

Lucas Quass, *Proxy Marriages & the Military Widow Penalty: Excluding Alien Widows of Fallen Soldiers*, 20 S. CAL. REV. L. & SOC. JUST. (forthcoming 2011).

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 Corp. 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 where he met Hotaru Nakama, a Japanese girl in her early twenties.³ When the couple met at a birthday party, Hotaru was attracted to Sergeant Ferschke's smile and surprised to meet a man who was so respectful.⁴ Their relationship blossomed and within 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 Just two days after the engagement, Sergeant Ferschke was deployed to Iraq.⁷ Two weeks after his deployment, Hotaru found out that she was pregnant with his baby.⁸ Sergeant Ferschke was excited to learn about the pregnancy and immediately arranged⁹ for a proxy marriage to be conducted through a video conference between the parties in Iraq and

¹ 149 CONG. REC. S. 7279 (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 MARINE CORPS TIMES].

³ Philip Marcelo, *R.I. native, 22, killed while serving in Iraq*, PROVIDENCE JOURNAL-BULLETIN, Aug. 13, 2008, at 1 [hereinafter Marcelo].

⁴ IN THEIR BOOT: SECOND BATTLE (Brave New Foundation 2010), available at <http://www.intheirboots.com/itb/> [hereinafter IN THEIR BOOTS].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* See also, 155 CONG. REC. S. 10363, 10366 (2009) (statement of Senator Webb) (stating that Sergeant Ferschke and Hotaru "had, by all independent verifications, agreed that they would be married before they discovered she had been with child.").

⁸ IN THEIR BOOTS, *supra* note 4.

⁹ *Id.*

Okinawa.¹⁰ Sergeant Ferschke wanted to be married by proxy in order to ensure that his wife and child were provided for while he was deployed, rather than wait to have a traditional marriage ceremony after his return.¹¹

Sergeant Ferschke and Hotaru planned on raising their son in his hometown, as an American.¹² However, Sergeant Ferschke was killed in combat one month after the wedding; his wife was five months pregnant.¹³

The U.S. military recognizes proxy marriage and is currently providing Hotaru with survivor benefits; however the Immigration and Nationality Act (“INA”) does not recognize an unconsummated proxy marriage for immigration purposes.¹⁴ Accordingly, the U.S. Citizenship and Immigration Services (“USCIS”) has denied Hotaru the ability to immigrate to the United States to raise their child with her husband’s family in Tennessee.¹⁵ Tragically, if the proxy marriage was consummated after the ceremony, Hotaru would be eligible to immigrate to the United States as an immediate relative of a U.S. citizen. However, because Sergeant Ferschke was serving in Iraq at the time of his marriage, consummation was impossible. 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.¹⁶

The injustice that Hotaru and her family are now experiencing is a result of what this Note calls the “military widow penalty.” The military widow penalty arises when a deployed member of the U.S. military, who is a U.S. citizen, dies in combat, by accident or disease, which results in an alien widow immediately losing eligibility to immigrate solely because a proxy

¹⁰ Marcelo, *supra* note 3, at 1.

¹¹ IN THEIR BOOTS, *supra* note 4.

¹² *Id.*

¹³ MARINE CORPS TIMES, *supra* note 2, at 17.

¹⁴ *No way to treat a fallen Marine*, THE VIRGINIAN-PILOT, Nov. 2, 2009, at B8.

¹⁵ *Id.*

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

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 USCIS automatically denies the issuance of an immigrant visa to the alien widow.

This note will argue that Congress should terminate the military widow penalty. Part II of this Note will describe the process of securing legal permanent residence status by marrying a U.S. citizen and will define what is considered a valid marriage for immigration purposes. Part III evaluates the history and formation of the military widow penalty in the United States. Part IV will argue that proxy marriages are a defensible form of marriage and 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 had previously provided similar exceptions for the alien spouses of military members. Finally, Part V will propose a modification to the INA and will argue that private bills are insufficient to prevent future injustice from the military widow penalty.

II. THE PROCESS OF IMMIGRATING THROUGH MARRIAGE TO AN U.S. CITIZEN

Congress has plenary power over the admission of non-citizens to the United States.¹⁷ Accordingly, the Judiciary's power is limited when interpreting immigration law authorized by Congress.¹⁸ In 1921, Congress established a national origins quota system to limit the number of aliens¹⁹ immigrating to the United States.²⁰ In 1952, Congress enacted the INA, otherwise

¹⁷ *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889).

¹⁸ RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 19 (Stephanie L. Browning ed., 2006).

¹⁹ The INA defines the term alien as any person that is not a citizens or nationals of the United States. 8 U.S.C. § 1101(a)(3) (2006).

²⁰ Alien Immigration Limited Emergency Immigration Act, Pub. L. No. 67-5, 42 Stat. 5 (1921).

known as the McCarran-Walter Act.²¹ The INA provides that the term “immigrant” applies to every alien except an alien who is eligible for a nonimmigrant classification.²²

One of the simplest and most common avenues for aliens to immigrate to the United States is through an immediate relative relationship with an U.S. citizen.²³ 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”).²⁴ 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;²⁵ while the number of spouses of LPR increased from 50,000 to 112,000 over the same period.²⁶ 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.²⁷

The immediate relative category was established in 1952 when Congress enacted the INA.²⁸ The INA provides eligibility to immigrate through three different types of immediate relatives: 1) children of U.S. citizens, 2) parents of U.S. citizens, if the citizen child is at least twenty-one years old, and 3) through a valid marriage to a U.S. citizen.²⁹ Unlike other family preference categories defined by the INA, aliens immigrating through an immediate relative are not subjected to the world-wide quota restrictions and do not have to face the substantial wait

²¹ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), [hereinafter INA] (codified as amended at 8 U.S.C. §§1101-1537 (2006)).

²² INA § 101(a)(15); 8 U.S.C. § 1101(a)(15).

²³ 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).

²⁴ T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, AND HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 327 (Thomas West 2008) [hereinafter ALEINIKOFF].

²⁵ U.S. DEP’T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, YEARBOOK OF IMMIGRATION STATISTICS: 2008 18 (2009).

²⁶ *Id.*

²⁷ *Id.*

²⁸ INA, Pub. L. No. 82-414, 66 Stat. 163.

