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Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part

I. INTRODUCTION

Society traditionally favors married persons over single persons.¹ Reflecting this societal preference, the Supreme Court of the United States has consistently held that the right to marry is a fundamental right.² Similarly, Congress has authorized the Immigration and Naturalization Service (INS) to give preferential treatment to aliens on the basis of marriage.³ Immediate relatives (including spouses) of American citizens⁴ or lawful permanent residents automatically qualify for immigrant visas and permanent residency.⁵ Because of this

1. Married persons are afforded preferential status and benefits in numerous areas of the law including taxation and trusts and estates. See, e.g., I.R.C. § 6013 (1986) (allowing joint filing of tax returns by married persons, which effectively splits the earned income).

2. See *infra* notes 152-61 and accompanying text.

3. Subsection (b) of section 1151 exempts immediate relatives from numerical limitations on immigrant visas. 8 U.S.C. § 1151(b) (1982); see also *Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Status: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 6 (1985) [hereinafter *Hearings on Marriage Fraud*] (statement of Alan C. Nelson, INS Commissioner).

4. Although the Immigration and Nationality Act (INA) and the Marriage Fraud Amendments refer to American citizens as United States citizens, such persons shall be named "American citizens" for purposes of this article.

5. The end result of marriage to an American citizen is total exemption from numerical limitations on visas issued. If not for this privilege, the alien spouse would be subject to such quotas. If he or she did not fit another preferential category, the alien spouse most likely would not be able to enter the United States at all. Section 201(a) of the INA states:

Exclusive of special immigrants defined in section 1101(a)(27) of this title, immediate relatives specified in subsection (b) of this section, and aliens who are admitted or granted asylum under section 1157 or 1158 of this title, the number of aliens born in any foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, shall not in any of the first three quarters of any fiscal year exceed a total of seventy-two thousand and shall not in any fiscal year exceed two hundred and seventy thousand: *Provided*, That to the extent that in a particular fiscal year the number of aliens who are issued immigrant visas or who may otherwise acquire the status of aliens lawfully admitted for permanent residence, and who are subject to the numerical limitations of this section, together with the aliens who adjust their status to aliens lawfully admitted for permanent residence pursuant to subparagraph (H) of section 1101(a)(27) of this title or section 19 of the Immigration and Nationality Amendments Act of 1981, exceed the annual numerical limitation in effect pursuant to this section for such year, the Secretary of State shall reduce to such extent the annual numerical limitation in effect pursuant to this section for the following fiscal year.

patent advantage, marriage is the most frequently stated ground in petitions for permanent residency.⁶ Not all petitions are legitimate, however. Indeed, the INS has suggested that fraud plays a role in 30% of all immigration visa petitions based on marriage to an American citizen.⁷ Even the president of the American Immigration Lawyers Association concedes that fraud is present in some immigration-related marriages, although he estimates the frequency of fraud at one or two percent.⁸

In 1986, as part of a major reformation of the immigration system, Congress enacted the Immigration Marriage Fraud Amendments.⁹ Although Congress continues to emphasize and reward familial unity,¹⁰ it has placed new restrictions on the benefits of mari-

8 U.S.C. § 1151(a) (1982).

Section 201(b) of the INA states:

(b) 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 chapter.

8 U.S.C. § 1151(b) (1982).

Visas for spouses of lawful permanent residents may be obtained by virtue of section 203(a)(2) of the INA which states:

Visas shall next be made available, in a number not to exceed 26 per centum of the number specified in section 1151(a) of this title, plus any visas not required for the classes specified in paragraph (1) of this subsection, to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence.

8 U.S.C. § 1153(a)(2) (1982).

6. *Hearings on Marriage Fraud*, *supra* note 3, at 7. Statistics provided through the Immigration and Naturalization Service (INS) show that total immigration to the United States decreased 9.6% from fiscal year 1978 to fiscal year 1984, but that the number of immigrants who obtained permanent resident status based on marriage to American citizens increased 43% from fiscal year 1978 to fiscal year 1984. *Id.* at 8. It also has been estimated that while American marriages increased 60% between 1962 and 1984, immigration-related marriages increased 600% in that same time frame. *Id.* at 57 (statement of David S. North, Director, Center for Labor and Migration Studies, New Transcentury Foundation).

7. H.R. REP. NO. 906, 99th Cong., 2d Sess. 6, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 5978 (1986).

8. *Hearings on Marriage Fraud*, *supra* note 3, at 78 (statement of Jules Coven, President of the American Immigration Lawyers Association). As indicated by the conflicting evidence, the magnitude of the sham marriage problem remains the subject of much debate. See Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1239-41 (1986) (discussing the debate over sham marriages).

9. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (to be codified in scattered sections of 8 U.S.C.) [hereinafter IMFA]. The Amendments were instituted as part of an overall attempt to control the borders of the United States, and to provide an efficient solution to the problems of those aliens who are already present in the United States.

