Note

From Bereavement to Banishment: The Deportation of Surviving Alien Spouses Under the "Widow Penalty"

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Introduction

The death of a spouse can be one of the most tragic events of a person's life. This was the case for Dahianna Heard, who lost her husband Jeffrey, a security company contractor, when he was shot during an ambush in Iraq.[1] The newlyweds were only three months shy of their two-year wedding anniversary and had recently had a child together.[2] The same tragedy was endured by Charmaine van der Elst Kirtland, a former SeaWorld dolphin trainer, who met her husband John at an international animal training conference.[3] A week before their first wedding anniversary, John was diagnosed with colon cancer and passed away six months later, leaving behind two young stepchildren.[4] And twenty-six-year-old Maria Raquel Pascoal felt the same pain as well when her husband of almost two years died of sleep

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* J.D., expected May 2009, The George Washington University Law School. I would like to thank Brent Renison, Brian Smith, Laura Vartain, and Jenelle Williams for their guidance and advice on this Note, as well as my family and friends for their ongoing support.

1 *See* Víctor Manuel Ramos, *Iraq-War Widow in Casselberry Sues to Stay*, ORLANDO SENTINEL, Aug. 31, 2007, at A5.

2 *See id.*

3 *See* Fred Kockott, *Double Blow for SA Widow*, SUNDAY TRIB. (Dublin, Ir.), Jan. 2, 2005, at 1.

4 *Id.*

apnea at age thirty, leaving her to raise their three-month-old son by herself.[5]

In these circumstances, Dahianna, Charmaine, and Maria struggled with feelings of grief, despair, and regret for not having had an opportunity to say goodbye to their husbands. But there was another emotion that they experienced as well: *fear*. After their husbands' tragic deaths, these alien widows faced deportation from the United States.

Today, hundreds of alien widows and widowers[6] across the country face automatic deportation from the United States because their American citizen spouses died before the couples celebrated their two-year wedding anniversaries. Under the Immigration Service's[7] current interpretation of immigration law, if the citizen spouse dies before the second anniversary of the marriage, the alien spouse is no longer considered a "spouse" for immigration purposes.[8] Accordingly, if an alien's American spouse dies before the couple reaches the minimum time required, the Immigration Service will automatically deny, with no individual review of the facts, the alien spouse's application to adjust status to legal permanent residence ("LPR"), or a green card,[9] giving rise to the so-called "widow penalty."[10]

Deemed by some as a "crack in the law" not intended by Congress,[11] the widow penalty has likely remained unnoticed by legislators because its current application was not their intent. Contrary to the Immigration Service's interpretation of immigration law, no statute enacted by Congress states that alien spouses should be denied LPR status upon the death of the citizen spouse if the underlying marriage

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5 Blaine Harden, *Widows Face Deportation*, WASH. POST, Dec. 2, 2004, at A1.

6 I refer to "widows and widowers" as "widows" throughout the remainder of the text. While most of the individuals affected by the widow penalty are female, and the Note uses female pronouns for the third person singular when the pronoun is used generically, the law is equally applicable to male and female alien spouses.

7 This term is used throughout the Note to refer to the administrative agencies responsible for the enforcement of immigration laws, which include the former Immigration and Naturalization Service ("INS") and the current United States Citizenship and Immigration Service ("USCIS").

8 *See* 8 C.F.R. § 204.2(b)(1)(i)–(iv) (2006).

9 Generally, the process of receiving a "green card" refers to the process whereby the government adjusts a person's immigration status to "legal permanent residence" ("LPR"). This Note thus uses the term "LPR" to refer to this procedure.

10 This phrase was coined by Brent Renison, an immigration lawyer who has represented several clients affected by the two-year rule. *See* Rebecca Koffman, *The Widow's Defense*, OR. BUS., Jan. 2006, at 32.

11 Blaine Harden, *Widows Face U.S. Deportation*, WASH. POST, Dec. 2, 2004, at A1 (quoting Brent Renison, immigration attorney).

is less than two years old. Rather, as this Note shows, the clear and unambiguous expression of Congress is for the two-year marriage length requirement to apply only to alien spouses whose citizen partners did not file a petition on their behalf before death, as opposed to all alien spouses generally.[12]

The effect of the widow penalty on alien widows is anything but insignificant. Not only does the widow penalty effectively punish alien spouses for a happenstance out of their control, but it also facilitates the separation of biological parents from their American-born children.[13] If a central policy of U.S. immigration law is to preserve family unity,[14] the widow penalty undermines this goal.

To rectify this legal wrong, Congress should enact legislation to abolish the widow penalty for *all* alien widows, regardless of whether the citizen spouse filed a petition prior to death or marriage length. By exempting alien widows from the two-year marriage requirement for obtaining LPR status, and allowing them to self-petition for LPR status upon the death of their citizen spouses, Congress could put an end to the Immigration Service's automatic deportation of grieving widows and its subsequent separation of families. With immigration reform dominating congressional dockets in recent years, legislative reform of the two-year rule is feasible at this time if the Immigration Service's unjust application of the widow penalty can be highlighted.

Part I of this Note describes the process of becoming a legal permanent resident through marriage to a U.S. citizen. Part II discusses how the modern-day widow penalty was formed and explains the rule's categorical exceptions. Part III explores the dueling interpretations of the two-year rule, advanced in relevant court cases by the government and petitioner-widows. Part IV analyzes pending legislation that seeks to alleviate the harsh effects of the widow penalty in

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12 *See infra* Part III.B. The word "petition" as used in this sentence refers to I-130 petitions, which are filed by a U.S. citizen spouse on behalf of an alien spouse. This form is discussed in detail in Part I.B of this Note.

13 *See, e.g.*, Lornet Turnbull, *Husband's Suicide Leaves Ex-Nun Facing Deportation*, SEATTLE TIMES, Nov. 1, 2004, at B1 ("Across the country, at least 23 foreign nationals [subject to the widow penalty] . . . are fighting to stay in the U.S. The majority of them are women; half of them have children born in this country.").

14 *See Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 6 (1985) (statement of Alan C. Nelson, INS Comm'r) (stating that "[m]arriage has always played a crucial role in the laws and policies governing both the immigration and naturalization of aliens" and "[t]he value placed on marriage and the unity of the nuclear family is underscored by entirely exempting the immediate relatives of United States citizens . . . from all the numerical restrictions cited in the [Immigration and Nationality Act of 1952]").

some respects. Finally, Part V addresses the need to adopt legislation that allows all alien spouses to self-petition for LPR status upon the death of their citizen spouses, regardless of marriage length.

I. Legal Residence in the United States Through a Spousal Relationship

To understand the LPR process as it applies to alien spouses, it is helpful to survey current procedures for attaining the marital benefit in American immigration law. This section summarizes these procedures.

A. "Immediate Relatives": The Gateway to a Green Card

One of the easiest and most employed means of legal immigration to the United States is through a family relationship. In 2005, over fifty-eight percent of all legal immigration to the United States was family sponsored.[15] Only certain family-based relationships, however, bestow the ability to apply for an immigration benefit on behalf of an alien.[16]

For example, U.S. citizens can file a petition on behalf of a category of family members called "immediate relatives." First established by the Immigration and Nationality Act ("INA") of 1952,[17] the "immediate relatives" category includes three types of relatives: (1) children of U.S. citizens, (2) parents of U.S. citizens, provided the citizen is aged twenty-one and over, and, most importantly for the purposes of this Note, (3) the U.S. citizen's legal spouse.[18] Furthermore, individuals who meet the "immediate relatives" definition are not subject to quota restrictions, unlike other family preference categories, and therefore encounter no backlog for sponsorship.[19]

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15 Nicole Lawrence Ezer, *The Intersection of Immigration Law and Family Law*, 40 FAM. L.Q. 339, 340 (2006).

16 *See, e.g.*, 8 U.S.C. § 1154(a)(1)(A)(i) (2000) (stating that "[a]ny citizen of the United States claiming that an alien is entitled . . . to an immediate relative status . . . may file a petition with the Attorney General for such classification").

17 Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

18 *See* 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(i).

19 *See* 8 U.S.C. § 1151(b) (listing "immediate relatives" as among those "aliens not subject to direct numerical limitations"); JOHN STEPHEN GLASER, HOW TO IMMIGRATE TO THE UNITED STATES 6 (2004).

B. Attaining Legal Permanent Residence: The Petitioning Process

While alien spouses are provided with the opportunity to immigrate legally to the United States upon marriage to a U.S. citizen, the mere act of marriage itself does not confer on the alien spouse the right to remain in the United States. Rather, the citizen or alien spouse must take affirmative steps to request the benefit of LPR status for the alien spouse by complying with the proper petitioning requirements. This process includes submitting the necessary applications and supporting documentation to the appropriate Immigration Service office and attending a formal immigration interview.[20]

Congress has provided two different processes for alien spouses to attain LPR status, such that one or the other applies in the petitioning process. Upon marriage to an alien, a U.S. citizen, either by birth or through naturalization, may file a Form I-130 petition on his spouse's behalf, claiming that the spouse is entitled to classification as an "immediate relative."[21] The term "immediate relative," as applicable to the U.S. citizen's petition, is set forth in the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i) as 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."[22] For aliens whose citizen spouses have not filed an I-130 petition on their behalf, the INA provides a separate self-petitioning right, permitting an alien spouse to file a petition on her own behalf on a Form I-360 self-petition.[23] Supporting documentation to prove bona fide marriage, such as a marriage certificate, must be filed by the petitioning spouse with the Form I-130 or Form I-360.[24] Generally, however, the Immigration Service

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20 *See* 8 U.S.C. § 1186a(c) (stating the requirements of a timely petition and interview for removal of condition).

21 *See* 8 U.S.C. § 1154(a)(1)(A)(i) ("[A]ny citizen of the United States claiming that an alien is entitled . . . to an immediate relative status under section 1151(b)(2)(A)(i) of this title may file a petition with the Attorney General for such classification."); *see also* GLASER, *supra* note 19, at 7.

22 8 U.S.C. § 1151(b)(2)(A)(i).

23 *See* 8 U.S.C. § 1154(a)(1)(A)(ii) ("An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section."). The I-360 self-petition process is considered an exception to the I-130 procedure for only certain categories of persons, including Amerasians, widows, and special immigrants.

24 GLASER, *supra* note 19, at 7. A marriage will only be recognized for immigration purposes if it is valid under state law (or, if the marriage is entered into outside the United States, under local laws, and with proper registration) and qualifies under the INA. *See id.* Hence, polygamous marriages, same-sex marriages, unconsummated proxy marriages, marriages to minors, and some common-law unions are not valid for immigration purposes. *See* Ezer, *supra* note 15, at 343–44.

will recognize the validity of the marriage as long as the marriage is lawful in the place where the marriage took place.[25]

Once the I-130 is filed and approved, a visa is immediately available to the alien spouse, which allows her to apply to adjust status to LPR on a Form I-485.[26] The I-130 and the I-485 adjustment of status application are generally filed concurrently for efficiency, but are not required to be filed jointly. The couple will then be required to appear for an "adjustment of status" interview to evaluate the legitimacy of the marriage and the alien spouse's qualification for LPR status.[27] Because formal immigration interviews are scheduled by the local offices of the Immigration Service, the time period between the filing of the I-130 or I-360 and the interview ranges from two months to several years.[28]

Once the adjustment of status interview is conducted, and the marriage is found to be valid by immigration officials,[29] the grant of LPR status depends on marriage length. If the couple has been married for more than two years at the time of the interview, the alien spouse's adjustment of status application will be approved and the alien spouse will be granted LPR status. However, if the couple has been married for less than two years at the time of the interview, the alien spouse is granted "conditional residence" status, pursuant to legislation enacted to prevent marriage fraud.[30] Although conditional

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25 *See* GLASER, *supra* note 19, at 7.

26 The term "adjustment of status application" is used throughout the Note to refer to the Form I-485, Application to Register Permanent Residence or Adjust Status, which allows alien spouses to adjust status to that of a permanent resident of the United States after their LPR petitions are approved. The adjustment of status application must be filed for the alien spouse to attain LPR status in the U.S.

27 *See* 8 U.S.C. § 1186a(c)(1)(B) (stating that "the alien spouse and the petitioning spouse . . . must appear for a personal interview before an officer or employee of the Service respecting the facts and information [of their petition]").

