Act provided that any alien admitted under this provision would be treated as a “nonquota immigrant.”⁹⁸ However, under the Act, proxy marriages would not be recognized unless the marriage was subsequently consummated.⁹⁹ Thus, the consummation rule was born.¹⁰⁰

In 1952 Congress adopted the INA, which continued to recognize proxy marriages for immigration purposes, as long as the marriage was consummated.¹⁰¹ With the implementation of the INA, the exclusion of

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 153.

⁹⁴ Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, 169 (1924).

⁹⁵ *Id.*

⁹⁶ GARDNER, *supra* note 73, at 386–87.

⁹⁷ War Brides Act of 1945, Pub. L. No. 79-271; 59 Stat. 659 (1945).

⁹⁸ *Id.*

⁹⁹ GARDNER, *supra* note 73, at 387.

¹⁰⁰ *Id.*

¹⁰¹ INA, Pub. L. No. 82-414, § 101(a)(35), 66 Stat. 163, 170 (1952) (“The term ‘spouse’, ‘wife’, or ‘husband’ do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”).

unconsummated proxy marriages has been applied to exclude marriages that are consummated prior to a formal ceremony.¹⁰²

IV. PROXY MARRIAGES INVOLVING DEPLOYED MEMBERS OF THE MILITARY ARE JUSTIFIABLE AND CONGRESS SHOULD AUTHORIZE AN EXCEPTION TO THE CONSUMMATION REQUIREMENT

The INA provides that a proxy marriage is not recognized for immigration purposes, unless subsequently consummated.¹⁰³ An alien-spouse that is married by proxy to a deployed member of the U.S. military will be unable to satisfy this consummation requirement if the citizen-spouse dies during deployment. The right to marry is a fundamental right that is guaranteed by the Constitution, through due process,¹⁰⁴ however, a constitutional argument will not advance the rights of an alien-widow of a proxy marriage to a deceased member of the military.

In determining the due process rights of an alien seeking admission to the U.S., the United States Supreme Court determined that “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹⁰⁵ Because Congress has plenary power over immigration, a challenge to how Congress defines a spouse for immigration purposes would not be fruitful. Accordingly, the INA definition of spouse should include alien-widows of unconsummated proxy marriages when the U.S. citizen-spouse is a member of the U.S. military, deployed at the time of the proxy marriage, who dies from combat, disease, or accident.

Congress should honor fallen soldiers by ending the military widow penalty by recognizing unconsummated proxy marriages. This section will argue that the circumstances surrounding military proxy marriages are distinct from civilian proxy marriages for immigration purposes, and that there is less concern for fraud with military proxy marriages.

¹⁰² *In re B*, 5 I. & N. Dec. 698, 699 (B.I.A. 1954).

¹⁰³ 8 U.S.C. § 1101(a)(35) (2006).

¹⁰⁴ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

¹⁰⁵ *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

A. PROXY MARRIAGES ARE POPULAR AMONG THE MILITARY AND
CONGRESS RECOGNIZES ALIEN-WIDOWS OF PROXY MARRIAGES
FOR SURVIVOR BENEFITS

Proxy marriages have become increasingly popular¹⁰⁶ among military members, who often seek legal assistance from the Judge Advocate General's Corps concerning such marriages.¹⁰⁷ In response to this demand, companies that help facilitate proxy-marriage involving members of the military have developed throughout the United States.¹⁰⁸

Military benefits often motivate a couple to enter into a proxy marriage while the soldier is deployed, rather than wait for the soldier to return home for a traditional ceremony.¹⁰⁹ For example, a couple may get married by proxy to ensure that a pregnant bride has health insurance as soon as possible, rather than wait months for the husband to return.¹¹⁰ Other motivations include securing the right to be notified of the death of the military-spouse,¹¹¹ financial considerations, housing allowances, and job training for the civilian-spouse.¹¹²

Additionally, a deployed soldier may contemplate his or her own death on the battlefield. With the possibility of not returning home in mind, a soldier may choose a proxy marriage to ensure that military

¹⁰⁶ See, e.g., *National News Recap: Top Stories of the Week*, CHI. TRIB., May 20, 2007, at C10 (stating that, because double proxy marriages have become so popular in Montana, the state legislature has considered modifying its law).

¹⁰⁷ Captain Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice*, 2004 ARMY LAW 22 n.94 ("The issue of proxy marriages comes up with some frequency [in the professional experience of a JAG.]").

¹⁰⁸ Tahlia Ganser, *In Montana, No Need to Show Up for Own Wedding*, GREAT FALLS TRIB., Apr. 30, 2007, at 6M (discussing a Pennsylvania proxy marriage company whose proxy marriages are ninety percent military). Today, a quick internet search turns up dozens of companies that specialize in the facilitation of proxy marriages for deployed members of the military. E.g. Google, <http://www.google.com> (search "proxy marriage") (last visited Jan. 14, 2011). Montana is the only state that allows "double proxy marriages," where both parties are absent from the ceremony. It has done so since World War II. Dan Barry, *Trading Vows in Montana, No Happy Couple Required*, N.Y. TIMES, Mar. 10, 2008, at A11. However, to be eligible for a double proxy marriage in Montana, "[o]ne party to a proxy marriage must be a member of the armed forces of the United States on federal active duty or a resident of Montana at the time of application for a license and certificate." MONT. CODE ANN. § 40-1-301 (2009).