10. H.R. REP. NO. 906, *supra* note 7, at 6.

tal status in order to deter marriage fraud in immigration petitions.¹¹ The most intrusive and burdensome of the Amendments' restrictions requires an alien who marries during deportation or exclusion proceedings to leave the United States for two years before the INS will approve his or her petition for immediate relative status.¹²

Because an alien who marries an American citizen or lawful permanent resident is entitled to preferential status, the motive of an alien who marries while facing exclusion or deportation is suspect. Certainly not all aliens who marry during proceedings have fraudulent motives. The Amendments, however, do not give the alien the opportunity to prove that his or her marriage is valid despite its timing.

Under the Amendments, an alien who marries before proceedings begin is entitled to prove the validity of his or her marriage to qualify for conditional status.¹³ If conditional status is granted, the alien is permitted to stay in the United States. Two years later, the alien qualifies for permanent resident status if the marriage is deemed valid.¹⁴

Conversely, the Amendments create a presumption of invalidity for an alien who marries during proceedings. Such aliens are required to *leave* the U.S. for two years.¹⁵ Aliens who marry during proceedings are not afforded the same legal process as those who marry before proceedings. They are arguably deprived of all process because of the presumed invalidity of their marriages.

Further, the Amendments may raise an equal protection issue because they differentiate between aliens who marry during proceedings and those who marry before their inception. Both groups must remain married for two years to indirectly prove the validity of their marriages, but only those who marry during proceedings must leave the country for this time period. Those aliens may then face an additional two years "conditional" residency period. The Amendments also impinge on the American spouse's constitutional right to marry. Nevertheless, the Amendments will probably withstand a due process or equal protection challenge because of the broad range of discretion Congress traditionally enjoys in immigration and naturalization matters.

11. *Id.* In reality, the Amendments represent the latest attempt to deter immigration related marriage fraud. The use of fraud in attempts to enter the United States has always evoked great consternation; the effort to prevent such use has always been inefficient.

12. IMFA § 5 (amending INA § 245, 8 U.S.C. § 1255 (1982)).

13. IMFA § 2(a) (adding § 216(a)(1) to the INA).

14. IMFA § 2(a) (adding § 216(c)(3)(B) to the INA).

15. IMFA § 5.

The section that follows addresses the underlying problem of marriage fraud, and thus provides the background for the passage of the Amendments. The next section discusses the substantive provisions of the Amendments and the problems of implementation. The final section posits that the Amendments force a collision between Congress' plenary power over immigration and the constitutional rights of aliens and their American spouses.

II. MARRIAGE AND IMMIGRATION BEFORE THE AMENDMENTS

A. *Types of Marriage Fraud*

Marriage fraud in the immigration context includes contractual fraud, which is conspiratorial in nature, and one-sided marriage fraud, which is unilateral in nature. In contractual fraud,¹⁶ an American citizen receives money to marry an alien. Fees generally range from \$3,000 to \$5,000, but in some cases may exceed \$20,000.¹⁷ Underground organizations known as "marriage sham rings"¹⁸ provide a supply of potential spouses, and help the parties avoid detec-

16. This type of fraud involves both the alien and the United States citizen or lawful permanent resident. Both parties knowingly agree to marry for one purpose—immigration of the alien to the United States. Written prenuptial agreements are not unusual where the contracting parties stipulate to the dissolution of the marriage at the earliest possible point in time and to absolve the United States citizen of any debts that the alien spouse may accrue. *Hearings on Marriage Fraud*, *supra* note 3, at 17-18 (statement of Alan C. Nelson, INS Commissioner). An interesting question surrounds these prenuptial agreements—could the courts find such agreements voidable because contrary to public policy, that policy being opposed to a fraudulent marriage for immigration purposes?

17. *Id.* at 13 (statement of Alan C. Nelson, INS Commissioner).

18. Some examples of recently broken sham marriage rings:

(1) A Los Angeles attorney was convicted on 16 counts of conspiracy and fraud, along with 6 co-conspirators, for arranging marriages between Filipinos and United States citizens. The attorney is believed to be responsible for arranging 50 such sham marriages, charging the aliens between \$3,000 and \$5,000.

(2) A New York city attorney was disbarred for lying and fabricating addresses for alien clients in order to secure quick divorces. The INS uncovered over 260 fraudulent divorce cases.

(3) A Del Rio, Texas notary public was convicted for arranging "thousands" of sham marriages over a 10-year period. A Mexican attorney was also prosecuted for participating in the Del Rio scheme.

(4) In Lafayette, Louisiana, a donut shop manager and 24 other individuals were indicted on charges of conspiracy and making false statements. The sham ring focused on students at nearby universities.

(5) In Belle Glade, Florida, authorities broke up a marriage ring run by a minister. The illegal Haitians involved paid up to \$10,000 for the filing of immigration petitions.