28 GLASER, *supra* note 19, at 9. In the meantime, alien spouses can request a work permit. *Id.*

29 If the marriage is not found to be valid after the formal interview, the alien spouse and the citizen spouse may be subject to criminal penalties for entering into a marriage for the purpose of circumventing immigration laws. These penalties include imprisonment of not more than five years, a fine of not more than $250,000, or both. 8 U.S.C. § 1325(c). Since its passage, however, very few people have been fined or imprisoned under this statute. Rather, the most common responses by the government, after detecting a sham marriage, are deportation and denial of an entry visa. Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 704 (1997).

30 *See* 8 U.S.C. § 1186a(c)(3)(B) ("If the Attorney General determines that such facts and information are true, the Attorney General shall so notify the parties involved and shall remove the conditional basis of the parties effective as of the second anniversary of the alien's obtaining the status of lawful admission for permanent residence."); *see also* GLASER, *supra* note 19, at 14.

residence status is in every other way the legal equivalent of full LPR status, the couple must submit a Form I-751, Petition to Remove Conditions on Residence, within ninety days of the couple's second anniversary of marriage.[31] Otherwise, the LPR status is terminated.

Throughout the petitioning process, the Immigration Service can terminate the alien spouse's conditional residence status at its discretion if the couple does not appear for their formal interview[32] or are no longer together on their two-year wedding anniversary,[33] or if the Service finds that the underlying marriage was improper or solely for immigration purposes.[34] This determination can only be made by the Immigration Service upon an individual review of the facts and information alleged with respect to the qualifying marriage in the adjustment application and formal interview.[35] The Attorney General, in his or her discretion, can also grant a "hardship waiver" to remove conditional residency status if the alien spouse is a victim of abuse at the hands of the citizen spouse or the marriage was terminated, and the alien spouse was not at fault.[36] The hardship waiver process requires the Attorney General to review the alien spouse's individual situation to ensure that the underlying marriage was bona fide and that the alien was not at fault in failing to meet the petitioning requirements.[37]

Nowhere in the applicable statutory provisions, however, does Congress provide for the automatic revocation of an alien widow's approved I-130 petition after the death of her citizen spouse. Yet, this

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The conditional residence requirement was added in 1986, when Congress made sweeping changes to INA procedures in order to deter immigration-related marriage fraud. These amendments, entitled the Immigration and Marriage Fraud Amendments of 1986 ("IMFA"), Pub. L. No. 99-639, 100 Stat. 3537 (codified in scattered sections of 8 U.S.C.), significantly modified the process for obtaining legal permanent residence through marriage to a U.S. citizen.

31 8 U.S.C. §§ 1186a(d)(2)–(3), 1186b. Furthermore, supporting documentation in the form of joint tax returns, insurance policies, utility bills, and other evidence of shared pecuniary interests must be filed with a Form I-751 Petition to Remove Conditions on Residence, before the condition is removed, to show that the marriage is not fraudulent. *See* 8 C.F.R. § 204.2(a)(i)(2)(B) (2006); GLASER, *supra* note 19, at 13–14.

32 8 U.S.C. § 1186a(c)(2)(A)(ii).

33 *See id.* § 1186a(b)(1)(A)(ii).

34 *Id.* § 1186a(b)(1)(A)(i).

35 *See id.* § 1186a(c)(3)(A) (stating that after the petition is filed and the formal interview is conducted, "the Attorney General shall make a determination . . . as to whether the facts and information alleged in the petition are true with respect to the qualifying marriage"). Thereafter, the Attorney General is required to remove the conditional residency status if the determination is favorable, or terminate the LPR status if the determination is adverse. *See id.* § 1186a(c)(3)(B)–(C).

36 *See id.* § 1186a(c)(4).

37 *See id.*

is how the Immigration Service has interpreted the statute.[38] Creating the illusion that Congress cares more about alien divorcees than widows, the Immigration Service individually grants hardship waivers to alien divorcees married for only a few months to their citizen spouses, but automatically denies LPR status to alien widows married for less than two years to their American partners if the death occurs before their adjustment of status applications are processed. By perfunctorily dismissing, with no individual review of the facts, the alien spouse's I-130/I-485 if the citizen spouse dies before the couple reaches two years of marriage, the Immigration Service has thus transgressed the limits of the statute to create the "modern-day" widow penalty.[39]

II. The Formation of the Modern-Day Widow Penalty

The modern-day widow penalty derives not from one source but rather from a constellation of Immigration Service statutory interpretations, case law, and legislation. A brief synopsis of this immigration puzzle's underpinnings will provide insight into how this "crack in the law" developed and was ultimately cemented as controlling law.

Prior to 1990, the widow penalty existed in the form of obscure regulations and a handful of court decisions. The statutory interpretation that governs the current operation of the widow penalty, however, was cemented as controlling law after the adoption of legislation in 1990. This Note uses the term "modern-day widow penalty" to refer to the latter stage.

A. The Pierno *Decision*

The foundation of the widow penalty began to be laid in 1959, when the Immigration Service adopted a regulation requiring automatic revocation of a spousal petition upon the death of the petitioner.[40] This regulation was enacted pursuant to a statute that provided "[t]he Attorney General may, at any time, for what he deems to be *good and sufficient cause*, revoke the approval of any petition (for nonquota status) approved by him."[41] The regulation provided for the revocation of a spouse beneficiary's petition "upon

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38 *See infra* Part II.

39 A "widow penalty" has long existed in various forms; its most recent form, with which this Note is primarily concerned, was created by legislation introduced in 1990. *See infra* Part II.

40 *See* 8 C.F.R. § 206.1(b)(2) (1965); *see also* 41 Fed. Reg. 55,849 (Dec. 23, 1976).

41 8 U.S.C. § 1155 (1952) (emphasis added).

the death of the petitioner or the beneficiary."[42] In other words, the Immigration Service automatically revoked a petition approved prior to the death of the petitioner where the adjustment of status application had not been adjudicated at the time of the petitioner's death.

Ten years later, however, the Second Circuit, in *Pierno v. INS*,[43] struck down the regulation because, in their opinion, the Immigration Service went well beyond the intent of Congress in automatically revoking the spousal petitions upon the death of the citizen petitioner.[44] Expressing disbelief that Congress could have intended automatic dismissal in passing a statute that gave the Attorney General discretion to revoke petitions for "good and sufficient cause," the Second Circuit held that the wooden application of rules mandating automatic revocation was not a permissible interpretation of the statute.[45] The statute is permissive, reasoned the court, and should not be interpreted to authorize the Attorney General to automatically revoke alien widows' adjustment of status petitions.[46]

B. The Varela *Interpretation*

Despite the *Pierno* court's reprimand of the Immigration Service for its unreasonable construction of the INA, the Immigration Service responded to *Pierno* by adopting another automatic revocation regulation eight years after that decision. This regulation also appeared to misconstrue the statute. But before the Immigration Service's response to *Pierno*, the Board of Immigration Appeals ("Board") had laid the groundwork that assured the *Pierno* interpretation of the INA would not invalidate the new regulation. This ground work came in the 1970 case of *Matter of Varela*.[47]

The appellant in *Varela*, a citizen of the Philippines, had recently married a U.S. citizen, only to become a widow a few weeks later when her spouse died of a heart attack while on active duty as a petty

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42 8 C.F.R. § 206.1(b)(2) (1965).

43 Pierno v. INS, 397 F.2d 949 (2d Cir. 1968).

44 *Id.* at 951.

45 *Id.* at 950–51.

46 *Id.* Several years after the *Pierno* decision, the Ninth Circuit also held that the Immigration Service abused its power by ruling that a beneficiary was no longer a "spouse" for immigration purposes upon separation from his or her U.S. citizen spouse. Dabaghian v. Civiletti, 607 F.2d 868, 870 (9th Cir. 1979). Although the case considered whether separation, as opposed to death, terminated the marriage under immigration law, the *Dabaghian* court nonetheless reached the same conclusion as the *Pierno* court: "The [Immigration Service's] contention has no support in any statute or federal decision." *Id.* at 869.

47 Varela, 13 I. & N. Dec. 453 (B.I.A. 1970).

officer in the U.S. Naval Reserve.[48] Although the citizen husband had promptly filed an I-130 petition on his wife's behalf soon after their marriage took place,[49] the Immigration Service had not yet ruled on the petition at the time of his passing, and the District Director subsequently denied the wife's adjustment of status application.[50]

In a decision comprising only a few short pages, the Board upheld the District Director's decision to deny the appellant's adjustment of status application, stating that a spouse is no longer a "spouse" for immigration purposes once the petitioner citizen dies.[51] Providing no support in the form of case law or other relevant statutes for its conclusion, the Board held that the appellant in the case was not the "spouse" of a U.S. citizen because the citizen's death "stripped her of that status."[52]

Fifteen years after its decision in *Varela*, the Board decided *Matter of Sano*.[53] The Board went a step further in cementing the widow penalty by holding that *Varela* should have been dismissed without deciding the case on the merits because the Board had no jurisdiction to hear appeals from anyone other than the petitioning citizen spouse.[54]

The Immigration Service has for over twenty years adhered to *Varela* and *Sano*[55] as authority for the propositions that an alien spouse is no longer a "spouse" for immigration purposes after the citizen spouse has died (*Varela*), and that the petitioning citizen spouse is the only party that can appeal an adjustment of status denial to the

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48 *Id.* at 453.

49 *See id.*

50 *Id.* at 454.

51 *Id.*

52 *Id.*

53 Sano, 19 I. & N. Dec. 299 (B.I.A. 1985).

54 *See id.* at 301. The Board stated:

> Unless the regulations affirmatively grant us power to act in a particular matter, we have no appellate jurisdiction over it. . . . We therefore conclude that we lack jurisdiction to address an appeal by the beneficiary from the denial of a visa petition. To the extent that our decision in *Matter of Varela* . . . conflicts with this conclusion, it is hereby modified.

Id. (citations omitted).

55 *See* Memorandum from Mike Aytes to U.S. Citizenship and Immigration Services Field Leadership (Nov. 8, 2007) [hereinafter Aytes Memorandum], *available at* http://ssad.org/images/Michael_Aytes_Memo_on_Freeman_I130AFMAD0804_110807_1_.pdf (advising the Immigration Service that it is "legally obligated to follow the precedent decisions of the Board of Immigration Appeals, in the absence of a supervening precedent decision of a court of appeals. Thus, [Immigration Service] adjudicators must follow *Sano* and *Varela* . . . .").

Board (*Sano*). Thus, under the authority of *Varela* and *Sano*,[56] it is the official policy of the Immigration Service to strip alien widows both of their status as "spouse" after the death of their citizen spouses and of their ability to appeal the denial of their adjustment of status petitions.[57]

The holdings of these cases, however, create anomalous results. Under *Varela* and *Sano*, an alien spouse married for ten years to a U.S. citizen would be unable to become a lawful permanent resident if his or her spouse died before the processing of her adjustment of status application, but an alien spouse married for just six months to a U.S. citizen could attain LPR status if her citizen spouse died the day after the adjustment of status application was approved.[58] Regardless, the Immigration Service has specifically endorsed the conclusion from *Varela* that "there is no authority to approve a visa petition after the petitioner dies,"[59] and escaped accountability for their harsh interpretation by convincing the general public that such a scheme was enacted by Congress to prevent marriage fraud.[60] The evidence, however, is clear: it was these two simple administrative court decisions, and not Congress, that gave birth to the widow penalty.

C. Automatic Revocation Upon Death

The Immigration Service's resolve to automatically revoke alien widow petitions upon the death of their citizen spouses, regardless of its statutory power to do so, was also seen in an automatic revocation regulation enacted by the Immigration Service eight years after the *Pierno* decision.

Although not relied on by the Board in *Varela* or *Sano*, the 1976 regulation *required* the revocation of an approved I-130 petition upon the death of the citizen petitioner "unless the Attorney General in his discretion determines that for humanitarian reasons revocation would

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56 *See* 8 C.F.R. § 1003.1(g) (2006) (stating that decisions made by the Board of Immigration Appeals "shall be binding on all officers and employees in the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States").

57 *See* Aytes Memorandum, *supra* note 55.

58 *See* Robinson v. Chertoff, No. 06-5702 (SRC), 2007 U.S. Dist. LEXIS 34956, at *13 (D.N.J. May 14, 2007), *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007) ("[P]rompt adjudication of the I-130 petition (before the citizen dies) will result in an approval. A delay in adjudication (until after the citizen dies) will result in a denial. But a severe delay of two years or more, followed by the citizen's death, will also result in an approval.").