¹⁰⁹ Karen Jowers, *It's a Great Day for a . . . Double Proxy Wedding?; Couple Discovers Solution to Long-Distance Love*, A.F. TIMES, June 7, 2004, at 22.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Benefits*, MPPM: MILITARY PAY PROXY MARRIAGE, www.proxymarriages.net/benefits (last visited Sept. 12, 2011).

survivorship benefits will provide for his or her loved one. Moreover, the U.S. military recognizes proxy marriages and pays survivor benefits to widowed spouses, including Hotaru Ferschke.¹¹³ For a spouse to be eligible for survivorship benefits under the veterans' benefits program, the spouse must meet the definition of a widow under the National Service Life Insurance Act.¹¹⁴ For purposes of survivor benefits, "[t]he terms 'widow' or 'widower' mean a person who was the lawful spouse of the insured at the maturity of the insurance."¹¹⁵

Courts have consistently recognized widows of proxy marriages for military insurance purposes.¹¹⁶ For instance, in *Barrons v. United States*, Lieutenant Barrons was deployed to Africa and was subsequently notified that his girlfriend, June, was pregnant with his child.¹¹⁷ He immediately arranged for them to be married by proxy in Nevada through the Red Cross.¹¹⁸ After the marriage, Lieutenant Barrons designated June as his primary beneficiary under his life insurance policy provided by the military.¹¹⁹ Unfortunately, Lieutenant Barrons died in combat one week after his proxy marriage ceremony.¹²⁰

June was receiving payments from the policy until her father-in-law claimed that her proxy marriage did not make her eligible for benefits.¹²¹ The Ninth Circuit determined that in order for June to receive the insurance proceeds, she must fall within the meaning of the term *widow*, as provided by the National Service Life Insurance Act of 1940.¹²² The Act provided that "insurance shall be payable only to widow, widower, child, . . . parent, . . . brother or sister of the insured."¹²³ Accordingly, the court determined that June's eligibility as a widow "rests upon the validity of the proxy marriage."¹²⁴ Thus, the Circuit Court was required to determine

¹¹³ *Can Marine's Widow, Baby Stay in U.S.?*, A.F. TIMES, Oct. 5, 2009, at 26 [hereinafter *Marine's Widow*].

¹¹⁴ See 38 U.S.C. § 1901 (2006).

¹¹⁵ *Id.*

¹¹⁶ See *infra* notes 1177–1266 and accompanying text.

¹¹⁷ *Barrons v. United States*, 191 F.2d 92, 93 (9th Cir. 1951).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 94.

¹²¹ *Id.* at 93.

¹²² *Id.* at 94.

¹²³ National Service Life Insurance Act of 1940, Pub. L. No. 801-76, 602(g), 54 Stat. 1010 (1940).

¹²⁴ *Barrons*, 191 F.2d at 94.

if the Barrons' proxy marriage was valid under Nevada law.¹²⁵ After examining Nevada marriage law, the Circuit Court determined that the proxy marriage was valid and that June was entitled to insurance benefits as a widow.¹²⁶

Undoubtedly, Sergeant Ferschke's motivation to marry Hotaru by proxy was in part due to his desire to immediately provide insurance benefits for her and their child, rather than wait for his return from Iraq.¹²⁷ The U.S. military recognized Hotaru's proxy marriage without a legal challenge,¹²⁸ and because proxy marriage is also valid under Japanese law, she is now receiving survivor benefits.¹²⁹

Surprisingly, an unconsummated proxy marriage has entitled Hotaru to significant financial support from the U.S. government, but her marriage does not entitle her to live and raise her son with her husband's family in the United States.¹³⁰ Unlike the INA, the National Service Life Insurance Act's definition of *widow* includes proxy marriages, even unconsummated proxy marriages.¹³¹ Thus, under current law, an unconsummated proxy marriage raises suspicion of marriage fraud but no suspicion of insurance fraud.

Requiring proxy marriages to be consummated after the marriage ceremony may give some protection against fraudulent marriages. However, the absence of post-marital consummation should not defeat proxy marriages involving deployed members of the military where the genuineness of the marriage can be demonstrated by other evidence.¹³² Since Congress does not view military widows of unconsummated proxy

¹²⁵ *Id.* at 96.

¹²⁶ *Id.* at 97–99; *see also* United States v. Layton, 68 F. Supp. 247 (S.D. Fla. 1946) (finding that a proxy marriage between a soldier, who died in World War II, and his widow was valid because the marriage was valid under the laws of the state in which it was entered).

¹²⁷ STEPHENSON, *supra* note 71.

¹²⁸ *See, e.g., Marine's Widow, supra* note 113, at 26 ("The U.S. military recognizes proxy marriages for couples separated by war, and the Corps is paying survivor benefits to Ferschke and her baby.").

¹²⁹ Kristin M. Hall, *Marine's Widow in Fight—Proxy Wedding Puts Her in Precarious Spot*, MEMPHIS COM. APPEAL, Sept. 20, 2009, at B3 ("Japan doesn't require a wedding ceremony, and couples getting married only have to complete sworn affidavits proving they are legally free to marry and register at a Japanese municipal government office.").

¹³⁰ *See supra* notes 16–17 and accompanying text.

¹³¹ *See* 38 U.S.C. § 1901 (2006) (the definition of widow does not exclude proxy marriages).

¹³² *See* J. P. Luton, Jr., *Domestic Relations—Proxy Marriage—Necessity of Cohabitation*, 25 TEX. L. REV. 681, 682–83 (1947) (following similar logic for common law marriage in a non-immigration context).

marriages as fraudulent for insurance purposes and allows them to receive substantial insurance benefits, it follows that these same military widows should be granted admission to the United States, unless there is evidence of marriage fraud.