(6) In Kansas City, Kansas, seven Nigerians were indicted for taking part in sham marriages. The purpose of marriage to United States citizens was not only to qualify for immigration benefits, but also to qualify for guaranteed student loans and lower tuition rates, food stamps, and subsidized housing.

Id. at 15-16 (statement of Alan C. Nelson, INS Commissioner).

tion.¹⁹ Financial gain is a primary motivation, but the American citizen who agrees to participate in a fraudulent marriage may act on other motives. Many Americans participate in contractual fraud because they sympathize with aliens facing deportation.²⁰ Others assist aliens illegally because they oppose numerical restrictions on immigration.²¹ Some feel pressure to do "a favor" for a friend or business acquaintance.²² Contractual fraud can also be self-perpetuating; roles reverse. An alien attains permanent resident status by marrying an American, and then agrees to marry another alien after terminating the earlier marriage.²³

In "one-sided marriage fraud,"²⁴ a convincing and seemingly devoted alien induces an unsuspecting American citizen or permanent resident into marriage. Once the alien achieves permanent residency, he or she unceremoniously abandons the American spouse.²⁵ Often, aliens choose to marry United States servicemen stationed abroad; the additional inducement is that spouses of United States servicemen can apply for naturalization immediately upon marriage to an American citizen.²⁶

B. *Immediate Relative and Second Preference Status*

Marrying an American citizen entitles the alien to "immediate relative" status,²⁷ and exempts him or her from the numerical limitations on immigrant visas.²⁸ Marrying a lawful permanent resident entitles the alien to second preference status.²⁹ Because of the liberal ceilings placed on second preference visas, an alien who marries a lawful permanent resident possibly may enjoy the same preference as

19. *Id.* at 14.

20. *Id.* at 13.

21. *Id.* at 14.

22. *Id.* at 13. The element of coercion, initially applied by parents or friends of the American citizen to help the alien, can then be shifted to coercion by the alien after the marriage has taken place. Threats of violence, actual violence, extortion, and blackmail can be used to intimidate the American citizen or permanent resident from alerting the authorities of the fraudulent marriage because of the possibility of criminal or civil sanctions. *Id.* at 13-14.

23. *Id.*

24. *Id.* at 14.

25. *Id.* Often the alien spouse is concealing a prior undissolved marriage. The alien spouse will now apply for a second preference visa for the real spouse. This can involve a "sham divorce" on the part of the alien who then fraudulently marries an American citizen. The alien also can pose as another person with forged birth documentation or as a dead American citizen whose death cannot be traced. *Id.* at 12.

26. *Id.* at 17; see INA § 319(b), 8 U.S.C. § 1430(b) (1982).

27. See INA § 201(b), 8 U.S.C. § 1151(b) (1982); 8 C.F.R. § 204.1(a) (1987).

28. See *supra* note 5 and accompanying text.

29. See INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1982).

an alien who marries an American citizen.³⁰

The Immigration and Nationality Act (INA) delineates the procedure for adjustment of status based on marriage to an American citizen or lawful permanent resident.³¹ Following the procedure, the nonalien spouse petitions the INS to grant the alien immediate relative or second preference status. The INS then investigates the validity of the marriage.³² If the alien proves that the marriage is valid,³³

30. Congress has allocated 26% of all preference petitions for second preference aliens, totalling 70,200 plus any visas not used by the first preference. Currently, however, there is a 16-month waiting period. See *supra* note 5 and accompanying text.

31. INA § 204, 8 U.S.C. § 1154 (1982).

32. Section 101(a)(35) of the INA provides one vague reference to types of marriages that are prohibited. It is the only section that defines marriage for immigration purposes in any way. It reads as follows: "The term 'spouse', 'wife', or 'husband' does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated." 8 U.S.C. § 1101(a)(35) (1982).

The definition of a bona fide or valid marriage for immigration purposes has been a source of great discussion in the courts. The courts have made it clear that it is only necessary that the parties have a valid intent to marry. The marriage is not required to be viable. In *Whetstone v. INS*, the court stated:

We find no requirement in the statute that . . . a marriage, once lawfully performed according to state law, is to be deemed insufficient proof of "a valid marriage" merely because at some later time the marriage is either terminated, or the parties separate. The only proof in this case establishes that petitioner's marriage is not terminated. So far as the record discloses the facts, she is today married to Whetstone although they are not living together. There is no requirement that a marriage, entered into in good faith, must last any certain number of days, months or years. Much less is there any requirement that a *bona fide and lasting marital relationship* (whatever that may mean) exists as of the time the INS questions the validity of the marriage.

561 F.2d 1303, 1306 (9th Cir. 1977). Similarly in *Chan v. Bell*, a district court noted:

The Immigration and Naturalization Service clearly could not, consistently with due process of law, be regarded as vested with both the authority to establish the vague and elusive concept of marriage viability and the enormous power to regulate and enforce that concept in actual practice.