59 Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35,732, 35,735 (June 21, 2006).

60 *See infra* note 65 and accompanying text.

be inappropriate."[61] While the regulation recognized that the death of the citizen petitioner did not automatically revoke the approved I-130 petition, its compliance with the *Pierno* opinion was nevertheless superficial. Enacted under a statute that authorized revocation by the Attorney General for "good and sufficient cause,"[62] the Immigration Service's new regulation nevertheless frustrated congressional intent by adopting automatic revocation language for a decision dependent on individual cause.

This regulation, despite its inconsistency with *Pierno*, remains the law today.

D. The Immigration Marriage Fraud Amendments of 1986

Over fifteen years after the Board handed down its decision in *Varela*, Congress significantly modified the adjustment of status immigration procedures through the enactment of the Immigration Marriage Fraud Amendments of 1986 ("IMFA").[63] As discussed in Part I of this Note, the IMFA provided that an alien spouse, married to a U.S. citizen, would be required to fulfill a two-year conditional residence requirement before she would be granted permanent LPR status.[64]

A common myth among the general public is that Congress created the widow penalty through the adoption of these marriage fraud provisions.[65] Yet, a collective analysis of the plain language of the

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61 Immigrant and Nonimmigrant Status, 41 Fed. Reg. 55,847, 55,849 (Dec. 23, 1976) (codified at 8 C.F.R. § 205.1(a)(3) (1977)).

62 *See* 8 U.S.C. § 1155 (1952).

63 Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986) (codified in scattered sections of 8 U.S.C.).

64 *See supra* notes 29–31 and accompanying text.

65 *Cf. Fox News Interview with Michael Cutler* (Fox television broadcast Aug. 6, 2007). In that interview, Cutler, a former Senior Special Agent for the Immigration Service, stated, in response to a question about the two-year widow penalty rule:

> I'll tell you the reason this happened. We have a huge problem with immigration-benefit fraud . . . Right now, very little is done to go after people who commit benefit-fraud . . . the two-year rule came about because of so many abuses in the system . . . So the government had to come up with a way of combating immigration-benefit fraud.

Id.; *see also* Harden, *supra* note 11 ("The two-year rule was added to immigration law in 1990, when there was widespread concern about foreigners using sham marriages to get 'green cards' for permanent residence."); Turnbull, *supra* note 13 ("concerns about possible marriage fraud prompted lawmakers to require couples to have been married at least two years before the U.S. citizen spouse's death"); Scott Richardson, *Widow Trying to Stay in U.S. After Husband Was Killed in Iraq*, PANTAGRAPH.COM, Mar. 1, 2008, http://www.pantagraph.com/articles/2008/03/01/news/doc47c9f97c82985156623029.txt ("The time limit is meant to prevent sham marriages. But,

IMFA, Congress's goal in adopting the legislation, and the statutory provisions that the IMFA left untouched demonstrates that Congress likely did not intend to create the widow penalty through its adoption of the IMFA.

The first indication that Congress did not intend to utilize the IMFA to deport alien widows is the plain language of the statute. By using parentheticals within its statutory provisions, Congress clearly indicated that the presence of the petitioning spouse was not a necessary condition for adjusting status. For instance, the IMFA states that in order for the two-year conditional residence requirement to be removed, "the alien spouse and the petitioning spouse (*if not deceased*) jointly must submit to the Attorney General . . . a petition which requests the removal of such conditional basis"[66] and "the alien spouse and the petitioning spouse (*if not deceased*) must appear for a personal interview."[67] Considering that the inability of a deceased spouse to file a petition or attend an interview post-death is clear, Congress's explicit exception of deceased spouses from the condition removal process strongly suggests that Congress did not intend to preclude the availability of LPR status to alien widows whose citizen spouses died during the two-year conditional residence period and thus could not take part in the condition removal process.

In addition, by specifically exempting the citizen spouse's death as a deciding factor in the denial of adjustment of status, the plain language of the IMFA suggests that Congress did not intend the death of an alien widow's citizen spouse to be dispositive. For instance, the IMFA provides that each I-751 petition should contain a statement that the qualifying marriage "has not been judicially annulled or terminated, *other than through the death of a spouse*"[68] and establishes the Attorney General's ability to terminate the LPR status of an alien spouse if the qualifying marriage "has been judicially annulled or terminated, *other than through the death of a spouse*."[69] Lastly, the IMFA's omission of alien widows from consideration for the Attorney General's "hardship waiver," which allows for the removal of conditional residency status on a discretionary basis,[70] indicates Congress's

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in the case of the death of a spouse, the government automatically terminates the application without allowing the survivor to prove the marriage was bona fide.").

66 8 U.S.C. § 1186a(c)(1)(A) (2000) (emphasis added).

67 *Id.* § 1186a(c)(1)(B) (emphasis added).

68 *Id.* § 1186a(d)(1)(A)(i)(II) (emphasis added).

69 *Id.* § 1186a(b)(1)(A)(ii) (emphasis added).

70 *See id.* § 1186a(c)(4)(B) (stating "[t]he Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien . . . if

belief that alien widows should not reach this stage of the process, where they are subject to deportation for failure to comply with the IMFA provisions.

Another consideration that demonstrates that Congress did not intend to codify the widow penalty through enactment of the IMFA is Congress's overall goal in adopting the IMFA: to reduce the rate of immigration-related marriage fraud.[71] A provision that allows alien widows to be deported after the death of their citizen spouses does not further this legislative goal because potential offenders will not be deterred by an unlikely circumstance they cannot foresee. In other words, because alien widows are unlikely to predict if and when their citizen spouses will die with any accuracy, and the chances are slim that a citizen spouse would die within the first two years of marriage, the widow penalty rule does nothing to deter those aliens who wish to enter into sham marriages.

Furthermore, the IMFA created criminal penalties for citizens who enter into a marriage for the purpose of circumventing immigration laws, including imprisonment for up to five years, a fine of up to $25,000, or both.[72] Not only are these types of punishment likely to be more effective than the widow penalty in deterring sham marriages, they are also codified in a different section of the United States Code, exemplifying that Congress did not intend to create the widow penalty as a type of punishment for fraudulent marriage participation.[73] The

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the alien demonstrates that . . . the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse)").

71 *See* H.R. REP. NO. 99-906, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5978, 5978 (describing the IMFA as a bill "to amend the Immigration and Nationality Act to deter immigration-related marriage fraud and other immigration fraud"). At the time of the IMFA's enactment, government agencies presented statistics indicating that incidents of marriage fraud were extremely high and on the rise. *See, e.g.*, 132 CONG. REC. 27,015 (1986) (statement of Rep. Lungren) ("The Immigration Service estimates that up to one-third of the marriage petitions they see involve some type of marriage fraud."). For example, Congress considered a sample study conducted by the Immigration Service, which determined that thirty percent of applications for adjustment of status based on an alien's marriage to a U.S. citizen were actually submitted in order to evade immigration laws. *See* 132 CONG. REC. 33,802–03 (1986) (statement of Sen. Simpson). The Immigration Service also estimated that 50,000 sham marriage petitions were filed each year and claimed that the number was growing. *See* Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1241 (1986). In light of these concerns, Congress established the two-year condition for all marriages between aliens and citizens or legal permanent residents to reach its goal of preventing sham marriages. *See generally Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 4 (1985).

72 *See* 8 U.S.C. § 1325(c).

73 *Cf. id.* §§ 1151(b)(2)(A)(i), 1325(b).

intentional creation of the widow penalty by Congress, within the bounds of a law geared towards preventing marriage fraud, thus is unlikely.

Lastly, while the IMFA may have added a number of procedural provisions to the INA, it did not modify, alter, or eliminate any provision relating to the "immediate relatives" definition or the Immigration Service's power to automatically revoke approved I-130 petitions. Because these interrelated statutory provisions form the basis of the modern-day widow penalty, it is highly unlikely that Congress meant to create the widow penalty with legislation that left its core regulations untouched.

E. The Immigration Act of 1990

Only a few years after the enactment of the IMFA, Congress passed the Immigration Act of 1990 ("Immact"),[74] which modified various provisions of the INA, including the INA's definition of "immediate relative." This important change to the "immediate relative" definition provided alien widows who had lost their citizen spouses of more than two years with the opportunity to self-petition for LPR status if not already attained before the citizen spouse's death.[75] While the aforementioned regulations and relevant case law laid the foundation, it is the interpretation of this recent statutory provision that has created the modern-day widow penalty.

When the original INA was passed in 1952, the definition of immediate relative, which at the time was referred to as "nonquota immigrant," included "an immigrant who is the child or the spouse of a citizen of the United States."[76] With no additional qualifier or time limit on its classification of children and spouses as immediate relatives, the INA of 1952 thus allowed alien spouses to be freely admitted to the United States upon marriage to a citizen.[77] The immediate relatives definition changed very little over time, except for the inclusion of parents of U.S. citizens within the immediate relatives category in

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74 Immigration Act of 1990, Pub. L. No. 101-649, § 101(a), 104 Stat. 4978, 4980–81 (codified in various sections of 8 U.S.C.).

75 8 U.S.C. § 1151(b)(2)(A)(i).

76 *See* INA of 1952, Pub. L. No. 82-414, § 101(a)(27), 66 Stat. 163, 169–70 (current version at various sections of 8 U.S.C.).

77 Turnbull, *supra* note 13 ("Five decades ago, the process was simple and quick . . . . 'Many of these cases were adjudicated . . . the same day.'" (quoting Brent Renison, immigration attorney)).

1965.[78] One year before the Immact was passed, the INA's immediate relatives definition made no indication that death of the citizen spouse was to have any effect on the classification of the alien spouse as an immediate relative, providing:

> The 'immediate relatives' referred to in subsection (a) of this section 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.[79]

In 1990, Congress adopted Immact, which inserted the following language into this provision after the first sentence:

> 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.[80]

The Immact seems to modify prior versions of the "immediate relatives" definition by providing an I-360 self-petition option for alien widows seeking to attain LPR status who had been married to their citizen spouses for over two years prior to the citizen spouse's passing. In other words, the Immact appears to grant an alien widow who has been a spouse for two years at the time of the citizen's death the right to self-petition for LPR status yet deny this self-petition option to alien spouses married for less than two years at the time of the citizen's death.

The Immigration Service has adopted this interpretation, automatically revoking all approved I-130 petitions and thus denying adjustment of status upon the death of the petitioning spouse unless the

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78 *See* INA of 1965, Pub. L. No. 89-236, § 201(b), 79 Stat. 911, 911 (1965) (current version at various sections of 8 U.S.C.).

79 Staff of H. Comm. on the Judiciary, 101st Cong., Report on Immigration and Nationality Act (as Amended Through January 1, 1989) with Notes and Related Laws 25 (Comm. Print 1990).

80 Immigration Act of 1990, Pub. L. No. 101-649, § 101(a), 104 Stat. 4978, 4980–81 (codified at 8 U.S.C. § 1151(b)(2)(A)(i) (2000)).

underlying marriage to the U.S. citizen was at least two years in length, in which case the alien widow would qualify for the self-petition option. Government enforcement under this construction, read in conjunction with the *Varela* decision, thus creates the modern-day widow penalty, in which an alien widow is no longer considered to be a "spouse" after the citizen spouse's death unless the couple was married for more than two years.

Challengers to the modern-day widow penalty have advanced an alternative explanation regarding Congress's intent in adopting the new "immediate relatives" definition.[81] Because Congress created a dual petitioning process for alien spouses to achieve LPR status[82] such that either the citizen spouse files an I-130 petition on behalf of the alien spouse or the alien spouse files an I-360 self-petition on her own behalf, it is questionable whether Immact's self-petition option, requiring the filing of an I-360 petition and including the two-year marriage length requirement, applies to alien spouses with I-130 petitions already filed on their behalf by their citizen spouses. In other words, in light of the dual petitioning process set up by Congress, such that either the Form I-130 or the Form I-360 route applies, the language of the Immact provision leaves open whether Congress intended for the I-360 self-petition option, including the two-year marriage length requirement, to apply to *all* alien spouses or only to those alien spouses who still have the option of filing an I-360 self-petition because no I-130 petition has been filed on their behalf.