²⁹ 8 U.S.C. §§1151(b)(2)(A)(i); 1154(a)(1)(A)(i).

time as do other classifications.³⁰ The INA also provides for the issuance of visas to fiancées of U.S. citizens to allow for the couple to be married in the United States within ninety days of admission.³¹

To begin the process of securing a family-based immigrant visa, the citizen spouse may submit a petition to USCIS in order to establish the validity of the relationship and the status of the U.S. citizen.³² If the U.S. citizen dies after filing the petition and the couple was validly married for at least two years, the form is automatically converted to a widow petition.³³ 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.³⁴ 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, or remarried and must file a petition within two years of the death of the U.S. citizen spouse.³⁵

After the petition is filed, USCIS will determine if the underlying spousal relationship was genuine.³⁶ If the family immigrant petition is approved, the alien may apply for an immigrant visa if living outside the United States³⁷ or if eligible, apply to adjust status to an LPR if currently residing in the United States.³⁸ LPR status is advantageous because a LPR spouse is

³⁰ 8 U.S.C. § 1151(b).

³¹ § 1101(a)(15)(K).

³² § 1154(a)(1)(A)(i) (“any 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 USC § 1153(a)] or to an immediate relative status under section 201(b)(2)(A)(i) [8 USC § 1151(b)(2)(A)(i)] may file a petition with the Attorney General for such classification.”); § 1154(a)(1)(B)(i) (“any 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 USC § 1153(a)(2)] may file a petition with the Attorney General for such classification.”).

³³ *Id.*; INA §§204.2(i)(1)(iv), 205.1(a)(3)(i)(C)(1).

³⁴ 8 C.F.R. 204.2(b) (2010).

³⁵ *Id.* See also, 8 U.S.C. § 1154(a)(1)(A)(ii) (“[a]n 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.”).

³⁶ 8 C.F.R. 204.2.

³⁷ 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).

³⁸ § 1255(a) (stating that an alien may be adjusted to status to an LPR if “(1) the alien makes an application for such

eligible to become a naturalized citizen after three years, and can reside and work in the United States while in LPR status.³⁹

The INA allows for spouses of U.S. citizens and LPRs to become eligible for LPR status.⁴⁰ After lawful admission to the United States on an immigrant visa, the alien spouse may file an application for adjustment of status to an LPR.⁴¹ 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.⁴² 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.⁴³ To remove the conditional status, the couple is required to appear for an interview with USCIS to evaluate the marriage for fraud and eligibility for LPR status.⁴⁴

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

Generally, USCIS will determine the validity of a marriage by the laws of the state or country of celebration.⁴⁵ A marriage must be legally valid, not against U.S. public policy, and not entered into for the singular purpose of obtaining an immigration benefit. This general rule

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.”)

³⁹ § 1430(a). However, a spouse of an LPR is included in the quota system. § 1153(a)

⁴⁰ 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)(2). *See also*, § 1151(a)(1) (“aliens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence” which includes “family sponsored immigrants”); § 1153(a)(2) (“family-sponsored immigrants” includes spouses of permanent resident aliens); § 1151 (b)(2)(A)(i) (defines “immediate relatives” as 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.”).

⁴¹ 8 C.F.R. 245.2(a)(3).

⁴² 8 U.S.C. § 1186a(a).

⁴³ § 1186a(b)(1).

⁴⁴ § 1186a(c)(1)(B).

⁴⁵ *See e.g., In re Luna*, 18 I. & N. Dec. 385, 386 (B.I.A. 1983) (“the 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) (“[g]enerally, the validity of a marriage is determined according to the law of the place of celebration.”).

“applies [to] marriages in foreign countries or in a state or territory of the United States.”⁴⁶ For example, common law marriages are considered legal marriages for immigration purposes if legal in the country or state where the marriage was entered.⁴⁷ However, if a marriage was performed in a state or country to avoid the marriage law of the couple’s state of residence, then that marriage will only be recognized to the extent of the law of the state of residence.⁴⁸

For a marriage to be valid for immigration purposes, it must not be in conflict with public policy.⁴⁹ This is generally understood to mean that the marriage must be lawful in the intended place of destination in the United States.⁵⁰ Marriages that are not recognized for immigration purposes as a violation of public policy, despite being legal in the place of celebration, include incestuous marriages,⁵¹ polygamous marriages⁵² and same-sex marriages.⁵³

Polygamous marriages are typically not recognized; specifically the INA states “[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible.”⁵⁴

Currently, the INA will only recognize one marriage and will not recognize a subsequent marriage without termination of the first.⁵⁵

⁴⁶ ALEINIKOFF, *supra* note 24, at 327.

⁴⁷ *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 for immigration purposes).

⁴⁸ *Compare In re E*, 4 I. & N. Dec. 239 (B.I.A. 1956) (recognizing an incest marriage, despite California law voiding such marriages, because California, the couple’s place of residence recognized marriages legally preformed in other states and countries), *with In re Zappia*, 12 I & N Dec. 439 (B.I.A. 1967) (not recognizing an incest marriage, because the couple state of residence did not recognize such marriages and the marriage was conducted in South Carolina during a short trip out of state to avoid marriage laws.).

⁴⁹ ALEINIKOFF, *supra* note 24, 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 and such subsequent marriage cannot be accorded recognition for immigration purposes”).

⁵⁰ ALEINIKOFF, *supra* note 24, at 327.

⁵¹ *In re Zappia*, 12 I. & N. Dec. 439, 441 (B.I.A. 1967).

⁵² *In re Darwish*, 14 I & N Dec. 307, 308 (B.I.A. 1973).

⁵³ *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982).

⁵⁴ 8 U.S.C. § 1182 (a)(10)(A).

⁵⁵ *Egan v. Weiss*, 119 F.3d 106, 108-09 (2d Cir. 1997) (petition denied because divorce decree was not final). *See also, SARAH IGNATIUS & ELISABETH STICKNEY, IMMIGRATION LAW AND THE FAMILY 4:25 (2002).*

Congress has also excluded homosexuals from the definition of marriage. Specifically, the Defense of Marriage Act provides that the term spouse “refer[s] only to a person of the opposite sex who is a husband or a wife.”⁵⁶ Thus, the Defense of Marriage Act mandates that USCIS cannot recognize same-sex marriage, even if same-sex marriage is legal in the place where the marriage was entered.

Proxy marriages are also barred by Congress for immigration purposes, unless the marriage has been consummated.⁵⁷ 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.”⁵⁸ “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.”⁵⁹ Although unconsummated proxy marriages are specifically excluded by the INA, USCIS may issue a visa to an alien married by proxy to allow the alien to enter the United States to consummate the marriage.⁶⁰

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).⁶¹

⁵⁶ 1 U.S.C. § 7 (2006).

⁵⁷ 8 U.S.C. § 1101(a)(35).

⁵⁸ *Id.*

⁵⁹ H.R. Rep. No. 82-1365, at 33 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1685.

⁶⁰ 8 U.S.C. § 1101(a)(35).