464 F. Supp. 125, 130 (D.D.C. 1978). Under section 204(b) of the INA, once the petition for immediate relative status is filed, it must be approved so long as the Attorney General 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 § 1151(b) of this title." 8 U.S.C. § 1154(b) (1982). Nowhere is the Attorney General empowered to deny the immediate relative status based on the viability or solidarity of the marriage. *Chan*, 464 F. Supp. at 128; see also *Matter of Boromond*, 17 I & N Dec. 450 (1980) (no examination of the viability of a marriage may occur). In addition, no INS rule or regulation requires proof of the viability of a marriage before approving the immediate relative petition. *Id.* The Marriage Fraud Amendments do not appear to amend this subsection of section 204. The regulations require only that a certificate of marriage and proof of legal termination of all prior marriages of both parties accompany the petition. 8 C.F.R. § 204.2 (1987). Furthermore, 8 C.F.R. § 205.1(a)(1)-(4) provides for revocation of the petition only upon written withdrawal, the death of either spouse, or the legal termination of the marriage as husband and wife. 8 C.F.R. § 205.1(a)(1)-(4) (1987).

33. The Supreme Court of the United States has held that "Congress did not intend to

he or she attains immediate relative or second preference status and is entitled to become a lawful permanent resident.³⁴

The original Act provided no guidelines for identifying a valid or "bona fide" marriage. Because objective evidence³⁵ is easy to fabricate, courts determined that the bona fides of a marriage depends on the parties' intent at the time they entered the marriage.³⁶ During its investigation, the INS, however, cannot directly determine the subjective intent of the parties; the INS *must* assess objective evidence of the validity of the marriage.³⁷ Lacking guidance, INS district officers make ad hoc determinations based on *their own* subjective views of a "valid" marriage.³⁸ The results are inescapably inconsistent.³⁹

provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship." *Lutwak v. United States*, 344 U.S. 604, 611 (1953).

It should be noted that the Court in *Lutwak* went on to state that the conduct of the parties after marriage is relevant only to the extent that it bears upon their subjective state of mind at the time they were married. *Id.* at 617. The Ninth Circuit reiterated this sentiment in *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975). That court emphasized that the intent of the parties at the time of their marriage is controlling. "Evidence that the parties separated after their wedding is relevant in ascertaining whether they intended to establish a life together when they exchanged marriage vows." *Id.* at 1202. In *McLat v. Longo*, however, a district court commented:

[A] marriage refers to an inter-spousal relationship, not to the mere legal ceremony celebrating the same. Were it otherwise, the intent and purpose of the immigration laws would be eroded and frustrated. Whether they should be is a matter for Congressional determination. That they have not been is indicative of Congress's satisfaction with their present structure and operation. And this Court is not about to usurp the legislative function by judicially sanctioning plaintiffs' beliefs.

412 F. Supp. 1021, 1027 (D.V.I. 1976) (citation omitted).

The opening paragraphs of *McLat* provide an interesting example of many courts' attitudes toward marriage fraud.

Despite the rigidity of the present [quota preference structure], however, ways exist to "beat the system". . . . Not everyone is fortunate enough to be the parent or child of a United States citizen. But anyone, with a little assistance from Cupid and/or Mammon, can become a citizen's spouse.

Id. at 1021.

34. See INA § 245, 8 U.S.C. § 1255 (1982).

35. Examples of objective evidence may include cohabitation, joint property, tax returns, and bank accounts. See H.R. REP. NO. 906, *supra* note 7, at 9.

36. See *supra* notes 32-33.

37. Commissioner Nelson recommended that the Marriage Fraud Amendments include a clear definition of marriage and the requirements necessary to meet such a definition. *Hearings on Marriage Fraud*, *supra* note 3, at 18. Specifically, Commissioner Nelson recommended that "[s]ection 101(a)(35) be amended to specify indicia of what constitutes a marriage recognized for the purposes of conferring an immigration benefit. Such indicia must include cohabitation after the marriage and after the petition is filed, and viability at the time the permanent benefit is accorded." *Id.* at 48; see *supra* note 2.

38. Section 204(a) of the INA requires only that:

The petition [for immediate relative status] shall be in such form as the Attorney

III. ANALYSIS OF THE MARRIAGE FRAUD AMENDMENTS

A. Two Year Conditional Permanent Resident Status

Most of the text of the Marriage Fraud Amendments governs the granting of permanent residency based on marital status. Under the INA, an alien with immediate relative or second preference status was entitled to permanent residency.⁴⁰ The Amendments provide for a *conditional* permanent residency of two years before the alien attains *permanent* permanent resident status.⁴¹ This provision of the Amendments only affects aliens who have been married for less than two years.⁴²

General may by regulations prescribe and shall contain such information and be supported by such documentary evidence as the Attorney General may require.