These competing interpretations of congressional intent are further explored in Part III of this Note.

F. Exceptions to the Widow Penalty

There are four statutory exceptions to the widow penalty; three were created by Congress, and one was established by the Immigration Service. A brief look at their discordant nature, however, reveals that Congress, in creating the widow penalty exceptions, may have been reacting to the adverse consequences of the Immigration Service's enforcement of the widow penalty rather than sanctioning the widow penalty itself.

The first two exceptions, both enacted by Congress, exempt surviving spouses from the widow penalty based on the nature of the citizen spouse's death. Signed into law as part of Uniting and

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81 *See infra* Part III.B.

82 *See supra* Part I.B.

Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot") Act of 2001,[83] the first exception to the widow penalty preserves the lawful immigration status of alien widows who lost their spouses in the September 11, 2001, terrorist attacks against the United States.[84] The second exception to the widow penalty applies to alien widows whose citizen spouses die in combat while serving in the U.S. military.[85] Both exceptions apply regardless of the length of the underlying marriage.

While these two exceptions to the widow penalty help a number of grieving widows retain their LPR status, the two tragic causes of death that form the basis for these exemptions are no different than the unfortunate events that claim the lives of many citizen spouses. For instance, if the widows of September 11th terrorist attack victims or military combat fatalities are omitted from the widow penalty's wrath, then why should the widows of the Oklahoma City bombing victims or U.S. contractors killed in Iraq be subject to it?[86] Some have suggested that these legislative immunities stem not from the tragic circumstances at hand, but from the exempt group's political power.[87]

The third and fourth exceptions to the widow penalty exempt alien widows based on considerations of timing. The Immact's addition to the "immediate relatives" definition, which allows alien widows who have been married for more than two years at the time of their spouse's death to self-petition for LPR status, could be considered an exception to the widow penalty.[88] But the Immact provision's status as an exception to the widow penalty is based on how the "immediate relatives" definition is interpreted and applied, and, as dis-

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83 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 (codified in scattered sections of the U.S.C.).

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

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

86 *See generally* Freeman v. Ashcroft, No. 04-666-PA, 2004 U.S. Dist. LEXIS 15249, at *12 (D. Or. July 26, 2004) (citing petitioner's argument that the exceptions to the widow penalty make unreasonable distinctions, such as failing to cover a spouse of a contractor who died in Iraq, but covering the spouse of a solider who died in combat in Iraq).

87 *Cf.* Turnbull, *supra* note 13 ("'There's an awareness the problem exists . . . . Congress doesn't want to be seen to be deporting 9/11 widows and widows of servicemen. But we should cover everybody if we cover anyone in this group of people whom I believe everyone will agree is deserving of some sort of humane consideration.'" (quoting Brent Renison, immigration attorney)).

88 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

cussed in Part III of this Note, there is considerable conflict in this area.[89]

Finally, the Immigration Service has adopted a rule whereby it can "reinstate for humanitarian reasons" an approved I-130 petition filed on behalf of an alien widow if the I-130 petition was approved before the death of the citizen but the adjustment of status application had yet to be adjudicated.[90] Adopted in response to the *Pierno* decision, this exception presents an anomaly; if the Immigration Service deems an alien widow no longer a "spouse" of a U.S. citizen under the *Varela* decision, because the death of the citizen spouse "stripped her of that status,"[91] then it would be nonsensical for the Immigration Service to grant LPR status to a supposedly ineligible widow. While the logic behind the exception thus seems faulty, the "humanitarian reasons" exception nevertheless remains as a narrow exception to the widow penalty.

In sum, the four exceptions to the widow penalty seem jumbled, inconsistent, and lacking in explanation. While Congress's enactment of such narrow exceptions could be construed as expressing their endorsement of the widow penalty, Congress may have been motivated more by the strong political voices of the exempted groups—military wives and September 11th victims who grasp the attention of the media on a national scale—than by approval of the widow penalty's consequences. In addition, the other exceptions to the widow penalty are either subject to conflicting interpretations or are inconsistent in allowing pre-death approvals to be reinstated while preempting completely post-death approvals.[92] Without a coherent rationale for any of the four exceptions, the lines drawn by Congress seem arbitrary and the reasoning underlying the laws muddled.

III. Understanding the Widow Penalty Through Case Law

In recent years, the widow penalty has been the subject of a handful of court cases. Older decisions adopted the Immigration Service's position and held that an alien widow, whose citizen spouse dies before the adjustment of status application is adjudicated, does not qualify as a "spouse" under the INA. In the past two years, however,

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89 *See supra* Part II.E.

90 *See* Immigrant and Nonimmigrant Status, 41 Fed. Reg. 55,847, 55,849 (Dec. 23, 1976) (codified at 8 C.F.R. § 205.1(a)(3) (1977)).

91 Varela, 13 I. & N. Dec. 453, 454 (B.I.A. 1970).

92 *See* Robinson v. Chertoff, No. 06-5702 (SRC), 2007 U.S. Dist. LEXIS 34956, at *14 n.3 (D.N.J. May 14, 2007), *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007).

a number of courts have come to the opposite conclusion, reflecting a judicial trend toward a more compassionate understanding of the widow penalty.

During the course of litigation, opponents of the widow penalty have raised, and the government has responded to, arguments on three main issues: (1) the deference owed to the Board's construction of the statute, (2) the plain language of the statute and "whole act" canons, and (3) practical and humanitarian considerations informing the interpretation of the statute. Focusing on the various arguments advanced by both the government and widow penalty challengers in these cases illuminates the inconsistent nature of the widow penalty along with its unsound legal basis, both of which provide additional evidence that Congress did not necessarily intend to create the widow penalty as it stands today.

A. The Board's Definition of "Spouse" and Chevron *Deference*

In widow penalty cases, the government has successfully invoked the "*Chevron* doctrine" and argued that courts are required to defer to the Board's permissible interpretation of immigration law.[93] *Chevron* and its progeny hold that if the court determines that Congress has not directly addressed the precise question at issue regarding the interpretation of a statute, and Congress has delegated power to the administrative agency to administer the statute, then the court must defer to the agency's reasonable interpretation of the statute.[94] On the other hand, if the court concludes that the intent of Congress is clear, "that is the end of the matter, for the court, as well as the administrative agency, must give effect to the unambiguously expressed intent of Congress."[95]

Invoking the *Chevron* doctrine, the government has maintained that if a court considers the language of the spouse-based immigration law ambiguous, it should defer to the Board's reasonable construction of the statute, which was established in *Varela*.[96] As explained in Part

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93 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). These cases include *Turek v. Department of Homeland Security*, 450 F. Supp. 2d 736, 738, 740 (E.D. Mich. 2006), *Freeman v. Ashcroft*, No. 04-666-PA, 2004 U.S. Dist. LEXIS 15249, at *11 (D. Or. July 26, 2004), and *Burger v. McElroy*, No. 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854, at *17 (S.D.N.Y. Apr. 9, 1999).

94 *Chevron*, 467 U.S. at 842–43; Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005).

95 *Chevron*, 467 U.S. at 842–43.

96 *See* Freeman v. Gonzales, 444 F.3d 1031, 1038–39 (9th Cir. 2006) (rejecting the government's argument that the Board's interpretation of the statute in the *Varela* decision was entitled

II of this Note, the Board in *Varela* denied an alien widow's adjustment of status application because the alien widow, whose citizen husband died after only a few weeks of marriage, was no longer considered the "spouse" of a U.S. citizen for immigration law purposes.[97] The Board interpreted the statutory term "spouse" to include the husband or wife of a living person, but not a person who had passed, as "death . . . stripped [the wife] of that status."[98]

To supplement its ambiguity/deference argument, the government also contends that because the Board has never expressly rejected the reasoning used in *Varela*, the Board's interpretation of "spouse" in *Varela* is controlling under the *Chevron* doctrine. In these cases, upon finding the language of the widow penalty ambiguous, courts have accepted the government's argument and given deference to the Board's permissible statutory construction to revoke an alien widow's approved I-130 petition upon the death of her citizen spouse because the widow is no longer a "spouse" for immigration law purposes.[99]

Chevron deference is not warranted by the Board's interpretation in the *Varela* decision, however, because Congress clearly intended an alien widow whose citizen spouse has filed the necessary forms *to be* and *to remain* an immediate relative, as exemplified in the unambiguous language of several statutory provisions. For instance, 8 U.S.C. § 1154(a)(1)(A)(i) provides that "[a]ny citizen of the United States claiming that an alien is entitled to immediate relative status under § 1151(b)(2)(A)(i) of this title *may file a petition* with the Attorney General for such classification."[100] The clear language of this provision indicates that a citizen spouse is generally eligible, without exception, to file a petition on behalf of his alien spouse, so long as the

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to deference); Taing v. Chertoff, 526 F. Supp. 2d 177, 182–83 (D. Mass. 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008) (same); *Turek*, 450 F. Supp. 2d at 740 (rejecting the Ninth Circuit's approach in *Freeman v. Ashcroft* and affirming the B.I.A.'s denial of immediate relative status for plaintiff).

97 *See* Varela, 13 I. & N. Dec. 453, 454 (B.I.A. 1970).

98 *Id.* at 454.

99 *See Turek*, 450 F. Supp. 2d at 740 (holding that the Board's previous construction of the statute in *Varela* is a reasonable interpretation of the statute); Freeman v. Ashcroft, No. 04-666-PA, 2004 U.S. Dist. LEXIS 15249, at *11 (D. Or. July 26, 2004) (stating that the Board's interpretation of the statute cannot be said to be an impermissible construction of the statute); Burger v. McElroy, No. 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854, at *17 (S.D.N.Y. Apr. 9, 1999) (giving deference to the Board's interpretation of statutory law, as it cannot be said that it was an impermissible construction of the statute).

100 8 U.S.C. § 1154(a)(1)(A)(i) (2000) (emphasis added).

marriage is not fraudulent.[101] Because the government pointed to nothing in the statute to suggest that properly filed forms were entirely voided upon the citizen petitioner's death, the court in *Freeman v. Gonzales* did not give deference to the Board's interpretation of "spouse" in *Varela*.[102]

Another provision subject to much debate in this regard is 8 U.S.C. § 1154(b), which provides in pertinent part that "[a]fter an investigation of the facts in each case . . . the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151(b) . . . approve the petition . . . ."[103] While the government has relied on Congress's use of the present tense in the provision to justify its dismissal of alien widows' petitions, as widows are no longer "spouses" in the present tense after the death of their citizen spouses, the court in *Robinson v. Chertoff*[104] rejected this contention as contrary to the unambiguous intent of Congress. Believing the statute's use of the present tense to be insignificant, the *Robinson* court declined "to stretch the language of § 1154(b) to the point where agency inaction may disqualify an applicant simply because the passage of time renders obsolete information that was true and accurate at the time the I-130 petition was filed."[105] Rather, the court explained, under the clear command of the statute, if the Attorney General determines that the information in the petition is correct and that the alien spouse is an immediate relative, he should approve the adjustment of status application, regardless of the subsequent death of the citizen spouse.[106]

Lastly, even if a court determines that Congress has not spoken directly to the precise question at issue, the Board's interpretation of "spouse" in *Varela* does not warrant *Chevron* deference because it automatically excludes the entire category of surviving spouses from its purview, and thus is an unreasonable interpretation of the statute. Decided two years before the *Varela* decision, *Pierno* held that it would not be reasonable to interpret the INA to authorize the "wooden application" of rules mandating automatic revocation of spousal petitions, and the court expressed disbelief that automatic rev-

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101 *See id.* § 1154(a)(1)(A)(iii)(I)(aa).

102 *See* Freeman v. Gonzales, 444 F.3d 1031, 1041 (9th Cir. 2006).

103 8 U.S.C. § 1154(b).

104 Robinson v. Chertoff, No. 06-5702 (SRC), 2007 U.S. Dist. LEXIS 34956, at *12–14 (D.N.J. May 14, 2007), *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007).

105 *Id.* at *12.