⁶¹ U.S. Dep’t of State, *Visas*, 9 FOREIGN AFFS. MANUAL 40.1, n1.3 (2008), *available at*

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.⁶² However, consummation prior to the proxy marriage ceremony, such as Sergeant Ferschke and Hotaru's case, does not validate the marriage for immigration purposes.

Even after 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.⁶³ The petitioner bears the burden of proof to establish that the underlying marriage was entered in good faith.⁶⁴

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 that she does not meet the current INA definition of marriage.⁶⁵ Despite her proxy marriage being legal under Japanese law, the marriage was not recognized for purpose of immigration because the marriage was not consummated after it was entered. Moreover, evidence of pre-consummation, as evident from the birth of a child, does not make the marriage valid under the INA.⁶⁶ Thus, Hotaru's case demonstrates what this Note has termed the "military widow penalty."

<http://www.state.gov/documents/organization/86920.pdf>.

⁶² *See Id.* ("A party to an unconsummated proxy marriage may be processed as a nonimmigrant fiancé(e). A proxy marriage celebrated in a jurisdiction recognizing such marriage is 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.").

⁶³ *Skelly v. INA*, 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)).

⁶⁴ *Lutwak v. United States*, 344 U.S. 604, 612 (1953).

⁶⁵ Hotaru currently remains in the United States in limbo on a visitor's visa, while she continues to lobby Congress to grant her LPR status through a private bill. Correy Stephenson, *Proxy marriage leaves wife, baby in limbo*, LAWYERS USA, Oct. 23, 2009 [hereinafter LAWYERS USA].

⁶⁶ 9 FOREIGN AFFS. MANUAL 40.1, n1.3.

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 while on deployment, whether in combat, by disease or accident, thus leaving the proxy marriage unconsummated. This problem exists for U.S. citizen civilian petitioners; however this Note will argue 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 and social justice.

III. THE DEVELOPMENT OF EXCLUDING UNCONSUMMATED PROXY MARRIAGES:

JAPANESE PICTURE BRIDES & PROXY MARRIAGE IN THE EARLY 1900s

Immigration authorities in the United States have traditionally been suspicious of proxy marriages. As early as the 1900s, Pacific Coast immigration port officials did not recognize proxy marriages for purposes of immigration.⁶⁷ Rather, alien brides who were married by proxy were allowed to enter the United States to legalize their marriage by immediately remarrying their husbands at the port.⁶⁸

The development of the statutory exclusion of proxy marriages for immigration purposes started in the early 1900s with the increased number of Japanese picture brides immigrating to the United States through the Gentleman's Agreement of 1907 with Japan.⁶⁹ The Gentleman's Agreement halted Japanese immigration but provided that Japanese men within the United States could continue to send for or bring a wife into the United States.⁷⁰ 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.⁷¹

⁶⁷ MARTHA MABIE GARDNER, *THE QUALIFICATION OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP IN THE UNITED STATES, 1870-1965*, 166 (UMI 2001) [hereinafter GARDNER].

⁶⁸ *Id.*

⁶⁹ NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 145-47 (Harvard University Press 2000) [hereinafter COTT].

⁷⁰ *Id.* 150-155.

⁷¹ *Id.* at 151. *See also*, GARDNER, *supra* note 67, at 171 (reporting that from 1910 to 1913, 3,156 Japanese women

A Japanese picture bride is an arranged marriage, 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.⁷² If an agreement was reached by the families, the couple would marry by proxy in Japan and the bride would immigrate to the United States to meet and reside with her husband.⁷³ From 1900 to 1924, approximately 22,000 picture brides immigrated to the United States from Japan, Okinawa, and Korea.⁷⁴ Picture brides were mostly married by proxy to a man that they had only seen in a photograph.⁷⁵

West Coast port officials, who admitted picture brides, defended the practice by arguing that marriage is a bargain based on the consent of the parties.⁷⁶ Immigration officials in Hawaii first instituted the practice of requiring "that proxy brides remarry their 'alleged husbands' right away, in an American ceremony at the port."⁷⁷ Immigration officials on the East Coast 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.⁷⁸

Japanese picture brides became the subject of public criticism and Congressional debate in the early 1900s.⁷⁹ For instance, Senator James D. Phelan of California claimed on the floor of Congress that marriage by proxy where "the parties are separated by an ocean and merely exchange photographs—is no marriage at all."⁸⁰

were admitted to the United States as picture brides, while over that same period eighteen Japanese picture brides were denied admission. Additionally, from 1910 to 1913, 1,408 Japanese women were admitted to the United States who had been married through a traditional ceremony, while over that same period seven were denied admission).

⁷² COTT, *supra* note 69, at 151.

⁷³ *Id.*

⁷⁴ Suzanne H. Jackson, *To Honor and Obey: Trafficking in "Mail-Order Brides"*, 70 GEO. WASH. L. REV. 475, 485 (2002).

⁷⁵ ALEINIKOFF, *supra* note 24, at 639.

⁷⁶ COTT, *supra* note 69, at 151.

⁷⁷ *Id.*

⁷⁸ *Id.* at 152.

⁷⁹ GARDNER, *supra* note 67, at 165; COTT, *supra* note 69, at 153-55.

⁸⁰ COTT, *supra* note 69, at 153.

In the Western states, racist sentiment against the Japanese resulted in the public labeling of picture brides as prostitutes, illegal labors, and as a threat to the morality of the community.⁸¹ Opponents of Japanese immigration argued that recognizing picture brides as a valid means of immigration would open the flood gates for Japanese women to the United States as prostitutes.⁸² San Francisco immigration authorities claimed that half of all Japanese picture brides led immoral lives in the United States.⁸³ Opposition also feared that Japanese couples would reproduce faster than white couples, resulting in the indefinite expansion of the Japanese race in the United States.⁸⁴

In 1912, organized labor in San Francisco urged President Wilson to exclude picture brides from immigrating to the United States.⁸⁵ Organized labor argued that picture brides were not wives but were labors in fact, “working as horticulturists with their husbands, thus displacing white farmers.”⁸⁶ Immigration officials questioned if picture brides were brought to the United States as laborers under the false pretense of wives because Japanese picture brides often worked in family owned businesses.⁸⁷

In 1917, immigration authorities recognized the validity of proxy marriage 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.⁸⁸ However, as racial tension and anti-Japanese sentiment continued to grow in the Western states, Congress enacted the Immigration Act of 1924, ending any debate over the validity of proxy marriages.⁸⁹ Specifically, the Immigration Act of 1924 authorized a broad

⁸¹ GARDNER, *supra* note 67, at 165-66.

⁸² *Id.* at 167-168.