8 U.S.C. § 1154(a) (1982).

Section 204(b) of the INA requires an investigation of the facts in each case but does not provide specificity or guidelines. Section 235(a) of the INA provides for inspection by immigration officers. Pertinent parts of the section are as follows:

The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. . . . The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpoena [sic] the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States.

8 U.S.C. § 1225(a) (1982).

39. This Comment will not address the tangential issue of INS investigatory procedures. For a discussion of this issue, see generally Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238 (1986).

40. INA § 204, 8 U.S.C. § 1154 (1982).

41. Section 2(a) of the IMFA, adding section 216 to the INA, reads as follows:

(a) **CONDITIONAL BASIS FOR PERMANENT RESIDENT STATUS BASED ON RECENT MARRIAGE**—Chapter 2 of the Immigration and Nationality Act is amended by adding at the end the following new section:

“**CONDITIONAL PERMANENT RESIDENT STATUS FOR CERTAIN ALIEN SPOUSES AND SONS AND DAUGHTERS**”

Sec. 216. (a) **IN GENERAL.**—(1) **CONDITIONAL BASIS FOR STATUS.**—Notwithstanding any other provision of this Act, an alien spouse (as defined in subsection (g)(1)) and an alien son or daughter (as defined in subsection (g)(2)) shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

IMFA § 2(a) (adding § 216 to the INA).

42. IMFA § 2(a) (adding § 216(g)(1) to the INA).

The Amendments provide instructions for filing the petition⁴³ and attending the personal interview.⁴⁴ The INS must attempt to notify the petitioning alien and spouse ninety days before the conditional status period ends.⁴⁵ The Amendments authorize a hardship waiver⁴⁶ if the alien fails to meet the statutory requirements for removal of the conditional status under this Act. The Attorney General may grant a waiver if deportation would result in hardship, or if the alien has terminated the marriage for "good cause."⁴⁷ In determining whether a hardship would result, the Attorney General may

43. Section 2(a) of the IMFA, adding section 216(c)(1)(A) to the INA, provides detailed instructions on the contents and period for filing the petition to remove conditional status. The petition must state that the qualifying marriage was valid under the laws of the place where the marriage occurred, has not been judicially annulled or terminated (except through the death of the spouse) was not entered into fraudulently for purposes of obtaining entry to the United States, and no fee or consideration was given for the filing of such petition (excluding any necessary attorney's fees). Additionally, the petitioning spouses must provide a statement that includes the actual residence and place of employment of each party from the date the conditional status was granted. The petition must be filed within the 90-day period prior to the second anniversary of the granting of the conditional status. Section 216(d)(2)(B) provides for a "good cause" extension of the filing period if the alien can establish to the satisfaction of the Attorney General good cause and extenuating circumstances. Furthermore, if an alien finds himself in deportation proceedings as a result of nonfiling within the statutory time period, the Attorney General may stay such proceedings pending the filing of the petition.

44. Section 2(a) of the IMFA, adding § 216(c)(1)(B) to the INA, requires the Service to conduct a personal interview with the petitioners within 90 days of filing the petition to remove conditional status at a time and place convenient to all parties. Again, the Attorney General may waive the deadline for the personal interview at his discretion.

45. Section 2(a) of the IMFA, adding § 216(a)(2) to the INA, requires that the Attorney General "shall provide for notice to such [alien] spouse, son, or daughter respecting the provisions of this section and the requirements of subsection (c)(1) to have the conditional basis of such status removed" at the time permanent residency is granted on a conditional basis and on an "attempted" basis, on or about 90 days before the two year conditional residency is at end. The section also provides that the Attorney General's failure to provide such notification does not affect the enforcement of other provisions of the Act.

46. Section 2(a) of the IMFA, adding § 216 (c)(4) to the INA, provides for the removal of the conditional permanent residency status, at the discretion of the Attorney General, for any alien who has failed to meet the statutory requirements of timely filing of petition and personal interview, if:

(A) extreme hardship would result if such alien is deported, or, (B) 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) by the alien spouse for good cause and the alien was not at fault in failing to meet the requirements of paragraph (1). In determining extreme hardship, the Attorney General shall consider circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis.

IMFA § 2(a) (adding § 216(c)(4) to the INA).