106 *See id.*

ocation could have been intended by Congress.[107] Moreover, the subsequent case of *Sano*, which held that the *Varela* court lacked jurisdiction to decide the case,[108] renders *Varela* "extra-jurisdictional" and undeserving of *Chevron* deference.[109]

Of the courts that have found in favor of petitioner-widows, all have refused to give *Chevron* deference to the Board's interpretation of "spouse," and have substituted their own interpretations of the statute.[110]

B. Plain Language of the Statute and "Whole Act" Canons

While the Board's decision in *Varela* laid the groundwork for the widow penalty, the modern-day version has come to fruition through the Immigration Service's interpretation of the "immediate relatives" definition in 8 U.S.C. § 1151(b)(2)(A)(i). In pertinent part, it provides:

> 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.[111]

Based on the language and structure of this section, as compared to other sections of relevant immigration statutes, both the government and opponents of the widow penalty have raised a number of arguments about Congress's intent when it adopted the provision at issue.

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107 *See* Pierno v. INS, 397 F.2d 949, 950–51 (2d Cir. 1968).

108 Sano, 19 I. & N. Dec. 299, 301 (B.I.A. 1985).

109 *Cf.* Freeman v. Gonzales, 444 F.3d 1031, 1038–40 (9th Cir. 2006) (pointing out that the Board incorrectly gives deference to its interpretation of the word "spouse" in the *Varela* case, even though it was a decision that the Board itself later said was "extra-jurisdictional").

110 *See, e.g.*, *Freeman*, 444 F.3d at 1038–40; Lockhart v. Chertoff, No. 1:07CV823, 2008 U.S. Dist. LEXIS 889, at *14–15 (N.D. Ohio Jan. 7, 2008), *appeal docketed*, No. 08-3321 (6th Cir. 2008); Taing v. Chertoff, 526 F. Supp. 2d 177, 182–83 (D. Mass. 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); Robinson v. Chertoff, No. 06-5702 (SRC), 2007 U.S. Dist. LEXIS 34956, at *12–14 (D.N.J. May 14, 2007), *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007).

111 8 U.S.C. § 1151(b)(2)(A)(i) (2000).

From the government's standpoint, the plain meaning of the statute, primarily the second sentence of § 1151(b)(2)(A)(i) ("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 . . . the alien shall be considered . . . to remain an immediate relative after the date of the citizen's death . . . ."), controls any situation in which the citizen spouse dies prior to adjudication of the alien's adjustment of status application. To be an "immediate relative," the government claims, an alien spouse must have been married to a U.S. citizen for at least two years at the time of the citizen's death.[112]

To supplement its interpretation, the government maintains that not only does the first sentence of the immediate relatives provision make no suggestion that an alien beneficiary remains a "spouse" of a U.S. citizen after the death of the citizen, but also that there is no support in the statute as a whole that the term "spouse" remains irretrievably determined at the time the I-130/I-485 petitions are filed.[113] The government has also utilized dictionary definitions and arguments about grammatical structure to supplement their litigation position. For example, in *Taing v. Chertoff*, the government argued that a widow can no longer be considered a "spouse" under current legal understanding because Black's Law Dictionary defines "spouse" as "one's husband or wife," "wife" as "a woman who has a lawful husband living," and "widow" as a "woman whose husband has died and who has not been remarried."[114] In *Taing*, the government also advanced an argument about the grammar of the provision, by pointing to the phrase "for the purposes of this subsection," which begins § 1151(b)(2)(A)(i).[115] Echoing congressional intent that the subsection be read as a whole, such a phrase, the government has argued, signals that the second sentence's inclusion of the self-petition option for spouses of more than two years should be read as a limitation on the first sentence's general inclusion of spouses within the immediate relatives definition.[116]

Courts have adopted the government's plain language approach in three recent cases: *Burger v. McElroy*,[117] *Freeman v. Ashcroft*,[118]

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112 *See, e.g.*, *Freeman*, 444 F.3d at 1041; *Robinson*, 2007 U.S. Dist. LEXIS 34956, at *7–8; Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 738–39 (E.D. Mich. 2006).

113 *See, e.g.*, *Taing*, 526 F. Supp. 2d at 183–84; *Turek*, 450 F. Supp. 2d at 738–39.

114 *See Taing*, 526 F. Supp. 2d at 183–84.

115 *See Taing*, 526 F. Supp. 2d at 184–85.

116 *See id.*

117 Burger v. McElroy, No. 97 Civ. 8775 (RPP), 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. Apr. 9, 1999).

and *Turek v. Department of Homeland Security*.[119] In each of these three cases, the petitioners were alien widows deemed ineligible by the Immigration Service for immediate relative status because their petitioning spouses died before the widows' adjustment of status applications were adjudicated. Upholding the denial of adjustment of status in each case, the courts all held that under the clear language of § 1151(b)(2)(A)(i), an alien widow whose citizen spouse died less than two years after marriage is no longer an immediate relative for immigration law purposes.[120]

Because the plain meaning of the statute seems to support the government's interpretation, opponents of the widow penalty have advanced more particular and analytical arguments based on the language of § 1151(b)(2)(A)(i) and its consistency with related immigration statutes. This approach has been successful in four recent cases: *Freeman v. Gonzales*,[121] *Robinson v. Chertoff*,[122] *Taing v. Chertoff*,[123] and *Lockhart v. Chertoff*.[124]

The landmark case of *Freeman*, a recent decision by the Ninth Circuit, marked a definitive change in present-day jurisprudence on the widow penalty. Holding that the Immigration Service misconstrued congressional intent by automatically dismissing the approved I-130 petitions of *all* alien widows whose citizen spouses died within two years of marriage, the Ninth Circuit rejected the government's argument that an alien widow who was married to a U.S. citizen for less than two years is no longer an immediate relative for immigration law purposes, and found in favor of the petitioner-widow.[125]

The case was brought by an alien widow named Carla Freeman, a dual citizen of South Africa and Italy who was denied LPR status by

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118 Freeman v. Ashcroft, No. CV 04-666-PA, 2004 U.S. Dist. LEXIS 15249 (D. Or. July 26, 2004).

119 Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736 (E.D. Mich. 2006).

120 *See id.* at 740; *Freeman*, 2004 U.S. Dist. LEXIS 15249, at *7–9; *Burger*, 1999 U.S. Dist. LEXIS 4854, at *14–20. In *Turek*, however, there were extenuating circumstances that may have influenced the court's decisionmaking: because the plaintiff had entered into marriage with a U.S. citizen during removal proceedings, an automatic presumption of marriage invalidity was raised. *Turek*, 450 F. Supp. 2d at 740.

121 Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006).

122 Robinson v. Chertoff, No. 06-5702 (SRC), 2007 U.S. Dist. LEXIS 34956 (D.N.J. May 14, 2007), *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007).

123 Taing v. Chertoff, 526 F. Supp. 2d 177 (D. Mass. 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008).

124 Lockhart v. Chertoff, No. 1:07CV823, 2008 U.S. Dist. LEXIS 889 (N.D. Ohio Jan. 7, 2008), *appeal docketed*, No. 08-3321 (6th Cir. 2008).

125 *See Freeman*, 444 F.3d 1031, 1034 (9th Cir. 2006).

the Immigration Service following the death of her citizen husband of less than two years.[126] Objecting to the determination that she was no longer a "spouse" for purposes of the INA, Freeman argued that Congress's inclusion of the unrestricted word "spouse" in the first sentence of § 1151(b)(2)(A)(i) indicates that Congress intended a surviving spouse to be considered a "spouse" under the statute.[127] While Congress chose to permit only alien parents whose citizen children are at least twenty-one years old to qualify as immediate relatives, Freeman argued, Congress did not include any comparable qualifying language to be a spouse within the immediate relatives definition.[128] The Ninth Circuit agreed, stating that where Congress includes particular language in one section of a statute, but omits it in another, it is generally assumed that Congress acts intentionally.[129]

The *Freeman* court also concluded that Congress clearly intended to create a dual process for attaining LPR status, such that either the citizen spouse petitions for the alien spouse or, if he or she dies without doing so, the alien widow may self-petition if the underlying marriage was more than two years in length.[130] Based on this dual-petitioning process, the *Freeman* court concluded that a minimum two-year marriage rule for *all* alien widows, even those whose citizen spouses filed an I-130 petition on their behalf before death, is inconsistent with the structure of the petitioning process as a whole.[131] On the other hand, interpreting the second sentence of § 1151(b)(2)(A)(i) such that it applies a two-year marriage length requirement solely to alien widows who had no petition filed on their behalf at the time of the citizen spouse's death, the Ninth Circuit reasoned, harmonizes and is consistent with the language and structure of the statute and related provisions of immigration law.[132] As such, Congress introduced the two-year rule in the second sentence of the provision, set apart from the first sentence, which includes spouses generally within the immediate relatives definition, to make clear that the I-360 self-petition option in the second sentence governs only those cases where the surviving alien spouse files a petition *after* the citizen spouse has died. But, if the citizen spouse was alive at the time of the filing and filed an I-130 petition on her behalf, then the surviving alien spouse remains

126 *Id.* at 1032–34.
127 *See id.* at 1038.
128 *See id*.
129 *Id.* at 1039–40.
130 *Id.* at 1039.
131 *Id.* at 1038.
132 *Id.* at 1042–43.

an immediate relative under the definition in the first sentence of the provision.[133]

Furthermore, the court explained, if Congress intended the second sentence of the immediate relatives definition to apply to all alien widows, it presumably would have provided for the automatic approval of I-130 petitions as well as the I-360 self-petition option upon two years of marriage at the time of the citizen's death. The second sentence of § 1151(b)(2)(A)(i), however, only provides for an I-360 self-petition option, rendering its purposeful application to aliens who have I-130 petitions filed on their behalf, generally making them inapplicable for the I-360 self-petition, questionable.

Lastly, the court explained that while Congress may have wanted some objective evidence of a valid marriage in the case of a widow whose citizen spouse had taken no action to adjust her status during his lifetime, thereby justifying the two-year rule, there was no support within applicable immigration provisions that alien spouses who had filed the necessary forms should have their spousal status voided upon the premature death of their citizen spouses.[134]

The Ninth Circuit thus reached a twofold conclusion: that (1) the first sentence of the § 1151(b)(2)(A)(i), including children, spouses and parents of a U.S. citizen within the definition of an immediate relative, applies to I-130 petitions filed by U.S. citizen spouses on behalf of their alien spouses, but (2) the second sentence of § 1151(b)(2)(A)(i), allowing alien widows to self-petition for LPR status if the couple was married for at least two years prior to the citizen's death, applies solely to I-360 self-petitioners, whose citizen spouses did not file an I-130 petition on their behalf before death. Accordingly, since Freeman's citizen spouse filed an I-130 petition prior to his death, the court held that the two-year rule did not apply to her case and Freeman remained a spouse for purposes of § 1151(b)(2)(A)(i).[135]

Within the last year, three district courts outside the Ninth Circuit, in *Robinson*, *Taing*, and *Lockhart*, have adopted the rationale in *Freeman*, and overruled Immigration Service denials of adjustment of status applications for alien widows whose citizen spouses filed petitions on their behalf but passed away while the petitions were pending. These cases are procedurally and factually analogous to the *Freeman* decision.

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133 *See id.*

134 *See id.*; *id.* at 1042 n.18.

135 *Id.* at 1034.

C. Practical and Humanitarian Reasoning

Many commentators have also made compelling arguments that, for practical and humanitarian reasons, the widow penalty is illogical.

First, the widow penalty seems at odds with the overall pro-family and pro-immigration emphasis of Immact,[136] suggesting that Congress did not intend to place such a harsh penalty for alien widows in the statute.[137] For instance, throughout the Immact hearings, members of Congress spoke to "promoting family immigration"[138] and "[u]nifying families"[139] as both a goal of the proposed legislation and a critical priority of the American immigration system as a whole. Furthermore, congressional representatives applauded Immact for providing "unrestricted admission of the immediate family of U.S. citizens" and "increas[ing] the visas available for the closest family members of citizens and residents of the United States."[140]

The widow penalty is inconsistent with a law supporting family unification and legal immigration, as it makes possible the separation of alien widows from their citizen children[141] and decreases the number of visas available to family members of U.S. citizens. Enactment of the widow penalty provision thus sends the opposite message of the one Immact was intended to send—that the United States does not value families. Based on this divergence, it is difficult to understand why Congress would pass the widow penalty within the Immact, with-

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136 *See* 136 Cong. Rec. 36,837 (1990) (statement of Rep. Brooks) ("Those supporting family reunification should applaud our efforts [to enact Immact] . . . .").

137 *See Freeman*, 444 F.3d at 1043 (holding that the government's contention that Freeman's spousal status was stripped by her husband's untimely death frustrated congressional policy and was contrary to congressional intent).