⁸³ *Id.* at 171.

⁸⁴ COTT, *supra* note 69, at 152.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 153.

⁸⁹ *Id.* at 154.

statutory ban on proxy marriages with the implementation of a definition of “husband” and “wife” for immigration purposes.⁹⁰ 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.”⁹¹

Following World War II, the debate surrounding proxy marriages reopened with the passage of the War Brides Act of 1945.⁹² 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.⁹³ The Act provided that that any alien admitted under this provision would be treated as a nonquota immigrant.⁹⁴ However, the Act also provided that proxy marriages would not be recognized unless the marriage was subsequently consummated.⁹⁵ Thus, the consummation rule was born and has remained part of the INA.

In 1952, Congress adopted INA, which continues to recognize proxy marriages for immigration purposes, when the marriage has been consummated.⁹⁶ With the implementation of the INA, the exclusion of unconsummated proxy marriages has been applied to exclude marriages that have been consummated prior to a formal ceremony.⁹⁷

IV. PROXY MARRIAGES INVOLVING DEPLOYED MEMBERS OF THE MILITARY ARE JUSTIFIABLE & CONGRESS SHOULD AUTHORIZE AN EXCEPTION

The INA provides that a proxy marriage is not recognized for immigration purposes unless subsequently consummated.⁹⁸ An alien spouse, who married by proxy to a deployed

⁹⁰ Immigration Act of 1924, Pub. L. No. 68-139; 43 Stat. 153, 169 (1924).

⁹¹ *Id.*

⁹² GARDNER, *supra* note 67, at 286-87.

⁹³ War Brides Act of 1945, Pub. L. No. 79-271; 59 Stat. 659 (1945).

⁹⁴ *Id.*

⁹⁵ GARDNER, *supra* note 67, at 286-87.

⁹⁶ Immigration and Nationality Act, 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.”).

⁹⁷ *In re B*, 5 I. & N. Dec. 698, 699 (B.I.A. 1954).

⁹⁸ 8 U.S.C. § 1101(a)(35).

member of the U.S. military, who dies while deployed, will be unable to satisfy the consummation requirement. The right to marry is a fundamental right which is guaranteed by due process by the Constitution.⁹⁹ 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 United States, 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.”¹⁰⁰ Because Congress has plenary power over immigration, a challenge to how Congress defines a spouse for immigration purposes would not be fruitful. Accordingly, the definition of spouse in the INA should be amended by Congress to include surviving spouses of unconsummated proxy marriage to deployed U.S. citizen members of the military.

Congress should honor all fallen soldiers by ending the military widow penalty through the recognition of unconsummated proxy marriages. Specifically 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, and dies from combat, disease or accident. 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.

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

⁹⁹ Wash. v. Glucksberg, 521 U.S. 702, 720 (1997).

¹⁰⁰ Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

Proxy marriages have become increasingly popular¹⁰¹ among military members, who often seek legal assistance from the Judge Advocate General's Corps concerning proxy marriages.¹⁰² In response to this demand, proxy marriage companies have developed throughout the United States to facilitate military proxy marriages.¹⁰³

Military benefits often motivate a couple to enter into a proxy marriage, rather than wait for the soldier to return home for a traditional ceremony.¹⁰⁴ 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 many months for the husband to return.¹⁰⁵ Other motivations for choosing to enter a proxy marriage while on deployment include, securing the right to be notified of the death of the military spouse,¹⁰⁶ financial considerations, housing allowances and job training for the civilian spouse.¹⁰⁷

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 to be married by proxy to ensure that military survivorship benefits will provide for the soldier's loved ones. Moreover, the U.S. military recognizes proxy marriages and pays survivor benefits to the widowed spouses

¹⁰¹ See e.g., *National News Recap: Top Stories of the Week*, CHI. TRIB., May 20, 2007 at C10 (stating that double proxy marriages have become so popular in Montana and that the state legislature has considered modifying its law.)

¹⁰² 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 (stating that in the professional experience of a JAG [t]he issue of proxy marriages comes up with some frequency.”).

¹⁰³ 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 90% military). Further, a quick internet search will turn up dozens of companies that specialize in the facilitation of proxy marriages for deployed members of the military. Montana is the only state which allows double proxy marriages, where both parties are absent from the ceremony, and 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).

¹⁰⁴ Karen Jowers & D. Kevin Elliott, *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.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ MPPM, Proxy Marriage Military Benefits, available at www.proxymarriages.net/benefits.

of proxy marriages, including Hotaru Ferschke.¹⁰⁸ 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. 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."¹⁰⁹

Courts have consistently recognized widows of proxy marriages for military insurance purposes. For instance, in *Barrons v. United States*, Lieutenant Barrons was deployed to Africa and subsequently notified that his girlfriend, June, was pregnant with his child.¹¹⁰ Lieutenant Barrons immediately arranged for the couple to be married by proxy in Nevada through the Red Cross.¹¹¹ After the marriage, Lieutenant Barrons designated June as his primary beneficiary under his life insurance policy provided through the military.¹¹² Unfortunately, Lieutenant Barrons died in combat one week after his proxy marriage ceremony.¹¹³

June received payments from the policy until her father-in-law claimed that her proxy marriage made her ineligible for benefits.¹¹⁴ 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 1940.¹¹⁵ The Act provided that "[t]he insurance shall be payable only to widow, widower, child, . . . parent, . . . brother or sister of the insured."¹¹⁶ Accordingly, the court determined that June's eligibility as a widow "rests upon the

¹⁰⁸ *Can Marine's Widow, Baby Stay In U.S.?*, A.F. TIMES, Oct. 5, 2009, at 26 [hereinafter A.F. TIMES].

¹⁰⁹ 38 U.S.C. § 1901

¹¹⁰ *Barrons v. United States*, 191 F.2d 92, 93 (9th Cir. 1951)

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 94.

¹¹⁴ *Id.* at 93.

¹¹⁵ *Id.* at 94.

¹¹⁶ National Service Life Insurance Act of 1940, Pub. L. No. 801-76, 602(g), 54 Stat. 1010 (1940).

validity of the proxy marriage”¹¹⁷ Thus, the Circuit Court was required to determine if the Barrons’ proxy marriage was valid under the law of where it was celebrated.¹¹⁸ 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.¹¹⁹

Undoubtedly, Sergeant Ferschke’s motivation to marry Hotaru by proxy was in part due to her pregnancy and a desire to provide insurance benefits for her and their child immediately, rather than wait for his return from Iraq.¹²⁰ Hotaru’s proxy marriage was recognized by the U.S. military without a legal challenge¹²¹ and she is now receiving survivor benefits because by all accounts, proxy marriage is valid under Japanese law.¹²²

Surprisingly, an unconsummated proxy marriage has entitled Hotaru to significant financial support from the U.S. government, but her marriage does not entitled her to live and raise her son with her husband’s family in the United States. Under the National Service Life Insurance Act, Congress has chosen to include proxy marriages, even unconsummated proxy marriages, in the definition of widow, unlike the INA.¹²³ Thus, under current law, an unconsummated proxy marriage raises suspicion for marriage fraud but no suspicion for 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

¹¹⁷ Barrons, 191 F.2d at 94.