47. In light of the emergence of "no fault" divorces, an evidentiary question arises where grounds for the divorce are not presented. The alien in an immigration proceeding will have trouble proving that the divorce was granted for "good cause" when the grounds for the divorce were not divulged. Ingber & Prischet, *The Marriage Fraud Amendments*, in *THE NEW SIMPSON-RODINO IMMIGRATION LAW OF 1986*, at 564-65 (1986).

only consider events that occurred *during* the conditional status period.⁴⁸

1. DETERMINING THE BONA FIDES OF MARRIAGE

Although Congress did not define a bona fide marriage in affirmative terms, it did list "improper" conditions that disqualify a marriage under the Amendments.⁴⁹ Arguably, any marriage that is not "improper" under the Amendments is valid for immigration purposes.⁵⁰ A marriage is "improper" if the nonalien received a fee or

48. Therefore, the INS cannot consider the fact that the alien is married to a United States citizen or lawful permanent resident because that marriage took place prior to the conditional status period. *Id.*

49. Section 2(a) of the IMFA, adding section 216(b) to the INA, reads as follows:

(b) TERMINATION OF STATUS IF FINDING THAT QUALIFYING MARRIAGE IMPROPER.—(1) IN GENERAL.—In the case of an alien with permanent resident status on a conditional basis under subsection (a), if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that — (A) the qualifying marriage—

(i) was entered into for the purpose of procuring an alien's entry as an immigrant, or

(ii) has been judicially annulled or terminated, other than through the death of a spouse; or

(B) a fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition under section 204(a) or 214(d) with respect to the alien; the Attorney General shall so notify the parties involved and, subject to paragraph (2), shall terminate the permanent resident status of the alien (or aliens) involved as of the date of the determination.

IMFA § 2(a) (adding § 216(b) to the INA).

50. Included in the House Report accompanying the Amendments is a letter from John R. Bolton, Assistant Attorney General, to Peter Rodino, Chairman of the Senate Judiciary Committee, in which Bolton interprets the Amendments as requiring the alien and spouse to prove they have entered into a bona fide marriage. Bolton reads the Amendments as requiring four elements be fulfilled for the removal of the conditional status: 1) that the marriage is in accordance with the laws of the place where the marriage took place; 2) that the marriage has not been judicially annulled or terminated, except by death of a spouse; 3) that no fee or consideration has been paid; and 4) that the parties to the marriage have maintained a bona fide marital relationship. H.R. REP. NO. 906, *supra* note 7, at 9. While the actual language of the Amendments does include the first three requirements, it does not use the term bona fide in describing the marital relationship. The Amendments instead state that the parties must show the marriage "was not entered into for the purpose of procuring an alien's entry as an immigrant." IMFA § 2(a) (adding § 216(d)(1)(A)(i)(III) to the INA). In other words, Bolton has apparently concluded that a marriage is bona fide if it has not been entered into for purposes of evading the immigration laws. Bolton goes on to state that this element could be proved by providing "evidence of cohabitation, joint property, tax returns and other indices of marriage." H.R. REP. NO. 906, *supra* note 7, at 9. The Amendments do not establish such criteria as proof of a bona fide marriage and the INS has not issued any regulations that provide for such criteria. In commenting on these provisions in the Amendments, Bolton states that one of the reasons for the Amendments is the courts' and Board of Immigration Appeals's existing interpretation of what constitutes a marriage. *See supra* note 33 and accompanying text. Bolton wants the Amendments to affirmatively state that a marriage must

consideration, or if it has since been judicially annulled or terminated.⁵¹ In addition, the marriage must not have been "entered into for the purpose of procuring an alien's entry as an immigrant."⁵² The latter condition, of course, only restates the question.

Beyond the two year conditional period, the viability of the marriage is not at issue. Once the alien attains permanent resident status, he or she may terminate the marriage.⁵³ Congress drew the line at two years, believing that incidents of marriage fraud would substantially decrease if aliens and American spouses knew that they must maintain the appearance of a valid marital relationship for two years.

2. THE STATUS CONTROVERSY

The provision governing "conditional permanent residency" may simply mean permanent residency on a conditional basis.⁵⁴ If so, the conditional permanent resident enjoys the same rights as the permanent resident, with a condition subsequent that if the marriage does not remain valid for two years, the alien is not entitled to finalize his or her status. Conversely, the provision may create a new status known as *conditional permanent resident* status. If so, the status of a conditional permanent resident is qualitatively different from that of a permanent resident. Consequently, the rights of conditional permanent residents may be undefined.

The relevant provision is entitled "Conditional Permanent Resident Status for Certain Alien Spouses and Sons and Daughters."⁵⁵ The text reads in part: "[A]n alien spouse (as defined in subsection (g)(1)) and an alien son or daughter (as defined in subsection (g)(2)) *shall be considered, at the time of obtaining the status of an alien law-*

be viable, not simply valid, in order to avoid the same interpretation that validity, and not viability, is necessary. H.R. REP. NO. 906, *supra* note 7, at 10. It is interesting to note that both Commissioner Nelson and Assistant Attorney General Bolton recommended that the Amendments explicitly require viability but Congress did not choose to heed their advice.