138 136 Cong. Rec. 27,074 (1990) (statement of Rep. Morrison) ("Family 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. Yet current law causes this to occur all too often.").

139 *Id.* at 27,080 (statement of Rep. Morrison).

140 *Id.* at 35,612 (1990) (statement of Rep. Simpson).

141 In many of the widow penalty cases, the alien widows have given birth to children in the United States. When facing deportation, these widows thus must make a difficult choice: take their American children to a foreign land or leave their children with the citizen spouse's relatives in the United States. *See, e.g.*, Lockhart v. Chertoff, No. 1:07CV823, 2008 U.S. Dist. LEXIS 889, at *3 (N.D. Ohio Jan. 7, 2008), *appeal docketed*, No. 08-3321 (6th Cir. 2008) (alien mother of newborn U.S. citizen subject to deportation by the Immigration Service); Ramos, *supra* note 1 (potential deportation of deceased U.S. citizen's alien widow compels decision to return to Venezuela with couple's toddler, a U.S. citizen by birth); Richardson, *supra* note 65 (writing that Brent Renison, an immigration attorney, stated that in the cases of the more than 100 widows or widowers he represents, about twenty children are involved).

out any explanation of its disharmonious nature, unless Congress did not intend to do so.

Moreover, some challengers argue, and a few courts have agreed, that the "fortuity of the citizen spouse's untimely death is too arbitrary and random a circumstance to serve as a basis for denying the petition."[142] Many alien spouses affected by the widow penalty have, without delay, filed to attain permanent residence in the United States, and fully complied with applicable regulations, yet are subject to deportation based on chance.[143]

In addition, opponents of the widow penalty contend that it is unlikely that alien spouses pose a threat to our national security.[144] Aliens affected by the widow penalty do not enter the country illegally, but are admitted through visas or other forms of legal immigration. Therefore, by pursuing the deportation of alien widows, some commentators believe that the Immigration Service is simply wasting resources that could more effectively be used to secure the country's borders. Furthermore, the number of persons affected by the widow penalty each year in no way rivals the number of illegal aliens who enter this country each year.[145]

Lastly, it has also been asserted that the conduct the benefit requires—marriage—is itself the best deterrent for marriage fraud pur-

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142 Robinson v. Chertoff, No. 06-5702 (SRC), 2007 U.S. Dist. LEXIS 34956, at *12–13 (D.N.J. May 14, 2007), *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007); *see also Freeman*, 444 F.3d at 1043 ("[A]n alien's status as a qualified spouse should not run on whether [the Department of Homeland Security] happens to reach a pending application before the citizen spouse happens to die."); Taing v. Chertoff, 526 F. Supp. 2d 177, 187 (D. Mass. 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008) ("At issue is not whether the government has discretion to deny an Application (it does) but whether the interpretation upon which the government bases its decision is appropriate (it is not)."); Turnbull, *supra* note 13 (quoting Brent Renison, an immigration attorney, as stating "[t]hese people followed the rules, and by an act of God that chance was taken away").

143 *Robinson*, 2007 U.S. Dist. LEXIS 34956, at *13–14 ("The Court cannot imagine that Congress intended the time of death combined with the pace of adjudication, rather than the petitioner's conscious decision to promptly file an I-130 petition, to be the proper basis for determinating [sic] whether the alien qualifies as an immediate relative.").

144 *See This American Life: The Audacity of Government* (Chicago Public Radio broadcast Mar. 28, 2008) [hereinafter *Audacity of Government*] (statement of Jack Hitt) ("What threat is worth these hardball tactics? It's not like there is a wave of widows storming our shores . . . These aren't suspected terrorists.").

145 *Cf.* Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief, Hootkins v. Chertoff, No. CV 07-5696 CAS (C.D. Cal. Aug. 30, 2007) (class action lawsuit on behalf of eighty women facing possible deportation because of the widow penalty); Julia Preston, *Decline Seen in Numbers of People Here Illegally*, N.Y. TIMES, July 31, 2008, at A14 (stating that the illegal immigrant population reached an historic high of 12.5 million in August 2007).

poses, rendering the widow penalty unnecessary. The inherent difficulty in convincing persons to enter into a marriage with practical strangers acts in itself as a significant deterrent to the conduct.[146] Moreover, under state law, persons who enter into a valid marriage owe each other a duty of support, upon separation or divorce, and this duty is enforceable in most states.[147] Thus, a citizen who enters into a fraudulent marriage to help the alien receive immigration benefits will put himself or herself at considerable financial risk, as the couple will most likely have to comply with formal divorce procedures upon dissolution of the marriage.[148]

In response to these challenges to the widow penalty, the government has taken the position that it is counterintuitive for a court to hold that a spousal relationship endures beyond the dissolution of the marital relationship.[149] Under its common, ordinary meaning, the term "spouse," the government argues, is a married person and, as a matter of law, marriage ends upon the death of one spouse.[150] Furthermore, because the overall purpose of the immediate relatives category is to promote the unity of families of U.S. citizens, the government maintains that this goal can no longer be met where the citizen spouse is deceased.[151]

In sum, within the past fifteen years, most of the older court decisions have adopted the government's rationale and upheld the "widow penalty" based on *Chevron* deference to the Board's statutory construction and the plain meaning of immigration statutes. However,

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146 *See* Medina, *supra* note 29, at 714–15.

147 *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 6.1, 6.4 (2d ed. 1988).

148 *See id.* Furthermore, as stated by the *Lockhart* court, the *Freeman v. Gonzales* interpretation does not *require* the government to grant all adjustment of status applications; rather, the government may, in its discretion, ultimately deny adjustment of status if it determines that the underlying marriage was a sham. Lockhart v. Chertoff, No. 1:07CV823, 2008 U.S. Dist. LEXIS 889, at *32 (N.D. Ohio Jan. 7, 2008), *appeal docketed*, No. 08-3321 (6th Cir. 2008).

149 *See, e.g.*, Freeman v. Gonzales, 444 F.3d 1031, 1041 (9th Cir. 2006); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 739 (E.D. Mich. 2006).

150 *See* Aytes Memorandum, *supra* note 55; BLACK'S LAW DICTIONARY 1438 (8th ed. 2004) (definition of "spouse"); 52 AM. JUR. 2D *Marriage* § 8 (2007) (stating that "marriage is terminable only by death or a presumption of death, or by a judicial decree of divorce, dissolution, or annulment").

151 *See, e.g.*, *Turek*, 450 F. Supp. 2d at 739 ("Defendants further state that the entire purpose of the 'immediate relative' category—which is to promote the unity of families of U.S. citizens—can no longer be met here where Plaintiff's former wife is now deceased."); *Fox News Interview with Michael Cutler* (Fox television broadcast Aug. 6, 2007) ("The reason we give resident alien status to the [alien] spouse of a U.S. citizen is to benefit the U.S. citizen. So that the citizen can have the company of the spouse here in the U.S." (statement of Michael Cutler, former Senior Special Agent of the Immigration Service)).

within the past two years, there have been a number of victories for widow-petitioners, as the Ninth Circuit and several district courts have struck down the widow penalty based on the Board's disregard of clear congressional intent, statutory language, "whole act" interpretations of the statute, and humanitarian concerns.

While four judicial decisions may seem like a small wrinkle in the grand scheme of judicial decisionmaking, the anti-widow penalty cases of *Freeman*, *Robinson, Taing*, and *Lockhart* were all handed down in the past two years. These cases reflect a slow, but identifiable, judicial trend towards a less rigid interpretation of spouse-based immigration law.[152]

IV. Pending Solutions to the Widow Penalty

Congress should enact federal legislation to abolish the widow penalty for all alien widows because the rule does not rest on sound legal principles or logic, risks separating immigrant parents from their citizen children, and likely frustrates the intent of the Congress that enacted Immact. Although several solutions to the widow penalty are pending, they are likely to be inadequate to remedy the problem of the widow penalty as a whole because they will not reach all affected persons.

There are three types of solutions that have been proposed, and some employed, to minimize the harsh consequences of the modern-day widow penalty. These pending solutions include: (1) judicial reform via litigation within the U.S. court system, (2) the enactment of private bills that exempt individual widows from the two-year requirement, and (3) the adoption of federal legislation that preserves the widow penalty but allows an exception for widows who meet a certain burden of proof.

A. Judicial Reform

Judicial reform by means of litigation within the U.S. court system is one vehicle utilized by individual petitioners to alleviate the hardship caused by the widow penalty.

Litigation itself, however, is unlikely to fix the widow penalty on its own, as the Supreme Court rarely takes immigration cases,[153] and

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152 The effectiveness of judicial reform as a solution to the widow penalty is addressed in Part IV of this Note.

153 *See generally* John W. Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 TUL. L. REV. 669, 676 (1993). Since the Supreme Court recognized control of immigration by the political branches as vital to the pro-

judges do not have the power to create favorable interpretations of existing statutes *sua sponte*. Instead, judges must objectively construe congressional intent, which may remain somewhat unclear without specific legislative history regarding the enactment of the Immact provision. Furthermore, not every foreigner affected by the widow penalty has the legal ability or financial resources to bring suit. Some alien widows may not understand domestic laws, speak English, or have the money to hire a private lawyer to sue the government. In addition, the implementation of deportation policies by means of discretionary, case-by-case determinations has potential repercussions for litigants, as Congress has acted to exclude many discretionary determinations from the ambit of judicial review.[154] Lastly, some courts continue to defer to the Board's interpretation of the word "spouse" in *Varela*, and automatically revoke the approved I-130 petitions of alien widows, despite Congress's unambiguous language to the contrary.[155] This is yet another obstacle in the path of judicial reform of the widow penalty.

While the practicability of judicial reform of the widow penalty is questionable at the present time, a class action lawsuit and six cases involving the widow penalty are currently pending. In August 2007, a national class action complaint was filed in the United States District Court for the Central District of California.[156] Motivated by the lack of response from the government, Oregon immigration attorney Brent Renison filed a complaint for declaratory and injunctive relief and a petition for writ of mandamus to determine the rights and remedies of aliens affected by the widow penalty.[157] Specifically, the class action seeks an injunction prohibiting the government from using the death

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tection of national sovereignty and security over one hundred years ago, the Court has engaged in only superficial review of immigration laws, regarding them as "largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 U.S. 580, 588–90 (1952). Because the Court continually emphasizes the political nature of laws concerning entry or stay of aliens, it has been suggested that constitutional challenges to immigration policy may be non-justiciable under the political question doctrine. *Id.* at 588–89; *see also* Galvan v. Press, 347 U.S. 522, 531 (1954).

154 *See generally* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 624–40 (2006).

155 *See supra* Part III.A.

156 *See* First Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus, Hootkins v. Chertoff, No. CV 07-5696 CAS (C.D. Cal. Aug. 30, 2007) (challenging the denial of lawful permanent resident status to surviving spouses of American citizens).

157 *See Attorney Plans Class-Action Lawsuit to End Immigration Widow "Penalty" in U.S.*, INT'L HERALD TRIB., Aug 29, 2007, *available at* http://www.iht.com/articles/ap/2007/08/29/america/NA-GEN-US-Immigration-Widow-Penalty.php (explaining that a lack of response from

of the U.S. citizen spouse as a discretionary factor in the adjudication of the application for LPR status and a writ of mandamus compelling the government to reopen the named plaintiffs' adjustment of status applications.[158] At the time of publication, the parties had agreed in a stipulation to request that the case be placed on hold.[159]

Although this lawsuit may eventually have a positive outcome for a large number of affected widows, class actions can take years to resolve and will not immediately affect widows outside of the petitioning class. Indeed, the first step of class certification can take a very long time, and defendants can delay a case by filing motions to dismiss the case or motions regarding discovery matters.[160] In addition, during a recent radio broadcast of *This American Life*, lead attorney Brent Renison was asked whether winning the class action lawsuit would effectively end the widow penalty.[161] Renison responded in the negative, as the government could still invoke discretionary power and continue to deport alien widows despite the court's ruling on the class action.[162]

In addition to the class action lawsuit, plaintiffs in court cases might seek to extend the *Freeman* decision beyond the realm of the Ninth Circuit and establish its reasoning as binding precedent in courts across the country. At the present time, the *Freeman* case only applies in the Ninth Circuit.[163] The widow penalty, however, remains

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the government and the failure of immigration reform in the U.S. Congress convinced Brent Renison to file a class-action lawsuit).