¹¹⁸ *Id.* at 96.

¹¹⁹ *Id.* at 97-9. *See also*, United States v. Layton, 68 F. Supp. 247(SD 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 it was entered.)

¹²⁰ LAWYERS USA, *supra* note 65.

¹²¹ *See e.g.*, A.F. TIMES *supra* note 107, at 26 (reporting that “[t]he U.S. military recognizes proxy marriages for couples separated by war, and the Corps is paying survivor benefits to Ferschke and her baby.”).

¹²² Kristin M. Hall, *Marine's widow in fight -- Proxy wedding puts her in precarious spot*, MEMPHIS COM. APPEAL, Sept. 20, 2009, at B3 (reporting that according to the U.S. Embassy, “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.”).

¹²³ *See* 38 U.S.C. § 1901 (note that the definition for widow does not exclude proxy marriages).

consummation should not defeat proxy marriages involving deployed members of the military when the genuineness of the marriage can be demonstrated by other evidence.¹²⁴ Since Congress does not view military widows of unconsummated proxy 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 HAS 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.¹²⁵ When a citizen marries an alien, the transition to LPR status is lengthy and can involve substantial bureaucratic processing.¹²⁶ LPR status is not immediately granted upon marriage to a U.S. citizen; the U.S. citizen spouse must first file a petition with USCIS, which often involves substantial wait time to process.¹²⁷ If the alien is granted LPR¹²⁸ status prior to the couple’s second wedding anniversary then LPR status is given on a conditional basis as a CPR.¹²⁹ USCIS has traditionally taken the position that if the citizen spouse dies while the petition is being processed, then a petition for CPR status must be denied because the alien spouse is no longer an immediate relative of a U.S. citizen.¹³⁰ However, in a case where USCIS adjudicates the petition for CPR status quickly, “the government allows the

¹²⁴ 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).

¹²⁵ Memorandum from Mike Aytes, Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs. to Field Leadership (Nov. 8, 2007) [hereinafter Aytes], available at http://www.uscis.gov/files/pressrelease/1130AFMAD0804_110807.pdf.

¹²⁶¹²⁶ Surviving Spouses Against Deportation, Understanding the Issue - What is was the Widow Penalty? [hereinafter SSAD], available at <http://ssad.org/education.html>.

¹²⁷ *Id.*

¹²⁸ *Supra* note 42 and accompanying text.

¹²⁹ 8 U.S.C. § 1186a(a).

¹³⁰ See Aytes, *supra* note 125, at 1 (stating that “[t]he 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.”).

CPR to file to remove the condition despite the death, even if the marriage only lasted (for example) three months.”¹³¹ This strict application of the definition of immediate relative has been known as the widow penalty and was repealed by Congress in 2009.¹³²

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 the INA was first enacted by Congress, the term “immediate relative” was not used; instead, immediate relatives fell under a “nonquota immigrant” category.¹³³ The term “nonquota immigrant” included anyone who is a child or spouse of an U.S. citizen.¹³⁴ The original INA did not place any additional restrictions on a nonquota immigrant, thus facilitating alien spouses to be admitted upon marriage.¹³⁵ The term “immediate relative” was not added to the INA until the 1965 amendment, which provided that the term

immediate relatives . . . shall mean the children, spouses, and parents of a citizen of the United States: Provided, 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.¹³⁶

This definition did not provide for an automatic revocation of an alien spouse’s classification as an immediate relative upon the death of a U.S. citizen spouse.¹³⁷

¹³¹ SSAD, *supra* note 126.

¹³² FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, Oct. 28, 2009, 123 Stat. 2142 (2009).

¹³³ INA, Pub. L. No. 82-414, § 101(a)(27), 66 Stat. 163, 169-70.

¹³⁴ INA, 66 Stat. 163, 169-70 (“The term ‘nonquota immigrant’ means . . . an immigrant who is the child or the spouse of a citizen of the United States”).

¹³⁵ *Id.*

¹³⁶ INA, Pub. L. No. 89-326, § 201(b), 79 Stat. 911.

¹³⁷ *Id.*

In 1986, Congress passed the *Immigration Marriage Fraud Amendments* (“IMFA”),¹³⁸ intending to prevent noncitizens from obtaining permanent residence status through a fraudulent or sham marriage.¹³⁹ The IMFA provided that any noncitizen or alien who secures LPR status through a marriage that is less than two years old receives a conditional status for two years before becoming a LPR.¹⁴⁰ The IMFA was enacted to prevent fraud as the federal government had estimated that nearly thirty percent of spousal petitions were fraudulent.¹⁴¹ However, the IMFA did not provide a statutory widow penalty.

After the IMFA, Congress passed the Immigration Act of 1990¹⁴² which substantially changed the immigration system and modified the INA.¹⁴³ The Immigration Act of 1990 amended the definition of immediate relative by providing aliens spouses the ability to self-petition for adjustment of status to LPR status if the U.S. citizen spouse had died and the couple had previously been married for more than two years.¹⁴⁴ 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.¹⁴⁵

¹³⁸ 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)).

¹³⁹ ALEINIKOFF, *supra* note 24, at 179.

¹⁴⁰ *Id.* at 341.

¹⁴¹ H.R. REP. NO. 99-906, at 6, reprinted in 1986 U.S.C.C.A.N. 5978, 5978.

¹⁴² Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1151(b)(2)(A)(i) (2000)).

¹⁴³ ALEINIKOFF, *supra* note 24, at 179 (explaining that the Immigration Act of 1990 expanded immigration benefits while focusing on exclusion and removal grounds).

¹⁴⁴ 8 U.S.C. § 1151(b)(2)(A)(i).

¹⁴⁵ Immigration Act of 1990, Pub. L. No. 101-649, § 101(a), 104 Stat. 4978, 4980-81.