51. IMFA § 2(a) (adding § 216(b)(1)(A)(ii) and (1)(B) to the INA).

52. IMFA § 2(a) (adding § 216(b)(1)(A)(i) to the INA).

53. It is the lack of a viability requirement that makes the occurrence of fraudulent marriages so commonplace. In his statement before the Senate Judiciary Subcommittee on Immigration and Refugee Policy, Commissioner Nelson specifically requested that Congress make viability a requirement. See *Hearings on Marriage Fraud*, *supra* note 3, at 18. In some respects, the Amendments do require viability by placing the two year conditional status on the alien's marriage. This, however, is no different from the original INA regulations that provided for revocation of the petitions for adjustment of status, *before the decision on the petition became final*, of any immediate relative alien whose marriage is terminated. The Amendments do provide for special circumstances, such as the death of the American spouse. The Amendments also provide a hardship waiver, IMFA § 2(a) (adding § 216(c)(4) to the INA).

54. Ingber & Prischet, *supra* note 47, at 556.

55. IMFA § 2(a) (adding § 216(a)(1) to the INA).

fully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.”⁵⁶ Generally, when the meaning of the text and the title differ, the text governs. Because the phrase “conditional permanent resident *status*” appears in the title, but not in the text, a court applying this principle of statutory construction should find that the Amendments do *not* create a new status.⁵⁷

In addition, there are statements in the legislative history of the Amendments that support the view that Congress did not intend to create a new status of permanent residents.⁵⁸ For example, during the House debates over the Amendments, one congressman stated:

Under this legislation we do establish a 2-year conditional period on that permanent resident status, during which time the alien spouse may live in this country, work in this country, gets credit for going toward citizenship in that 3 years and everything else, just like any other permanent resident alien, except that before the end of the 2-year period is up, that alien spouse and the American citizen or permanent resident spouse has to apply by a petition that is sworn to the Attorney General seeking to remove that condition, thereby giving the Immigration Service and Attorney General a chance, a second look at that marriage and to look back and see if it has been annulled, if they are really still together, if in fact there was a fraud perhaps perpetrated, and so forth.⁵⁹

B. *Spousal Second Preference Petition*

Many aliens seek to obtain permanent resident status through a fraudulent marriage in order to bring their *real spouses* into the United States under a spousal second preference visa.⁶⁰ The alien divorces his or her alien spouse and fraudulently marries an American citizen or permanent resident. Once the alien spouse obtains permanent residency, he or she divorces the American citizen or permanent resident and files a spousal second preference petition for his or her alien spouse.⁶¹

In the Amendments, Congress attempted to deter fraud of this nature by requiring the alien spouse to wait five years before filing a

56. *Id.*

57. See Ingber & Prischet, *supra* note 47, at 557; see also K. LLEWELLYN, THE COMMON LAW TRADITION 524 (4th ed. 1969).

58. 132 CONG. REC. 8588-89 (daily ed. Sept. 29, 1986) (statement of Rep. McCollum).

59. *Id.*

60. See *Hearings on Marriage Fraud*, *supra* note 3, at 12.

61. See *supra* note 5 and accompanying text.

second preference spousal petition.⁶² The Attorney General⁶³ may waive this waiting period if the alien proves "to the satisfaction of the Attorney General by clear and convincing evidence that the prior marriage . . . was not entered into for the purpose of evading any provision of the immigration laws."⁶⁴ The alien has already met this burden *twice*: once to attain conditional permanent resident status, and again at the end of two years to attain permanent resident status. This provision is overkill; it unnecessarily and unfairly burdens the petitioning permanent resident.

C. *Fiance Visas*

The original Immigration and Nationality Act required that aliens applying for fiance visas establish a bona fide intention and the legal capacity to marry within ninety days of arrival in the United States.⁶⁵ If the parties married within that period, the alien was entitled to permanent resident status regardless of the viability of the marriage.⁶⁶ Consequently, an alien could leave an American spouse immediately after the marriage and still obtain permanent residency.

The Amendments place an additional condition on fiance visas. Now the alien and his or her fiance must have "met in person within 2 years before the date of filing the petition."⁶⁷ This provision reflects a cultural bias. In some countries, parents arrange their children's marriages; the children do not meet before marriage. Immigrants often wish to maintain their cultural heritage by continuing this custom.

62. IMFA § 2(c)(2) (amending INA § 204(a), 8 U.S.C. 1154(a) (1982)).

Section 203(a)(2) of the INA provides that "[v]isas shall next be made available . . . to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence." 8 U.S.C. § 1153(a)(2) (1982).

63. The Immigration and Nationality Act and the Marriage Fraud Amendments both refer to the Attorney General as the proper government official to carry out the provisions of the Acts. Nevertheless, the Attorney General has delegated that power routinely to the INS officer in each district.

64. IMFA § 2(c)(2)(A)(ii).

65. INA § 214(d), 8 U.S.C. § 1184(d) (1982).

66. Section 214(d) of the INA reads:

(d) In the event the marriage between the said alien and the petitioner shall occur within three months after the entry and they are found otherwise admissible, the Attorney General shall record the lawful admission for permanent residence of the alien and minor children as of the date of the payment of the required visa fees.