B. CONGRESS ENDED THE WIDOW PENALTY FOR CONDITIONAL
PERMANENT RESIDENTS ON GROUNDS APPLICABLE TO THE
MILITARY WIDOW PENALTY

The widow penalty for conditional permanent residents (CPR) involves the definition of immediate relatives under the INA.¹³³ When a citizen marries an alien, the transition to LPR status is lengthy and can involve substantial bureaucratic hurdles.¹³⁴ LPR status is not immediately granted upon marriage to a U.S. citizen; rather, the U.S. citizen-spouse must first file a petition with the USCIS, which often requires substantial processing time.¹³⁵ If the alien is granted LPR¹³⁶ status prior to the couple's second wedding anniversary, then LPR status is given on a conditional basis, as a CPR.¹³⁷ The USCIS has traditionally taken the position that if the citizen-spouse dies while the petition is processing, a petition for CPR status must be denied because the alien-spouse is no longer an immediate relative of a U.S. citizen.¹³⁸ However, in cases where the USCIS adjudicates the petition for CPR status quickly, "the government allows the CPR to file to remove the condition despite the death, even if the marriage only lasted (for example) three months."¹³⁹ This strict application of the definition of immediate relative has been known as the "widow penalty" and was repealed by Congress in 2009.¹⁴⁰

¹³³ Memorandum from Mike Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs. to Field Leadership (Nov. 8, 2007) [hereinafter Aytes Memorandum], http://www.uscis.gov/files/pressrelease/I130AFMAD0804_110807.pdf (type "mike aytes nov. 8, 2008" into the search bar).

¹³⁴ See *Understanding the Issue—What Is Was the Widow Penalty?*, SURVIVING SPOUSES AGAINST DEPORTATION, <http://ssad.org/education.html> [hereinafter *Understanding the Issue*] ("The immigration process often takes many months to complete.").

¹³⁵ *Id.*

¹³⁶ *Supra* note 477 and accompanying text.

¹³⁷ 8 U.S.C. § 1186a(a)(1) (2006).

¹³⁸ See Aytes Memorandum, *supra* note 133, at 1 ("The traditional view has been that if a Form I-130 visa petitioner dies before USCIS acts on the Form I-130, USCIS must deny the Form I-130.").

¹³⁹ *Understanding the Issue*, *supra* note 134.

¹⁴⁰ Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142 (2009).

To better understand why the military widow penalty should be repealed, it is important to examine how the widow penalty for CPRs developed and how it is similar to the military widow penalty.

1. Origins of the Widow Penalty for Conditional Permanent Residents

In 1952, when Congress enacted the INA, the term “immediate relative” was not used; instead, immediate relatives fell under a “nonquota immigrant” category.¹⁴¹ The term “nonquota immigrant” included the child or spouse of a U.S. citizen.¹⁴² The original INA did not place any additional restrictions on a nonquota immigrant, thus facilitating alien-spouses to be admitted upon marriage.¹⁴³ The term *immediate relative* was not added to the INA until the 1965 amendment, which provided:

[The term] immediate relatives . . . shall mean the children, spouses, and parents of a citizen of the United States; *Provided*, [sic] that in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Act.¹⁴⁴

This definition did not provide for an automatic revocation of an alien-spouse’s classification as an immediate relative upon the death of the U.S. citizen-spouse.¹⁴⁵

In 1986, Congress passed the Immigration Marriage Fraud Amendments (IMFA),¹⁴⁶ intending to prevent noncitizens from obtaining permanent residence status through a fraudulent or sham marriage.¹⁴⁷ At the time, the federal government estimated that nearly thirty percent of spousal petitions were fraudulent.¹⁴⁸ The IMFA provides that any noncitizen or alien who secures LPR status through a marriage that is less than two years old receives conditional status for two years before

¹⁴¹ INA, Pub. L. No. 82-414, § 101(a)(27), 66 Stat. 163, 169-70 (1952).

¹⁴² *Id.* (“The term ‘nonquota immigrant’ means . . . an immigrant who is the child or the spouse of a citizen of the United States.”).

¹⁴³ *Id.*

¹⁴⁴ INA, Pub. L. No. 89-236, § 201(b), 79 Stat. 911 (1965) (emphasis added).

¹⁴⁵ *Id.*

¹⁴⁶ Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified as amended at 8 U.S.C. §§ 1154, 1184, 1186a (1994)).

¹⁴⁷ ALEINIKOFF ET AL., *supra* note 29, at 179.

¹⁴⁸ H.R. REP. NO. 99-906, at 6, *reprinted in* 1986 U.S.C.C.A.N. 5978, 5978.

becoming an LPR.¹⁴⁹ However, the IMFA did not provide a statutory widow penalty.¹⁵⁰

After the IMFA, Congress passed the Immigration Act of 1990,¹⁵¹ which substantially changed the immigration system and modified the INA.¹⁵² The Immigration Act of 1990 amended the definition of immediate relative by providing alien-spouses with the ability to self-petition for adjustment of status to LPR, if the U.S. citizen-spouse died and the couple had been married for more than two years.¹⁵³ With the adoption of the Immigration Act of 1990, the following was inserted into the definition of immediate relative:

In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such date and only until the date the spouse remarries.¹⁵⁴

The interpretation of this provision by the USCIS and the courts gave rise to the widow penalty for CPRs.¹⁵⁵ According to the USCIS, this provision provided an automatic termination of a petition for CPR status

¹⁴⁹ ALENIKOFF ET AL., *supra* note 29, at 341

¹⁵⁰ *See id.*

¹⁵¹ Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1151(b)(2)(A)(i) (2006)).

¹⁵² ALENIKOFF ET AL., *supra* note 29, at 179 (explaining that the Immigration Act of 1990 expanded immigration benefits while focusing on exclusion and removal grounds).

¹⁵³ 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

¹⁵⁴ Immigration Act of 1990, Pub. L. No. 101-649, § 101(a), 104 Stat. 4978, 4980-81.