The interpretation of this provision by USCIS and the courts gave rise to the widow penalty for CPRs.¹⁴⁶ According to the USCIS interpretation, this provision provided for an automatic termination of a petition for CPR status, upon the death of the U.S. citizen spouse when the marriage is less than two years old.¹⁴⁷

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

On October 28, 2009, President Obama signed into law the Department of Homeland Security Appropriations Act of 2010 (“the Act”) and effectively ended the widow penalty for CPRs by expanding the rights of alien widows despite the death of a U.S. citizen spouse.¹⁴⁸ 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.¹⁴⁹

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.¹⁵⁰ The definition of “immediate relative” currently reads as follows:

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~~

¹⁴⁶ *In re Varela*, 13 I. & N. Dec. 453 (B.I.A. 1970) the applicant spouse became a widow only weeks after her marriage to a U.S. citizen, who died from a heart attack while serving active duty with the Navy Reserve. 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 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); *and* *Burger v. McElroy*, No. 97 Civ. 8775, 1999 U.S. Dist. LEXIS 4854, at *16 (S.D.N.Y. 1999).

¹⁴⁷ *See Aytes, supra note 125*, at 1 (stating that “[t]he 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.”).

¹⁴⁸ FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, Oct. 28, 2009, 123 Stat. 2142.

¹⁴⁹ 123 Stat. 2142 § 568(c)-(d).

¹⁵⁰ *Id.* at § 568(c).

~~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.¹⁵¹

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 a U.S. citizen spouse, to self-petition for CPR status.¹⁵²

The Act also provides that if the deceased U.S. citizen spouse had previously filed a petition on behalf of the alien spouse, that petition automatically converts into a self-petition.¹⁵³

By allowing alien widows to self-petition, the Act also removes the requirement that a third party submit an affidavit of financial support.¹⁵⁴

In order to be eligible to self-petition, the Act requires that the alien widow must not have remarried.¹⁵⁵ However, even if the alien widow has remarried, under section 568(d) of the Act, if a petition was previously submitted by the deceased U.S. citizen spouse then the surviving spouse remains eligible for CPR status.¹⁵⁶ Eligible unmarried children of an alien spouse may also be included in a self-petition, but children cannot self-petition.¹⁵⁷

The Act also includes a provision to ensure that USCIS will continue to process the applications of immigrants who are waiting to receive an immigrant visa prior to the death of the petitioner.¹⁵⁸ Specifically, section 568(d) of the Act provides additional protection for other

¹⁵¹ 8 U.S.C. § 1151(b)(2)(A)(i).

¹⁵² 123 Stat. 2142 § 568(c).

¹⁵³ 8 C.F.R. § 204.2(i)(1)(iv).

¹⁵⁴ INA 212(a)(4)(C)(i)(I).

¹⁵⁵ 123 Stat. 2142 § 568(c).

¹⁵⁶ 123 Stat. 2142 § 568(d).

¹⁵⁷ *In re Minkova*, 22 I. & N. Dec. 1161, 1162 (B.I.A. 1999).

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

survivors of deceased petitioners.¹⁵⁹ 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 United States since the death of the petitioner.¹⁶⁰ Section 568(d) includes immediate relatives, family preference relatives, employment-based dependants, beneficiaries of pending or approved refugee/asylee relative petitions, aliens admitted in T or U nonimmigrant status and asylees.¹⁶¹ Unlike section 568(c), section 568(d) requires residency in the United States and an affidavit of financial support from a substitute sponsor.¹⁶² 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.¹⁶³

USCIS is implementing these new regulations under the Act and has reopened previously denied CPR petitions.¹⁶⁴ 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.”¹⁶⁵ Accordingly, the Act has provided for these cases to be treated more humanely by no longer allowing the death of an U.S. citizen spouse, or other petitioner, to be the only reason for denial of immigration benefits.¹⁶⁶

When Congress ended the widow penalty for surviving spouses and other relatives of immigration sponsors who died during the CPR adjudication process, Congress did so in an effort to ensure humanitarian treatment of surviving spouses.¹⁶⁷ Congress considered many

¹⁵⁹ 123 Stat. 2142 § 568(d).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Memorandum from Donald Neufeld, Acting Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigration Servs. to Executive Leadership (Dec. 2, 2009), *available at* <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).

¹⁶⁵ Brent Renison, *New Law Expands Immigrant Rights Of Survivors*, 4 (Parrilli Renison 2009)

¹⁶⁶ *Id.*

¹⁶⁷ FY2010 Conference Summary: Homeland Security Appropriation, Committee on Appropriation, 5 (October 7,

heartbreaking stories when it determined that the widow penalty for CPRs should be terminated.¹⁶⁸ Congress 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.”¹⁶⁹ Likewise, the military widow penalty has resulted in “piling” on when USCIS denies immigration benefits to a spouse of a soldier who gave his or her life in service to 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.¹⁷⁰ 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. Prolonging the separation of spouses from each other, and from their children, is inconsistent with the principles on which this nation was founded.”¹⁷¹

Further, Congress has consistently favored family unification and expedited admission to the United States for immediate relatives of U.S. citizens.¹⁷² However, the military widow penalty is inconsistent with facilitating family unification and expedited admission for immediate relatives of U.S. citizens. 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.¹⁷³ If Congress continues to allow the military widow penalty to strip alien widows of their eligibility for immigration, it will

2009).

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

¹⁶⁹ *Id.*

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

¹⁷¹ *Id.* (“Yet current law causes this to occur all too often.”).

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

¹⁷³ 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 the in the United States and has successfully lobbied for a private bill to be introduced on her behalf, though the success of the bill is unlikely).

prevent family reunification and allow for 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.¹⁷⁴ Ending the widow penalty for CPRs only affected a relatively small number of aliens, who are still “required to demonstrate that they had a bona fide marriage before receiving [LPR status].”¹⁷⁵ Further, USCIS retained discretion to deny petitions.¹⁷⁶ Likewise, an amendment to the definition of spouse in the INA to end the military widow penalty would only affect a small class of individuals, likely smaller than the approximately two-hundred widows affected by the termination of the widow penalty for CPRs.¹⁷⁷ Moreover, spouses under an exception to the ban on unconsummated proxy marriages will also have to demonstrate the validity of the underlying marriage, while USCIS will retain discretionary authority, thus further alleviating fraud concerns.

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

Congress enacted two statutory exceptions to the widow penalty for CPRs. 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 (“USA Patriot Act”), provided the first exception for the widow penalty for CPRs in the aftermath of the September 11, 2001 terrorist attacks.¹⁷⁸ The USA Patriot Act

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

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (stating that there have been over 200 victims of the widow penalty).

¹⁷⁸ 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).