158 *See* First Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus, Hootkins v. Chertoff, No. CV 07-5696 CAS (C.D. Cal. Aug. 30, 2007). The class action includes approximately eighty widows, with Ana Maria Moncayo-Gigax, an Ecuadorian immigrant whose citizen spouse was killed while working as a U.S. Border Patrol agent in Washington, D.C., and Carolyn Robb Hootkins, an alien widow of famous actor William Hootkins, as two of the named plaintiffs. *See id.* at 8–9.

159 For information about the legal progression of the class-action lawsuit, see the Web site of immigration law firm Parrilli Renison LLC, at http://www.entrylaw.com/classaction.html, or the Web site of Surviving Spouses Against Deportation, at http://www.ssad.org/litigation/classaction.html.

160 *See* RICHARD D. FREER, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 818–19 (4th ed. 2005). Furthermore, because of prospective abuses and conflicts between counsel and the group, a class-action lawsuit is an enormous burden on the court in which it proceeds, as the court must assume administrative tasks to ensure that the class is being adequately represented by counsel and approve all settlements. These issues add on to the length of time required to resolve the case. *See id.* at 818–19. At present, the class has not yet been officially certified, and both the Department of Homeland Security ("DHS") and plaintiffs' counsel have filed numerous motions, making the case unlikely to be resolved in the near future. *See supra* note 159.

161 *Audacity of Government*, *supra* note 144.

162 *See id.*

163 *See* Administrative Office of the U.S. Courts: Understanding the Federal Courts: The

in effect throughout the rest of the country, creating a regional policy of federal immigration law.

Today, six court cases involving the widow penalty are pending in the U.S. court system. The cases of *Lockhart*, *Taing*, and *Robinson* resulted in favorable decisions for petitioner-widows in district court, but the government has appealed these decisions to the Sixth, First, and Third Circuits, respectively, seeking to limit the *Freeman* decision to the confines of the Ninth Circuit.[164] In light of recent jurisprudence on the widow penalty in the U.S. court system,[165] however, the government is unlikely to be successful.[166] Furthermore, new cases challenging the widow penalty have been filed in federal district courts in Texas, Maryland, and Missouri.[167]

B. Private Bills

Generally, private bills—legislation to benefit one individual or a particular group of individuals—are used to create "humanitarian flexibility in a law that, if applied as written, would produce harsh results."[168] In the context of immigration, private bills grant exceptions to small groups or particular individuals whose present situations merit special consideration.[169] Between 1995 and 2005, 451 private

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Jurisdiction of the Federal Courts, http://www.uscourts.gov/understand03/content_4_0.html (last visited Oct. 8, 2008).

164 *See* Lockhart v. Chertoff, No. 1:07CV823, 2008 U.S. Dist. LEXIS 889 (N.D. Ohio Jan. 7, 2008), *appeal docketed*, No. 08-3321 (6th Cir. 2008); Taing v. Chertoff, 526 F. Supp. 2d 177 (D. Mass. 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); Robinson v. Chertoff, No. 06-5702 (SRC), 2007 U.S. Dist. LEXIS 34956 (D.N.J. May 14, 2007), *appeal docketed*, No. 07-2977 (3d Cir. July 5, 2007).

165 *See supra* Part III.

166 Since this Note was submitted for publication, the Third Circuit decided the appeal *Robinson v. Napolitano*, No. 07-2977 (3d Cir. Feb. 2, 2009), in which the majority in a two-to-one decision expressly disagreed with the holding in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). Counsel for Mrs. Robinson is requesting rehearing en banc based on an argument that the majority in *Robinson* failed to properly consider relevant statutes 8 U.S.C. § 1154 and 8 U.S.C. § 1186a, and urging the court to adopt dissenting Judge Nygaard's interpretation.

167 Handford v. Chertoff, Civ. No. SA-08-CA-0795XR (W.D. Tex. filed Sept. 25, 2008); Robledo v. Chertoff, No. AW-08-CV-2581 (D. Md. filed Oct. 2, 2008); Kells v. Chertoff, No. 08-CV-1582-CAS (E.D. Mo. filed Oct. 14, 2008).

168 T. Alexander Aleinikoff & David A. Martin, Immigration Process and Policy 787 (4th ed. 1998). *See generally* Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 Geo. Immigr. L.J. 273 (2004).

169 *See* Margaret Mikyung Lee, Cong. Research Serv., Private Immigration Legislation 2 (2005).

immigration bills were introduced in Congress. However, only thirty-six bills were approved and subsequently enacted into law.[170]

An example of such a bill is Representative Brad Sherman's private bill for Mai Hoa "Jasmin" Salehi,[171] whose citizen husband was killed during an armed robbery of his restaurant before her adjustment of status application had been approved.[172] Commenting on the 1998 private bill, the House Report noted, "[a]lthough the occurrence of death prior to two years of marriage is rare, the waiver is routinely given for humanitarian reasons in a case of this type if the petition for conditional permanent residence has been approved."[173]

Aside from informing Congress about the inflexible or inadvertent aspects of the widow penalty, private bills alone are unlikely to remedy effectively the consequences of the widow penalty. Although a few alien widows may be spared from the widow penalty by private bills, the inability of many aliens to secure the congressional representation necessary to enact a bill in their name, in conjunction with the reluctance of Congress to pass private bills in general, suggests that the vast majority of widows will never be spared under this pending solution.

For instance, Anisha Goveas Foti, a citizen of India, was granted eligibility for LPR status in the United States through the passage of a private bill on her behalf in 2001.[174] One year prior to the passage of the bill, Mrs. Foti's citizen husband of two months, a State Department diplomatic courier, had been killed in the crash of Gulf Air Flight 72 off the coast of Bahrain while performing official duties for the government.[175] Because of Mr. Foti's line of work, various political figures, such as Congressman Tom Lantos and Johnny Young, former U.S. Ambassador to Bahrain, worked tirelessly to secure the passage of the private bill.[176] Without such political connections, however, a private bill's enactment is speculative.

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170 *See id.* at 29. Furthermore, after the Supreme Court's ruling in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), every bill, including a private bill, must be passed by the House of Representatives and the Senate and be presented to the President for possible veto before becoming law.

171 Priv. L. No. 105-7, H.R. 1794 (1998).

172 *See* H.R. REP. No. 105-698, at 2 (1998).

173 *Id.*

174 *See* Priv. L. No. 107-5 (2002).

175 *See President Signs Foti Bill*, STATE MAG. (U.S. Dept. of State, Washington, D.C.), Jan. 2003, at 8.

176 *See id.*

In addition to an alien widow's need for a political network to pass a private bill in her name, Congress has, in recent years, been extremely hesitant to pass bills designed to benefit a single individual, especially in the realm of immigration.[177] Members of Congress have expressed concern that private bills require too much effort for too little payoff, may induce scandal if used as a vehicle to gain votes, and could open up a floodgate of aliens requesting the privilege of residence.[178] Critics claim that special treatment for individual immigrants is controversial, especially when other immigrants subject to possible deportation have similarly riveting stories.[179] Senator Richard Durbin has succinctly summed up the problem: "We cannot fix the injustices of this system with private bills. Only comprehensive immigration reform can permanently remedy this situation."[180] Indeed, of the seventy-three private immigration bills introduced during the 109th Congress, the most recent legislative term to be completed, none have been approved by Congress.[181]

C. Legislative Reform

Congress's enactment of federal legislation is yet another possible solution to the widow penalty. Recent attempts to lessen the provision's consequences, however, have not been met with a positive congressional response.

As immigration reform remains at the top of the United States agenda, legislative modification will likely be successful at some point in the future. But legislative solutions to the widow penalty within proposed legislation, providing for exemptions from the widow penalty upon a presentation of evidence that the petitioning spouse filed

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177 *See* Griffith, *supra* note 168, at 301 (2004) (explaining that members of Congress have become increasingly unwilling to present private bills).

178 *See id.* at 301–03.

179 *See generally* Lee Sustar, *Don't Let Them Deport Elvira Arellano*, SOCIALIST WORKER, Sept. 1, 2006, at 4–5 ("I don't feel comfortable carving out an exception for one person when there are hundreds of thousands of people just in the Chicago region alone who would want a similar exemption." (statement of U.S. Sen. Barack Obama)).

180 *Id.* As a result of Congress's present-day attitude regarding immigration private bills, Senator Dianne Feinstein's private bill for Jacqueline Coats, an immigrant from Kenya who lost her husband before their two-year wedding anniversary when he died trying to rescue two boys from a Pacific Ocean riptide, has been unsuccessful. *See* Juliana Barbassa, *Hero's Widow May Be Forced to Leave U.S.*, SAN DIEGO UNION-TRIB., Sept. 2, 2007, *available at* http://www.signonsandiego.com/uniontrib/20070902/news_1n2deport.html. Mr. Coats did not have any political connections before his death, nor did he perish while working for the federal government. The bill was introduced in Congress in January 2007, but never gained approval. *See* S. 3809, 109th Cong. (2d Sess. 2006).

181 *See* LEE, *supra* note 169, at 29.

an I-130 petition on behalf of the alien spouse prior to his death or upon a proper showing of a valid and bona fide marriage, are insufficient to remedy the widow penalty dilemma. Rather, such alleged solutions riddle the widow penalty with additional exceptions, begging the question whether the law is, in fact, necessary.

In the spring of 2005, bipartisan legislation, which focused on comprehensive immigration reform and included a limited fix to the widow penalty, was introduced in both the House and the Senate. Entitled the Secure America and Orderly Immigration Act of 2005,[182] this bipartisan bill included an exception to the widow penalty for widows who had filed adjustment of status applications before their spouses' deaths.[183] This legislative solution, however, did not exempt widows who did not have adjustment of status applications filed before their spouses' deaths. The Act did not pass in either the Senate or the House, effectively killing the bill in its entirety.

In May 2006, the Senate passed a new comprehensive immigration reform bill with a different widow penalty exception. Called the Comprehensive Immigration Reform Act of 2006,[184] the bill contained an amendment that exempted alien widows from the widow penalty if they could prove by a preponderance of the evidence that the underlying marriage was entered into in good faith and not solely for the purpose of obtaining an immigration benefit.[185] However, no guidelines for the Immigration Service regarding how to make such a determination were provided in the amendment's text. Although passed by the Senate, the bill was not taken up by the House, effectively ending the bill's chances of enactment in 2006.

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182 Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (1st Sess. 2005); H.R. 2330, 109th Cong. (1st Sess. 2005).

183 *See id.* § 604 ("[A]ny alien described in paragraph (2) who applied for adjustment of status prior to the death of the qualifying relative may have such application adjudicated as if such death had not occurred.").

184 Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2d Sess. 2006).

185 *Id.* § 504. It stated:

> An alien who was the spouse of a citizen of the United States for not less than 2 years at the time of the citizen's death or, if married for less than 2 years at the time of the citizen's death, proves by a preponderance of the evidence that the marriage was entered into in good faith and not solely for the purpose of obtaining an immigration benefit, and was not legally separated from the citizen at the time of the citizen's death, and each child of such alien, shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death if the spouse files a petition under section 204(a)(1)(A)(ii) before the earlier of (I) 2 years after such date; or (II) the date on which the spouse remarries.

Id.