¹⁵⁵ *In re Varela*, 13 I. & N. Dec. 453 (B.I.A. 1970). In *In re Varela*, the applicant spouse became a widow only weeks after her marriage to a U.S. citizen, who died from a heart attack during active duty with the Navy Reserve. *Id.* After the marriage, the U.S. citizen-spouse filed a petition to for CPR status, but the petition had not adjudicated before the husband's death. *Id.* The Board of Immigration Appeals ruled that the petition was properly denied because the death of the U.S. citizen-spouse before the CPR petition was adjudicated had stripped the widow of her status as an immediate relative. *Id.* at 454. *See also* Robinson v. Napolitano, 554 F.3d 358, 360 (3d Cir. 2009); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 739-40 (E.D. Mich. 2006); Burger v. McElroy, No. 97 Civ. 8775, 1999 U.S. Dist. LEXIS 4854, at *16 (S.D.N.Y. 1999).

upon the death of the U.S. citizen-spouse when the marriage was less than two years old.¹⁵⁶

2. Congress Ended the Widow Penalty for Conditional Permanent Residents and Should Likewise End the Military Widow Penalty

On October 28, 2009, President Obama signed into law the Department of Homeland Security Appropriations Act of 2010, which effectively ended the widow penalty for CPRs by expanding the rights of alien-widows despite the deaths of their U.S. citizen-spouses.¹⁵⁷ Section 568(c) of the Act addresses the rights of alien-widows of deceased U.S. citizens, and section 568(d) addresses other survivor rights for family-based and employment-based immigration.¹⁵⁸

With the passage of section 568(c) of the Act, Congress removed the phrase “for at least 2 years at the time of the citizen’s death” from the definition of immediate relatives.¹⁵⁹ The definition of immediate relatives currently reads:

For purposes of this subsection, the term “immediate relatives” means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States [~~for at least 2 years at the time of the citizen’s death~~] and was not legally separated from the citizen at the time of the citizen’s death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen’s death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) within 2 years after such date and only until the date the spouse remarries.¹⁶⁰

Thus, by deleting the two-year marriage requirement, the Act allows an alien-widow, who has been married for less than two years prior to the death of his or her U.S. citizen-spouse, to self-petition for CPR status.¹⁶¹

¹⁵⁶ See Aytes Memorandum, *supra* note 133, at 1 (“The traditional view has been that if a Form I-130 visa petitioner dies before USCIS acts on the Form I-130, USCIS must deny the Form I-130.”).

¹⁵⁷ Dep’t of Homeland Sec. Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142 (2009).

¹⁵⁸ *Id.* § 568(c)–(d).

¹⁵⁹ *Id.* § 568(c).

¹⁶⁰ 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (alteration in original).

¹⁶¹ Dep’t of Homeland Security Appropriations Act § 568(c).

The Act also provides that if the deceased U.S. citizen-spouse previously filed a petition on behalf of the alien-spouse, that petition automatically converts into a self-petition.¹⁶² By allowing alien-widows to self-petition, the Act also removes the requirement that a third party submit an affidavit of financial support.¹⁶³ Although the Act prohibits self-petitions by alien-widows who have remarried,¹⁶⁴ even if the alien-widow has remarried, under section 568(d) of the Act, the surviving spouse remains eligible for CPR status if the deceased U.S. citizen-spouse previously submitted a petition.¹⁶⁵ Eligible unmarried children of an alien-spouse may also be included in a self-petition, but children cannot self-petition.¹⁶⁶

Moreover, the Act includes a provision to ensure that the USCIS will continue to process the applications of immigrants who were waiting to receive an immigrant visa before the death of the petitioner's spouse.¹⁶⁷ Specifically, section 568(d) of the Act provides additional protection for other survivors of deceased petitioners.¹⁶⁸ Section 568(d) of the Act provides for the adjudication of petitions and adjustment of status applications that were filed prior to the death of the qualifying relative when the beneficiary has continuously resided in the U.S. since the death of the petitioner.¹⁶⁹ Section 568(d) includes immediate relatives, family preference relatives, employment-based dependants, beneficiaries of pending or approved refugee/asylum relative petitions, and aliens admitted in T or U nonimmigrant status.¹⁷⁰ Unlike section 568(c), section 568(d) requires residency in the United States and an affidavit of financial support from a substitute sponsor.¹⁷¹ Approval of petitions is subject to the "unreviewable discretion of the Secretary [of Homeland Security]" if it is determined that approval is not in the public interest.¹⁷²

¹⁶² 8 C.F.R. § 204.2(i)(1)(iv) (2009).

¹⁶³ INA § 212(a)(4)(C)(i)(I).

¹⁶⁴ Dep't of Homeland Security Appropriations Act § 568(c).

¹⁶⁵ *Id.* § 568(d).

¹⁶⁶ *In re Minkova*, 22 I. & N. Dec. at 1162.

¹⁶⁷ 155 CONG. REC. 7227, 7242 (2009) (statement of Senator Hatch).

¹⁶⁸ Dep't of Homeland Security Appropriations Act § 568(d).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

The USCIS is currently implementing these new regulations under the Act and has reopened previously denied CPR petitions.¹⁷³ By ending the widow penalty for CPRs, Congress intended to put surviving spouses and other surviving aliens “in the position they enjoyed prior to the passing of the qualifying relative.”¹⁷⁴ Accordingly, the Act has provided for these cases to be treated more humanely by no longer allowing the death of a U.S. citizen-spouse, or other petitioner, to be the only reason for denying immigration benefits to an alien-widow.¹⁷⁵

In an effort to ensure humanitarian treatment of surviving spouses, Congress ended the widow penalty for surviving spouses and other relatives of immigration sponsors who died during the CPR adjudication process.¹⁷⁶ Congress considered many heartbreaking stories when it determined that the widow penalty for CPRs should be terminated.¹⁷⁷ It found that the widow penalty for CPRs was needlessly “‘piling’ on by responding to the tragic death of a spouse with an order of deportation instead of an offer of condolences.”¹⁷⁸ Likewise, the military widow penalty has resulted in “piling” on when the USCIS denies immigration benefits to a spouse of a soldier who died while serving the United States and its laws.