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, 2001.¹⁷⁹

The National Defense Authorization Act of 2004 provided a second exception to the widow penalty for CPRs for alien widows, legally married under the INA, whose U.S. citizen spouses died while deployed with the U.S. military.¹⁸⁰ The act specifically provided for

[s]pouses . . . 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.¹⁸¹

Thus, Congress provided grieving alien widows, children, and parents the “opportunity to legalize their immigration status and avoid deportation in the event of the death of their loved one serving in our military.”¹⁸² 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 injury or disease.” 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 parents of their immigration status as an immediate relative.¹⁸³

¹⁷⁹ *Id.* §§ 421(a), 421(b)(1)(B)(i), 423, 115 Stat. at 356, 360.

¹⁸⁰ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(a)-(e), 117 Stat. 1392, 1693 (2003).

¹⁸¹ *Id.* (“but 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.”).

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

¹⁸³ *Id.* See also, 149 CONG. REC. S. 7279, 7282 (2003) (statement of Senator Levin).

The military exception to the widow penalty for CPRs was given bipartisan support in Congress.¹⁸⁴ 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 the 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.¹⁸⁵ Furthermore, Congress has recognized the injustice of the widow penalty by abolishing the widow penalty for CPRs entirely.¹⁸⁶ Accordingly, Congress should 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 military member.

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

The problem of proxy marriages and a U.S. citizen spouse dying 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. citizen members of the military. Further, cases involving the military are distinct and entitled to separate consideration due to the unique circumstances of military deaths.

¹⁸⁴ 149 CONG. REC. S. at 7279 (statement of Senator Kennedy).

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

¹⁸⁶ See *supra* note 166 and accompanying text.

For example, the BIA decision in *Matter of B* demonstrates how the INA definition of spouse can impact proxy marriages that occur outside of the military.¹⁸⁷ In *Matter of B*, the petitioner, B, sought to bring his wife and child to the United States pursuant to his LPR status.¹⁸⁸ B attempted to marry the beneficiary, V, in Italy but due to missing documents the Italian authorities were unable to marry them.¹⁸⁹ The couple lived together in Italy, acting as husband and wife, and had three children together.¹⁹⁰ 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 1953.¹⁹¹

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, the place the marriage was entered.¹⁹² Although B and V lived together and “there was consummation prior to the marriage as evidenced by the birth of three children,” the INA¹⁹³ requires the proxy marriage to be consummated after it is celebrated.¹⁹⁴ Since 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.¹⁹⁵

¹⁸⁷ *In re B*, 5 I. & N. Dec. 698 (B.I.A. 1954).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 699.

¹⁹² *In re B*, 5 I. & N. Dec. at 699.

¹⁹³ 8 U.S.C. § 1101(a)(35).

¹⁹⁴ *In re B*, 5 I. & N. Dec. at 699.

¹⁹⁵ *Id.* (“at 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).] 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).

The exclusion of proxy marriages from immigration benefits is largely because proxy marriages have always been viewed as potential fraudulent marriages.¹⁹⁶ However, under the circumstances of a proxy marriage involving a deployed member of the U.S. military, the suspicion of fraud is dramatically lessened, especially when the marriage has been pre-consummated 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.”¹⁹⁷

In the typical proxy marriage case, the distance between the couple may be in some sense voluntary and a proxy marriage is merely a convenient mode of marriage. Under these circumstances, the current INA requirement¹⁹⁸ that a proxy marriage must be consummated before immigration benefits vest, is a reasonable protection against fraudulent marriages entered into solely for immigration benefits. In contrast, a proxy marriage is justifiable when the separation of the couple is due to military service.¹⁹⁹

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.²⁰⁰ 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.

In cases similar to *Matter of B* or cases outside of the military, other means of marriage are possible. But in the case of a deployed member of the military, the options for a marriage

¹⁹⁶ GARDNER, *supra* note 67, at 157.

¹⁹⁷ WILLIAM J. O’DONNELL & DAVID A. JONES, THE LAW OF MARRIAGE AND MARRIAGE ALTERNATIVES 18 (Lexington Books 1982) [Hereinafter O’DONNELL].

¹⁹⁸ 8 U.S.C. § 1151(b)(2)(A)(i).

¹⁹⁹ O’DONNELL, *supra* note 197, at 18.

²⁰⁰ 8 U.S.C. § 1101(a)(15)(K).

ceremony are restricted by physical separation and proxy marriage may be the only available means of marriage. As in Hotaru's case, when Sergeant Ferschke was serving in Iraq, proxy marriage was the only available means of performing a marriage. Unfortunately, when Sergeant Ferschke died in combat, the military widow penalty immediately stripped Hotaru of eligibility to immigrate, as consummation was impossible before his death.

Further, marriage fraud is not a major concern because proxy marriages that involve deployed members of military are infrequent. For example, in 2008 the total number of newly arrived spouses that immigrated to the United States was 45,519.²⁰¹ Of these newly arrived immigrant spouses only 115 were widows of U.S. citizens.²⁰² Although USCIS does not provide statistics for proxy marriages in general, it is clear that only a small fraction of the 115 newly arriving widows of U.S. citizens involve military proxy marriages. Thus, any concern about ending the military widow penalty is unfounded because cases like Ferschkes are rare and fraud is unlikely.

Lastly, Congress has shown a desire to protect alien widows from the harsh application of immigration law by authorizing a statutory exemption to the widow penalty for CPPs.²⁰³ "Congress may reasonably treat aliens whose spouses were killed during active military duty . . . more favorably than aliens whose spouses died from other causes."²⁰⁴ Accordingly, a narrow exception, drawn for the benefit of deployed members of the military, is a realistic legislative goal.

V. PROPOSED AMENDMENT: TERMINATING THE MILITARY WIDOW PENALTY

²⁰¹ U.S. DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS, YEARBOOK OF IMMIGRATION STATISTICS: 2008 20 (2009).

²⁰² *Id.*

²⁰³ *Supra* note 170 and accompanying text discussing the exception to the widow penalty for CPRs for alien widows whose U.S. citizen spouses have died while in combat service in the U.S. military.

²⁰⁴ *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 in the 9th Circuit on other grounds.).

In light of the injustice that the military widow penalty creates and because of the reasons discussed above, 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.”²⁰⁵ Congress should enact an amendment to this section to terminate 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) entered into a valid proxy marriage while on deployment and 3) while deployed subsequently died in combat, by accident or by disease.

Such an amendment may be drafted in a variety of ways. However, to garner political support in Congress, the amendment should include a provision to allow USCIS the 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 & ARE INSUFFICIENT TO END THE MILITARY
WIDOW PENALTY

As a last resort, when an alien is facing removal, an uncommon form of relief may be provided through private federal legislation to grant LPR status to specific aliens.²⁰⁶ This process is known as a private bill and is often used in high profile immigration cases.²⁰⁷ A private bill provides legal relief to a specified individual, group of individuals or entity that is adversely affected by the application of law.²⁰⁸ When a private bill is enacted it becomes private

²⁰⁵ 8 U.S.C. § 1101(a)(35).