Congress, however, did not give up. In 2007 and 2008, three immigration-focused bills were introduced, all of which included the same "preponderance of the evidence" amendment that was included in the Comprehensive Immigration Reform Act of 2006.[186] Ultimately, however, none of the bills passed in either the Senate or the House of Representatives.[187]

In sum, these pending legislative solutions to the widow penalty seem to produce more arbitrary lines than effective change to the widow penalty. For instance, with a lack of guidelines for administration, how will the "preponderance of evidence" standard be administered in practice? One can imagine a heightened burden of proof imposed by government agencies that are prone to rigidity with regard to spouse-based immigration law. Further, why must alien widows prove that their marriages were bona fide when alien widows of military personnel killed during active duty are not required to make such a showing? The manner of the citizen spouse's death cannot confirm that the underlying marriage was valid. Lastly, is it fair to base an alien widow's opportunity to attain LPR status on the timing of the adjustment of status application filing, without engaging in an individual review of the facts? Some aliens and citizens have been in a serious relationship with each other for a number of years, but for various reasons do not marry until many years later. If the alien never has an adjustment of status application filed prior to the spouse's death, however, is it fair to automatically deny adjustment of status if the couple

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186 The Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. § 504 (2007) was introduced in the Senate in May 2007. It was never voted on, however, though a series of votes on amendments and cloture took place. The last vote on cloture, in early June 2007, failed 34 to 61, effectively ending the bill's chances of passing in the Senate. It was subsequently pulled from the floor. *See* The Library of Congress, THOMAS, http://thomas.loc.gov/bss/110search.html (search by "Bill Number"; search for "S. 1348"; follow "All Congressional Actions" hyperlink) (last visited Oct. 8, 2008). Meeting a similar fate was the Security Through Regularized Immigration and a Vibrant Economy ("Strive") Act of 2007, H.R. 1645, 110th Cong. (1st Sess. 2008), introduced in the House in March 2007. The bill included the same widow penalty exception as the both the 2006 and 2007 Comprehensive Immigration Reform Acts. *Id.* § 516. While subcommittee hearings have been held, no congressional action has been taken regarding the Strive Act since May 2007. *See* The Library of Congress, THOMAS, http://thomas.loc.gov/bss/110search.html (search by "Bill Number"; search for "H.R. 1645"; follow "All Congressional Actions" hyperlink) (last visited Oct. 8, 2008). And finally, H.R. 6034, 110th Cong. (2d Sess. 2008), proposing the same standard as the latter three Acts, was introduced in the House of Representatives in May 2008. *See* The Library of Congress, THOMAS, http://thomas.loc.gov/bss/110search.html (search by "Bill Number"; search for "H.R. 6034"; follow "All Congressional Actions" hyperlink) (Oct. 8, 2008). Based on the unsuccessful path of its predecessors, however, H.R. 6034 appears to have only a slim chance of approval.

187 *See supra* note 186 and accompanying text.

has been together for over twenty years, but the citizen dies within two years of marriage?[188]

Creating gaping holes in widow penalty jurisprudence, the proposed exemptions thus are unlikely to resolve the basic problems at the heart of widow penalty enforcement.

V. Proposed Solution to the Widow Penalty

From the prior analysis of pending solutions, it seems unlikely that any of the proposed fixes will remedy the widow penalty in its totality. Judicial reform via court litigation may be too slow, as only the Ninth Circuit has adopted an approach that moderately remedies the widow penalty, and Supreme Court review is unlikely. Private bills only affect one widow, when hundreds are impacted. And current legislation, while hindered because of political deadlock, has included amendments that fail to deal with the problem itself. Because the Immigration Service is unwilling to change its current enforcement of the widow penalty, the most effective solution is for Congress to adopt narrow federal legislation that completely abolishes the widow penalty.

A. Amendments to the "Immediate Relatives" Definition

Congress should adopt a legislative amendment that completely eliminates the widow penalty. It can do so by adopting the amendment provided below:

> In the case of an alien who was the spouse of a citizen of the United States ~~for at least two 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 § 204(a)(1)(A)(ii) within 2 years after such date and only until the date the spouse remarries.

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188 This example is not fictional, but based on the true story of Rose-Marie Barbeau Quinn, a sixty-seven year-old alien widow who started dating her late citizen husband, Mike Quinn, in 1978. They didn't legally marry, however, until hours before Mike died of cancer in 1991, one year after the Immact of 1990 was passed. Since the couple had not been married for two years before Mike's death, Rose-Marie was forced to return to Canada as a result of the widow penalty. *See* Zach Dundas, *Widows' Lament*, WILLAMETTE WEEK (Portland, Or.), Sept. 21, 2005, at 10.

With the removal of just five words ("for at least two years") from the immediate relatives definition, the proposed amendment will abolish the two-year rule, provide the Immigration Service with no discretion to automatically revoke alien widows' approved I-130 petitions, and allow alien spouses of U.S. citizens to self-petition for LPR status, despite the death of the citizen spouse and regardless of the length of the underlying marriage.

B. Enactment of Amendment and Inherent Difficulties in Adoption

While adoption of the proposed amendment is likely the most effective solution to the widow penalty, there are numerous obstacles that stand in the amendment's path toward enactment. These difficulties can be overcome, however, by comparing the proposed amendment to successful legislative acts and highlighting weaknesses in the government's counterarguments.

1. Endorsement by Congress

If the widow penalty is to be eradicated, it is Congress who must adopt the solution, as the Immigration Service is unwilling to change its inflexible interpretation of spouse-based immigration law, and judicial reform may never occur at the Supreme Court level. Congress should thus analyze the underlying foundation of the widow penalty, question how it has become law, and determine whether Congress's legislative goals are furthered by its continued existence.

The actual enactment of the proposed amendments, however, may be met with some difficulty, namely the prevailing political dissonance with regard to immigration reform. Although reluctance to adopt new immigration policy hindered congressional attempts to pass limited fixes to the widow penalty in recent years, the widow penalty amendments were included within broad, all-encompassing bills that targeted other types of immigration reform. A less inclusive bill that targets the widow penalty exclusively could thus increase the proposed amendment's chances of being adopted by the legislature.

A comparison of this type of legislation to the Battered Immigrant Women Protection Act of 2000[189] is instructive. Drawn to the harsh impact of a requirement that domestic violence victims remain in abusive marriages in order to fulfill the mandatory two-year conditional residency requirement for LPR status, Congress successfully

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189 Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1518 (codified at 8 U.S.C. § 1101).

passed the Battered Immigrant Women Protection Act, despite individual members' conflicting beliefs about immigration reform as a whole. In passing this legislation, Congress created a procedure whereby abused spouses can self-petition to obtain LPR status without the knowledge or cooperation of the abusive relative, regardless of marriage length.[190]

A common theme of fairness and respect for human decency is present in both the Battered Immigrant Women Protection Act provisions and the proposed amendments to abolish the widow penalty. If Congress can recognize the harsh impact of a two-year marriage length requirement on alien widows, as it did in the case of abused spouses, and understand the political feasibility of targeted legislation within the realm of immigration law, as it did with the Battered Immigrant Women Protection Act, then Congress could successfully enact the proposed amendment to the widow penalty despite divergent views on immigration reform generally.

While unlikely, it is important to recognize the possibility that Congress intended to create and maintain the widow penalty. Although this Note highlights significant evidence to the contrary, Congress has been made aware of the legal challenges to its widow penalty provisions in recent court cases and could have easily clarified the widow penalty provision if the courts or the Immigration Service were misconstruing the statute. This counterargument to the Note's proposal seems weak, however, because it assumes that Congress acts consistently and promptly with regard to all legislative issues. To the contrary, Congress is a busy institution that deals with a multitude of legal, public, and social issues on a daily basis, making it impossible for Congress to be completely aware of the application of all enacted laws. Thus, Congress's lack of response to the Immigration Service's application of the widow penalty does not necessarily signal congressional approval of widow penalty administration; it could also indicate that alien widows lack a strong political voice to bring such an issue to the attention of the federal legislature.

2. Elimination of the Widow Penalty in Its Totality

Congress should completely eradicate the widow penalty for all alien widows for a number of distinct yet convincing policy reasons: it remains debatable whether Congress intended to create the widow penalty, the exceptions to the widow penalty produce arbitrary and

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190 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv) (2000).

unjust results, and the rationale behind the rule is faulty. There are inherent difficulties, however, with a legislative solution that eliminates the widow penalty altogether.

The government's main concern with the proposed amendment likely will be that a total exemption of alien widows from the two-year marriage length requirement will provide less of a procedural safeguard against sham marriages. For example, if the widow penalty were abolished, a young alien could marry a ninety-year-old citizen and be granted LPR status, regardless of when the ninety-year-old expires. Although this is a valid concern, in light of recent statistics that have estimated the marriage fraud rate to be minimal,[191] it may be uncalled for, especially in comparison to its harsh consequences for alien widows. Furthermore, criminal penalties such as incarceration and monetary fines are available to punish sham marriage participants, which may be more effective to deter fraudulent marriages than a provision that deports alien widows for an event they cannot foresee. Lastly, the widow penalty was not enacted to prevent marriage fraud, and thus is not tailored to meet that legislative goal.[192]

On the other hand, the widow penalty should be completely eradicated because the rule's application today was never Congress's intent. In fact, Congress did not lay the groundwork for the widow penalty; it has never passed legislation that specifically provides for the automatic deportation of all alien widows upon the death of their citizen spouses of less than two years; and it has never given a clear explanation as to why it modified the "immediate relatives" definition. In light of these considerations, maybe the question to be considered is not "why should we abolish the widow penalty?" but "why should we keep it?"

The widow penalty should also be abolished in its totality because its exceptions create inconsistent results and simply do not justify the rule itself. Under the current scheme, alien widows of September 11th

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191 *See* Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 652(a), 110 Stat. 3009, 3009-712 (1996) (estimating that the rate of marriage fraud between foreign nationals and U.S. citizens stood at eight percent, a far cry from the thirty percent rate that the Immigration Service asserted only ten years earlier). *Cf. Audacity of Government*, *supra* note 144. In that broadcast, Jack Hitt stated:

> The most puzzling part of the story is this: What problem is the government trying to solve? . . . These aren't fake marriages . . . . It's not like people are intentionally getting married, having kids, filing their paperwork, and then having their spouses accidentally die as a scheme to get a green card.

Id.

192 *See supra* Part II.C.

victims and military fatalities are spared from the widow penalty's impact, but alien widows of Hurricane Katrina victims and government contractors ambushed in foreign countries are not. Moreover, alien widows who were married to their citizen spouses for two years and one day are spared from the widow penalty's consequences, but alien widows who were married to their citizen spouses for one year and 364 days are subject to deportation. While opponents of a complete eradication of the widow penalty may argue a worst case scenario—such as a situation in which an alien widow kills her citizen spouse the day after their wedding, but can maintain LPR status regardless—such a circumstance is unlikely to occur with any frequency. Criminal sanctions will be a deterrent in themselves, and the deportation of hundreds of alien widows in anticipation of this dubious future event is nonsensical.

Lastly, the widow penalty's rationale and legislative foundation are unsound. As it currently stands, immigration law revokes alien widows' LPR status not based on the tardiness of their petitions, or their engagement in fraudulent marriages, but based on the untimely deaths of their chosen life partners—a tragic event outside of their control. Instead of punishing violations of law or procedure, the widow penalty punishes fate. As such, the widow penalty serves no purpose, in either the rational or legal world.

Conclusion

Strict interpretation of spouse-based immigration law, especially for alien widows who have lost their American spouses, is a significant concern that deserves immediate attention. Hundreds of alien widows, like Dahianna, Charmaine, and Maria, are being deported, with or without their children, based on a tragic happenstance that is out of their control.[193] Without any explicit approval by the legislature, the widow penalty has been adopted by Immigration Service interpretation and never formally recognized by Congress as applying to all alien widows. As such, it is understandable that the widow penalty has been deemed a "crack in the law" that does not rest on sound or logical legal principles.[194]

It has been suggested that the widow penalty has remained intact because the group affected by its consequence, alien widows, lacks a strong political voice. Proposed legislation in Congress, however,

193 *See supra* notes 1–5 and accompanying text.

194 *See supra* note 11 and accompanying text.

along with current cases in the federal courts, indicate that the widow penalty is gaining national attention. With immigration reform at the top of America's political agenda, Congress should adopt the proposed amendment to abolish the two-year rule within a narrow bill and allow widows of U.S. citizens to self-petition for LPR status, regardless of the length of the underlying marriage.

Immigration officials recently notified Dahianna Heard, the alien widow who faced deportation after her citizen contractor husband was killed in Iraq, that they would grant her adjustment of status application and stop deportation procedures.[195] Although the Immigration Service did not exempt Dahianna under the USA Patriot Act exception to the widow penalty because her husband did not die during active military duty, the Immigration Service seemed to have a "change of heart" after reviewing her dead husband's past military service record.[196] Her first act of freedom, she said, after almost two years of feeling like a prisoner, would be to go to the Department of Motor Vehicles and get her driver's license back.[197]

The result in Dahianna's case, however, is an anomaly. Immigration officials did not have a "change of heart" in the cases of Charmaine and Maria, who are currently subject to deportation procedures. Without legislative reform, the widow penalty will continue to punish those undeserving of punishment. But the death of a spouse should be penalty enough.

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195 Ramos, *supra* note 1.

196 *See id.*

197 *See id.*