The widow penalty for CPRs was also at odds with Congress’ overall goal of facilitating family unification through the INA.¹⁷⁹ For instance, Congressman Morrison argued that the widow penalty for CPRs should be ended because “[f]amily unification is the cornerstone of immigration to the United States.”¹⁸⁰ Prolonging the separation of families, particularly spouses and children, “is inconsistent with the principles on which this nation was founded.”¹⁸¹ Further, Congress has consistently favored family

¹⁷³ Memorandum from Donald Neufeld, Acting Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs., to Executive Leadership (Dec. 2, 2009), <http://www.uscis.gov/USCIS/Laws/Memoranda/2009/Widower120209.pdf> (stating that adjudicators must follow the widow penalty for CPRs outside of the 9th Circuit).

¹⁷⁴ Brent Renison, *New Law Expands Immigrant Rights of Survivors*, PARRILLI RENISON LLC 4 (2009).

¹⁷⁵ *Id.*

¹⁷⁶ FY2010 Conference Summary: Homeland Security Appropriation, Committee on Appropriation, 5 (October 7, 2009).

¹⁷⁷ 155 CONG. REC. S. 7288, 7305, 7242 (2009) (statement of Senator Nelson).

¹⁷⁸ *Id.*

¹⁷⁹ 136 CONG. REC. 27, 74 (1990) (statement of Rep. Morrison).

¹⁸⁰ *Id.* (“Yet current law causes this to occur all too often.”).

¹⁸¹ *Id.*

unification and expedited admission for immediate relatives of U.S. citizens.¹⁸²

However, the military widow penalty is inconsistent with these goals. An alien-widow to a member of the military from an unconsummated proxy marriage is likely to be considered family by the deceased citizen's family in the United States. As with Hotaru Ferschke, the family relationship is especially strong when the alien-widow has conceived a child with the deceased U.S. citizen.¹⁸³ If Congress continues to allow the military widow penalty to strip alien-widows of their eligibility for immigration, it will prevent family reunification and result in the inhumane treatment of grieving families and widows.

Congress was able to end the widow penalty for CPRs because the INA had already adequately addressed fraudulent marriages.¹⁸⁴ Ending the widow penalty for CPRs affected only a relatively small number of aliens who were still "required to demonstrate that they had a bona fide marriage before receiving [LPR status]."¹⁸⁵ Further, the USCIS retained discretion to deny petitions.¹⁸⁶ Likewise, an amendment to end the military widow penalty by changing the definition of *spouse* in the INA would affect only a small class of individuals, likely smaller than the approximately two hundred widows affected by the termination of the widow penalty for CPRs.¹⁸⁷ Moreover, spouses under an exception to the ban on unconsummated proxy marriages will still have to demonstrate the validity of the underlying marriage, and the USCIS will retain discretionary authority, thus further alleviating fraud concerns.

¹⁸² 136 CONG. REC. 35, 612 (1990) (statement of Rep. Simpson).

¹⁸³ IN THEIR BOOTS, *supra* note 4. Hotaru Ferschke has developed a family relationship with her deceased husband's family, and she has been living with them in Tennessee while on a temporary visa. The Ferschke family desperately wants Hotaru and their grandson Mikey to remain with them in the United States and they have successfully lobbied for a private bill to be introduced on her behalf, though the success of the bill is unlikely. *Id.*

¹⁸⁴ 155 CONG. REC. S. 7227, 7242 (2009) (statement of Senator Hatch).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (stating that there have been over 200 victims of the widow penalty).

3. Congress Exempted Military Widows from the Widow Penalty for Conditional Permanent Residents and Should Provide a Similar Exemption for Unconsummated Proxy Marriages

Congress enacted two statutory exceptions to the widow penalty for CPRs.¹⁸⁸ Likewise, Congress should provide a similar exception to end the military widow penalty. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act) provided the first exception for the widow penalty for CPRs in the aftermath of the September 11, 2001, terrorist attacks.¹⁸⁹ Specifically, the Patriot Act exempts alien-widows from the widow penalty for CPRs if the U.S. citizen-spouse died as a result of the terrorist attacks on September 11, 2001.¹⁹⁰

The National Defense Authorization Act of 2004 provided a second exception to the widow penalty for CPRs.¹⁹¹ This act specifically provided that:

Spouses . . . in the case of an alien who was the spouse of a citizen of the United States at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, if the citizen served honorably in an active duty status in the military, air, or naval forces of the United States and died as a result of injury or disease incurred in or aggravated by combat, the alien (and each child of the alien) shall be considered . . . to remain an immediate relative after the date of the citizen's death.¹⁹²

Thus, Congress provided grieving alien-widows, children, and parents with the "opportunity to legalize their immigration status and avoid deportation in the event of the death of their loved one serving in our military."¹⁹³ Senator Carl Levin argued that "[t]hose families, those noncitizen spouses and unmarried children and parents, who could become citizens while the loved one is alive surely should not lose that status and protection when the loved one is killed or lost in action or as a result of

¹⁸⁸ See *infra* notes 189–197 and accompanying text.

¹⁸⁹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁹⁰ *Id.* §§ 421(a), 421(b)(1)(B)(i), 423, 115 Stat. at 356, 360.

¹⁹¹ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(a)–(e), 117 Stat. 1392, 1693 (2003).

¹⁹² *Id.* (“[B]ut only if the alien files a petition under section 204(a)(1)(A)(ii) of such Act within 2 years after such date and only until the date the alien remarries.”).

¹⁹³ 149 CONG. REC. S. 7279 (2003) (statement of Senator Kennedy).

injury or disease.”¹⁹⁴ The exception for immediate relatives of U.S. citizen-soldiers killed in combat was enacted in part because Congress recognized the tragic sacrifice made by these families and the great injustice of stripping a widow, child, or parent of his or her immigration status as an immediate relative.¹⁹⁵

The military exception to the widow penalty for CPRs was given bipartisan support in Congress.¹⁹⁶ Accordingly, Congress should enact legislation to recognize the sacrifice of U.S. citizen-soldiers who die in combat and leave behind an unconsummated proxy marriage. The tragedy and injustice of the deceased soldier’s unconsummated proxy marriage and the widow penalty for CPRs are the same. Both soldiers give their lives in service to their country and both widows will lose their status as immediate relatives for immigration purposes.