²⁰⁶ ALEINIKOFF, *supra* note 24, at 818.

²⁰⁷ *Id.*

²⁰⁸ Matthew Mantel, *Private Bills and Private Laws*, 99 LAW LIBR. J. 87, 88 (2007).

law, applicable only to the named individual and is an exception to the general rule.²⁰⁹ Although private bills are available in other areas of the law, they commonly concern immigration and naturalization.²¹⁰ 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.²¹¹ Traditionally, private bills are enacted to allow the law to maintain some form of humanitarian flexibility and to avoid harsh results.²¹²

Historically, many private bills were introduced in Congress; however, the likelihood of receiving an exception to the military widow penalty today through a private bill is poor because the number of enacted private bills has drastically declined.²¹³ The decline is due to the fact that Members of Congress are reluctant to introduce private bills because of potential for political scandal.²¹⁴

A private bill, if passed by Congress could provide an avenue for widow aliens of unconsummated proxy marriages to immigrate despite the military widow penalty.²¹⁵ A private bill that provides exclusive relief to an individual is normally pursued after all judicial and administrative remedies have been exhausted.²¹⁶ “Congress typically is the individual’s court of last resort.”²¹⁷ The Ferschke family is hoping that Congress will enact a private bill that will

²⁰⁹ *Id.*

²¹⁰ *Id.* at 90.

²¹¹ H.R. Rep. No. 110-911, at 2 (2008) (citation and internal quotation marks omitted).

²¹² ALEINIKOFF, *supra* note 24, at 819.

²¹³ *Id.* at 818. *See also*, Mantel, 99 LAW LIBR. J. at 90 n.24 (2007) (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 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).

²¹⁴ Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273, 301 (2004).

²¹⁵ Mantel, 99 LAW LIBR. J. at 88.

²¹⁶ *Id.* at 90.

²¹⁷ *Id.*

grant Hotaru LPR status and the ability to raise her child in the United States.²¹⁸ However, the likelihood of any individual private bill being enacted by Congress is small and only a few private bills are approved each session.²¹⁹

An individual private bill for Hotaru would be a humanitarian act of Congress, but it would do little to prevent future injustice for similarly situated alien spouses. One disadvantage of a private bill is that each widow to a member of the military from an unconsummated proxy marriage will need Congress to pass a private bill in order to retain eligibility to immigrate. 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.²²⁰ To even be considered for a private bill, an alien widow will need access to significant political connections.²²¹ For instance, Hotaru Ferschke's situation has been covered in the national media²²² and her story gained even greater publicity through the production of a documentary.²²³ A private bill was introduced on her behalf in both the House and the Senate; however, a bill has not been passed despite the significant media attention.²²⁴

Moreover, not every alien widow of an unconsummated proxy marriage will garner the same spotlight as Hotaru, who enjoys the support her husband's hometown in pushing for the

²¹⁸ 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).

²¹⁹ See *supra* note 213, which demonstrated that Congress, in recent years, enacts only a few private bills a year.

²²⁰ Shaina N. Elias, *From Bereavement to Banishment: The Deportation of Surviving Alien Spouses Under the "Widow Penalty"*, 77 GEO. WASH. L. REV. 172, 207 (2009).

²²¹ *Id.*

²²² See e.g., Ian Urbina, *Immigration Rally Draws Thousands*, N.Y. Times, Oct. 14, 2009 (reporting in 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).

²²³ IN THEIR BOOTS, *supra* note 4.

²²⁴ S. 1774, 111th Cong. (2009) (Senate bill introduced on October 13th, 2009 and referred to the Senate Committee on the Judiciary on October 13th, 2009); H.R. 3182, 111th (2009) (House bill introduced on July 10th, 2009, referred to the House Committee on the Judiciary on July 10th, 2009 and referred to the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law on July 20th, 2009).

enactment of her private bill.²²⁵ 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 because alien widows are likely residing outside of the United States and may not have the means to appeal a USCIS decision. Thus, an amendment to the definition of spouse within the INA to end the military widow penalty should be the focus of Congressional attention and proponents of immigration reform, rather than the private bill of any one individual.

VI. CONCLUSION

Congress should honor the sacrifice of fallen soldiers, like Sergeant Ferschke, by terminating the military widow penalty. If Sergeant Ferschke died for anything, he died for the right for his wife, Hotaru, and his son, Mikey, to live in the United States.²²⁶

Congress should recognize the sacrifice that soldiers make by ensuring that their spouses have the ability to live and raise their children in the country that they fought and died for. Congress should recognize that in the context of the military, a proxy marriage may be the only means by which soldiers can form a family during times of war. Moreover, proxy marriages involving members of the military are not a threat of marriage fraud because Congress already provides life insurance benefits to alien widows of proxy marriages, including Hotaru Ferschke.²²⁷ Thus, there is little concern for fraudulent marriages.

Additionally, 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 a U.S. citizen spouse has died while serving with the

²²⁵ IN THEIR BOOTS, *supra* note 4 (IN THEIR BOOTS captures the broad support that Hotaru Ferschke has been shown in her deceased husband's hometown of Maryville, Tennessee. Other Marines circulate petitions on her behalf to lobby Congress for a private bill and Hotaru is cheered by the town while on a Flag Day parade float).

²²⁶ *Id.*

²²⁷ A.F. TIMES *supra* note 107, at 26.

U.S. military. Congress has recognized that the widow penalty for CPRs was inhumane and that the rule only adds insult to the injury by deporting a grieving widow. Thus, Congress should find that the military widow penalty is as cruel as or even crueler than the widow penalty for CPRs. Moreover, Congress had previously provided a statutory exception to the widow penalty for CPRs for alien widows of members of the military who died in combat, by accident or disease. Likewise, Congress should provide a similar exception for alien military widows of unconsummated proxy marriages and terminate the military widow penalty.

Finally, Congress has favored family reunification and the humane treatment of alien widows of U.S. citizen members of the military by ending the military penalty for LPRs. Thus, Congress should ensure family reunification and humane treatment for spouses affected by the military widow penalty by adopting the amendment proposed in this Note.

Therefore, since private bills are inadequate in addressing the military widow penalty problem and because private bills can only provide justice on a case-by-case basis, Congress should modify the definition of spouse as advocated in this Note. Legislation that terminates the military widow penalty honors the sacrifice that soldiers like Sergeant Ferschke have made and it allows for future soldiers to be assured that their spouses and children will be welcome in the United States.