Congress recognized the injustice of applying the widow penalty for CPRs to alien-spouses of U.S. citizen-soldiers who died in combat by providing an exception to protect alien-widows.¹⁹⁷ Furthermore, Congress has recognized the injustice of the widow penalty by abolishing the widow penalty for CPRs entirely.¹⁹⁸ Accordingly, Congress should also terminate the military widow penalty and recognize the injustice of denying an alien-spouse the status of immediate relative when a proxy marriage cannot be subsequently consummated due to the death of a deployed U.S. citizen-soldier or other member of the military.

C. THE CIRCUMSTANCES OF DEPLOYED MEMBERS OF THE MILITARY MARRIED BY PROXY ARE DISTINCT FROM CIVILIAN PROXY MARRIAGES

The problems arising from proxy marriages when a U.S. citizen-spouse dies can exist outside of the context of the military. However, because there is continued suspicion that proxy marriages for immigration purposes are fraudulent, an exception for unconsummated proxy marriages should be drawn narrowly to only include U.S. citizens that are members of the military. Further, cases involving the military are distinct and entitled to separate consideration due to the unique circumstances of military deaths.

¹⁹⁴ 149 CONG. REC. 7279, 7282 (2003) (statement of Senator Levin).

¹⁹⁵ *Id.* at 7279.

¹⁹⁶ *Id.*

¹⁹⁷ 149 CONG. REC. S. at 7282 (2003) (statement of Senator Levin).

¹⁹⁸ See *supra* note 157 and accompanying text.

For example, the Board of Immigration Appeals (BIA) decision in *Matter of B* demonstrates how the INA definition of *spouse* can impact proxy marriages that occur outside of the military.¹⁹⁹ In *Matter of B*, the petitioner, B, sought to bring his wife and child to the United States pursuant to his LPR status.²⁰⁰ B attempted to marry V in Italy, but due to missing documents, the Italian authorities were unable to marry them.²⁰¹ The couple lived together in Italy as husband and wife and had three children together.²⁰² B was admitted to the United States as an LPR in 1951; V remained in Italy and the couple entered into a proxy marriage under Italian law in 1953.²⁰³

Similar to the circumstances of Sergeant Ferschke, who entered into a valid proxy marriage under Japanese law, the BIA in *Matter of B* recognized that the proxy marriage was legal in Italy, where the marriage was entered.²⁰⁴ Although B and V lived together and consummated their marriage “prior to the marriage as evidenced by the birth of three children,”²⁰⁵ the INA requires the proxy marriage to be consummated *after* it is celebrated.²⁰⁶ Thus, because the INA does not account for marriages that have been consummated prior to the celebration of the marriage, the BIA determined that the couple did not have the required spousal relationship and denied the immigration petition.²⁰⁷

Proxy marriages are excluded from immigration benefits largely because such marriages have been viewed as potentially fraudulent.²⁰⁸ In the typical proxy marriage case, the distance between the couple may be voluntary, and the proxy marriage is merely a convenience. Under these circumstances, the current INA requirement that a proxy marriage must be

¹⁹⁹ *In re B*, 5 I. & N. Dec. 698 (B.I.A. 1954).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 699.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ 8 U.S.C. § 1101(a)(35) (2006).

²⁰⁷ *Id.* (“[A]t the time of this consummation there was no marriage in existence, and such marriage did not come into existence until February 27, 1953. The proxy marriage has never been consummated and the marriage therefore fails to satisfy the requirement of section 101 (a) (35) [codified as 8 U.S.C. § 1101(a)(35) (2006)] for the purpose of making parties thereto husband and wife.”); *see also In re R*, 4 I. & N. Dec. 650, 652 (B.I.A. 1952) (finding the underlying proxy marriage insufficient for immigration purposes for lack of post celebration consummation).

²⁰⁸ GARDNER, *supra* note 73, at 157.

consummated before immigration benefits vest²⁰⁹ is a reasonable protection against fraudulent marriages entered into solely for immigration benefits.

However, in contrast, a proxy marriage is justifiable when the separation of the couple is due to military service.²¹⁰ Here the suspicion of fraud is dramatically lessened, especially when the marriage has been consummate prior to the celebration of the marriage, as evidenced by pregnancy or birth of a child. For deployed members of the military, like Sergeant Ferschke, “the threat of imminent death may make proxy marriage all more important, since the marriage may be viewed as the last act of self-realization.”²¹¹

In cases similar to *Matter of B*, spouses are free to enter into a subsequent valid marriage because the current INA allows an alien-spouse to enter the United States on a visa to consummate the proxy marriage.²¹² Additionally, in *Matter of B*, the couple had several years to enter into a valid marriage either in Italy or in the United States. Although the family’s circumstances in *Matter of B* were unfortunate, a narrow exception for unconsummated proxy marriages is appropriate to prevent the possibility of marriage fraud.

Whereas other means of marriage may be possible in cases like *Matter of B*, in the context of a deployed military member, physical separation places severe restrictions on the couple, and a proxy marriage may be the only available means of marriage. In Hotaru’s case, for example, when Sergeant Ferschke served in Iraq, proxy marriage was the only available means of performing the marriage. Unfortunately, when Sergeant Ferschke died in combat, the military widow penalty immediately stripped Hotaru of eligibility to immigrate, because the couple was unable to consummate the marriage before his death.

Further, marriage fraud is not a major concern in the military context because proxy marriages that involve deployed members of the military are infrequent. For example, in 2008 the total number of newly arrived

²⁰⁹ 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

²¹⁰ WILLIAM J. O’DONNELL & DAVID A. JONES, *THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES* 18 (Lexington Books 1982).

²¹¹ *Id.*

²¹² See 8 U.S.C. § 1101(a)(15)(K)(i) (2006) (defining a nonimmigrant alien as one who is the fiancé of a U.S. citizen and who seeks to enter the United States to conclude a valid marriage within ninety days after admission); Calvo, *supra* note 66 and accompanying text.

spouses that immigrated to the United States was 45,519.²¹³ Of these newly arrived immigrant-spouses, only 115 were widows of U.S. citizens.²¹⁴ Although the USCIS does not provide statistics for proxy marriages in general, it is likely that only a small fraction of the 115 newly arriving widows of U.S. citizens were married by proxy to a member of the U.S. military. Thus, there should be little concern about ending the military widow penalty because cases like Ferschke's are rare and widespread fraud is unlikely.

Lastly, Congress has shown a desire to protect alien-widows from the harsh application of immigration law, by authorizing statutory exceptions to the widow penalty for CPRs.²¹⁵ Indeed, as the court in *Freeman v. Ashcroft* concluded, "Congress may reasonably treat aliens whose spouses were killed during active military duty . . . more favorably than aliens whose spouses died from other causes."²¹⁶ Accordingly, a narrow exception to the ban on unconsummated proxy marriages drawn for the benefit of deployed members of the military is a realistic legislative goal.

V. PROPOSED AMENDMENT: TERMINATING THE MILITARY WIDOW PENALTY

In light of the injustice that the military widow penalty creates, Congress should adopt an amendment to the INA to terminate the military widow penalty. Currently, the INA provides that the terms "'spouse,' 'wife,' or 'husband' do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated."²¹⁷ Congress should amend this section to eliminate the military widow penalty. The exception should provide that an unconsummated proxy marriage is included within the meaning of *spouse, wife, or husband* if the U.S. citizen-spouse is: (1) a member of the U.S. military, (2) who entered into a valid proxy marriage while on deployment, and (3) while deployed, subsequently died in combat by

²¹³ U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2008 YEARBOOK OF IMMIGRATION STATISTICS 20 (2009).

²¹⁴ *Id.*

²¹⁵ *Supra* notes 1888–1955 and accompanying text (discussing the exception to the widow penalty for CPRs for alien-widows whose U.S. citizen-spouses died during military service).

²¹⁶ *Freeman v. Ashcroft*, No. CV 04-666-PA, 2004 U.S. Dist. LEXIS 15249, at *12 (D. Or. July 24, 2004), *vacated*, *Freeman v. Gonzales*, 444 F.3d 1031, 1043 (9th Cir. 2006) (vacating the decision of the district court by ending the widow penalty for CPRs on other grounds).

²¹⁷ 8 U.S.C. § 1101(a)(35) (2006).

injury, by accident, or by disease. Finally, to garner political support in Congress, the amendment should include a provision that allows the USCIS discretion to reject unconsummated military proxy marriages that appear fraudulent.

A. PRIVATE BILLS ARE UNLIKELY TO PROVIDE RELIEF TO MILITARY WIDOWS OF UNCONSUMMATED PROXY MARRIAGES AND ARE INSUFFICIENT TO END THE MILITARY WIDOW PENALTY

As a last resort, when an alien is facing deportation, an uncommon form of relief may be provided through private federal legislation to grant LPR status to specific aliens.²¹⁸ This relief is known as a private bill and is often used in high-profile immigration cases.²¹⁹ A private bill provides legal relief to a specified individual, a group of individuals, or an entity that is adversely affected by the application of a particular law.²²⁰ When a private bill is enacted it becomes private law, applicable only to the named individual as an exception to the general rule.²²¹ Although private bills are available in other areas of the law they commonly concern immigration and naturalization.²²² One of the “most common circumstances for [Congress] granting private bill relief relates to a conditional permanent resident petition for an alien spouse not being approved before the untimely death of a U.S. citizen spouse,” known as the widow penalty for CPRs.²²³ Traditionally, private bills are enacted to allow the law to maintain some form of humanitarian flexibility and to avoid harsh results.²²⁴

Although many private bills have been introduced in Congress, the likelihood of receiving an exception to the military widow penalty through a private bill today is low because the number of enacted private bills has drastically declined in recent congressional terms.²²⁵ This decline is due

²¹⁸ ALEINIKOFF ET AL., *supra* note 29, at 818.

²¹⁹ *Id.* Although private bills are available in other areas of the law, they commonly concern immigration and naturalization. Matthew Mantel, *Private Bills and Private Laws*, 99 LAW LIBR. J. 87–88, 90 (2007).

²²⁰ Mantel, *supra* note 219, at 90.

²²¹ *Id.*

²²² *Id.*

²²³ H.R. Rep. No. 110-911, at 2 (2008) (citation and internal quotation marks omitted).

²²⁴ ALEINIKOFF ET AL., *supra* note 29, at 819.

²²⁵ *Id.* at 818; *see also* Mantel, *supra* note 219, at 90 n.24. Specifically, the 96th Congress enacted 122 private bills; the 97th Congress enacted 56; the 98th Congress enacted 54; the 99th Congress enacted 24; the 100th Congress enacted 48; the 101st Congress enacted 16; the 102nd

in part to the fact that members of Congress are reluctant to introduce private bills because of the potential for political scandal.²²⁶

If passed by Congress, a private bill could provide an avenue for widow-alien of unconsummated proxy marriages to immigrate despite the military widow penalty.²²⁷ A private bill providing exclusive relief to an individual is normally pursued only after all other judicial and administrative remedies have been exhausted: "Congress typically is the individual's court of last resort."²²⁸ However, the likelihood of any individual private bill being enacted by Congress is small because only a few private bills are approved each session.²²⁹

In 2009, a private bill was introduced in Congress that would grant Hotaru LPR status and the ability to raise her child in the United States.²³⁰ While an individual private bill for Hotaru would be a humanitarian act by Congress it would do little to prevent future injustices for similarly situated alien-spouses. Further, one disadvantage of utilizing a private bill is that *each* widow from an unconsummated proxy marriage to a member of the U.S. military will need Congress to pass a private bill in order to retain eligibility to immigrate. Indeed, a private bill will not rectify the underlying problem with the INA.

Moreover, in recent years Congress has been hesitant to pass individual private bills for immigration.²³¹ To even be considered for a private bill an alien-widow needs access to significant political connections.²³² For instance, the Ferschke family had to wait for over two years before Congress finally enacted a private bill for Hotaru,²³³ despite the fact that the Ferschke family had been covered in the national

Congress enacted 20; the 103rd Congress enacted 8; the 104th Congress enacted 4; the 105th Congress enacted 10; the 106th Congress enacted 24; the 107th Congress enacted 6; and the 108th Congress enacted 6. *Id.*

²²⁶ Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273, 301 (2004).

²²⁷ See Mantel, *supra* note 219, at 88.

²²⁸ *Id.*

²²⁹ See Mantel, *supra* note 219, at 90 (explaining that Congress, in recent years, has enacted only a few private bills a year).

²³⁰ A private bill has been introduced in the House and the Senate on behalf of Hotaru. H.R. 3182, 111th Cong. (2009); S. 1774, 111th Cong. (2009).

²³¹ Shaina N. Elias, *From Bereavement to Banishment: The Deportation of Surviving Alien Spouses Under the "Widow Penalty"*, 77 GEO. WASH. L. REV. 172, 207 (2008).

²³² *Id.*

²³³ Devin Dwyer, *Married by Phone: Marine Widow to Get Legal Status After Congress Acts*, ABC NEWS, <http://abcnews.go.com/US/japanese-widow-us-marine-green-card-private-bill/story?id=12412472>.

media,²³⁴ and their story gained extensive publicity through the production of a documentary.²³⁵

Although, ultimately, a private bill was enacted to benefit Hotaru and her son, not every alien-widow of an unconsummated proxy marriage will garner the same spotlight as Hotaru, who enjoyed the support of her husband's hometown in pushing for the enactment of the private bill.²³⁶ Special treatment of immigrants for private bills based on publicity, sympathy, and political connections is unjust. Other alien-spouses like Hotaru Ferschke may never make headlines, as they likely reside outside the United States and may not have the means to appeal a USCIS decision. Thus, an amendment to the INA to end the military widow penalty, rather than a private bill for any one person should be the focus of Congress and proponents of immigration reform.

VI. CONCLUSION

Congress should honor the sacrifice of fallen soldiers, like Sergeant Ferschke, by terminating the military widow penalty and ensuring that the surviving spouses of fallen members of the U.S. military may live and raise their children in this country. If Sergeant Ferschke died for anything, he died so that his wife, Hotaru, and his son, Mikey, may live here, in the United States.²³⁷

Congress should recognize that a proxy marriage might be the only way for a soldier to form a family during war. Moreover, marriage fraud is not a major concern because proxy marriages involving members of the military are rare, and Congress already recognizes alien-widows of proxy marriages for the purpose of insurance benefits.²³⁸

Congress recognized that the widow penalty for CPRs was inhumane and that the rule only worsens the situation by deporting a grieving widow. In response, Congress provided a statutory exception to the widow

²³⁴ See, e.g., Ian Urbina, *Immigration Rally Draws Thousands*, N.Y. TIMES, Oct. 14, 2009 (reporting on the Ferschke family); Lilly Fowler, *Can Online Marriages Tame the Culture Wars?*, MOBILE REG., Jan. 9, 2010, at D2 (same); John Fales, *Sgt. Shaft: Only 1 VA Gravesite Reserved Per Vet*, WASH. TIMES, Oct. 29, 2009, at B3 (same).

²³⁵ IN THEIR BOOTS, *supra* note 4.

²³⁶ *Id.* In *Their Boots* captures the broad support that Hotaru Ferschke has garnered in her deceased husband's hometown of Maryville, Tennessee. Marines circulated petitions on her behalf to lobby Congress for a private bill, and Hotaru was cheered by the town as she rode a parade float on Flag Day. *Id.*

²³⁷ *Id.*

²³⁸ *Marine's Widow*, *supra* note 113, at 26.

penalty for CPRs for alien-widows of victims of the terrorist attacks on September 11, 2001 and for alien-widows of members of the military who died in combat. Further, Congress has favored family reunification and has further promoted the humane treatment of alien-widows of U.S. citizens by ending the widow penalty for CPRs entirely.

For the same reasons that Congress eliminated the widow penalty for CPRs, Congress should modify the definition of *spouse* in the INA to include military widows of unconsummated proxy marriages when the U.S. citizen-spouse has died in combat. The military widow penalty is every bit as cruel as the widow penalty for CPRs, and Congress should provide a similar exception for alien-military-widows of unconsummated proxy marriages. Finally, Congress should continue to ensure family reunification and promote the humane treatment of alien-widows, as it did when it eliminated the widow penalty for CPRs, by eliminating the military widow penalty that is still imposed on alien-widows of unconsummated marriages to members of the U.S. military who die serving their country.

The only permanent solution to the military widow penalty is to amend the INA. Private bills are inadequate to address the penalty: the justice they provide is uncertain and determined on a case-by-case basis, and they do nothing to prevent the penalty from affecting alien-widows of military members in the future. Legislation that terminates the military widow penalty would honor the sacrifice that soldiers like Sergeant Ferschke have made, and would assure members of the U.S. military that the United States will welcome their spouses and their children.