8 U.S.C. § 1184(d) (1982). *Id.*; see *supra* note 33 and accompanying text; see also *Hearings on Marriage Fraud*, *supra* note 3, at 9 (Precedent decisions demand only that a valid marriage (absent pre-existent fraud or undissolved prior marriages) occur; consummation and cohabitation, viability, and intent at the time the alien applies for "recordation" of lawful admission has been deemed immaterial.).

67. IMFA § 3(a)(1) (amending INA § 214(d), 8 U.S.C. § 1184(d) (1982)).

The Amendments may preclude such action. Because the Attorney General has discretion to waive the meeting requirement,⁶⁸ however, the operation of this provision may not result in a cultural conflict.

IV. CONSTITUTIONAL QUESTIONS IN THE AMENDMENTS

The Amendments provide additional burdens on the alien seeking to enter or remain in the United States. Although burdensome, most sections of the Amendments do not pose constitutional questions. Section 5 of the Amendments does pose such a question.

A. *Marriage During Exclusion or Deportation Proceedings*

Under the INA, an alien in deportation or exclusion proceedings could marry an American and obtain immediate relative status.⁶⁹ The Attorney General could then adjust the status of the alien to that of permanent resident.⁷⁰ This decision could be made within the Attorney General's discretion.⁷¹

Through the Amendments, Congress has deprived aliens of the opportunity to be heard regarding the validity of their marriage. Congress has also deprived the Attorney General of his discretion to approve petitions for immediate relative status during a deportation or exclusion proceeding.⁷² Instead, the alien will be given the opportunity to depart voluntarily from the United States in lieu of actual exclusion or deportation.⁷³ At the conclusion of two years, the alien may then apply for immediate relative status. The bona fides of the marriage is irrelevant to the decision.

Under section 4 of the Amendments, an alien who "has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws" will be barred from immigrating to the United States.⁷⁴ Section 5 creates a strong presumption that the alien who marries while engaged in a judicial or administrative proceeding has a fraudulent motive. The two sections read together render the Amendments procedurally inefficient. The alien facing deportation or exclusion is already involved in a judicial or administrative proceeding. If the marriage is found to be fraudulent, section 4 requires that the alien be perpetually barred from immigrating to the United

68. IMFA § 3(a)(2).

69. INA § 245, 8 U.S.C. § 1255 (1982).

70. *Id.*

71. INA § 245(a), 8 U.S.C. § 1255(a) (1982).

72. IMFA § 5(a).

73. *Id.* § 5(b).

74. *Id.* § 4 (amending § 204(c), 8 U.S.C. § 1154(c) (1982)).

States.⁷⁵ If the alien proves that the marriage is valid, the Attorney General should be able to grant immediate relative status. Requiring the alien to leave the United States for two years before considering the validity of the marriage is inefficient and unfair to the alien and his or her family.

B. Due Process Rights of Aliens

Congress provides two mechanisms for determining an alien's right to remain in the United States. The exclusion proceeding,⁷⁶ which usually occurs at the alien's point of entry, determines an alien's admissibility into the United States. An alien is inadmissible if he or she falls under one of thirty-three classes of "excludables."⁷⁷ These classes can be grouped into seven categories: immoral aliens,⁷⁸ politically subversive aliens,⁷⁹ alien workers possessing employment skills available domestically,⁸⁰ criminal aliens,⁸¹ physically or mentally ill aliens,⁸² aliens likely to be public charges,⁸³ and aliens who have violated admission laws.⁸⁴ An alien who has already made a legal or illegal entry into the United States⁸⁵ will be subject to a deportation proceeding.⁸⁶ Congress has created eighteen classes of deportable aliens, which incorporate the thirty-three classes of excludable aliens.⁸⁷

75. The effects of this section of the Amendments can already be seen in everyday life. Probably the first marriage to be affected by the new law is discussed in an article that appeared in *The Washington Post National Weekly Edition*. Rebecca and Marco Mejia had lived together one year before deciding to marry. Marco Mejia had been arrested as an illegal alien in 1983 and was in the midst of a deportation proceeding. Instead of going on their honeymoon, the Mejias instead are faced with moving out of the country for two years. Mrs. Mejia, an American citizen, is a doctoral student at Georgetown University. She will either have to give up her studies for two years or remain in the United States without her husband. Walsh, *Till Marriage Do Us Part*, *Wash. Post Nat'l Weekly Ed.*, Mar. 16, 1987, at 34.

76. INA § 212, 8 U.S.C. § 1182 (1982 & Supp. II 1985). See generally 1 C. GORDON & H. ROSENFIELD, *IMMIGRATION LAW AND PROCEDURE* ch. 2 (1959).

77. See INA § 212(a), 8 U.S.C. § 1182(a) (1982 & Supp. II 1985).

78. See, e.g., INA § 212(a)(13), 8 U.S.C. § 1182(a)(13) (1982); see also Comment, *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1339 (1983).

79. See, e.g., INA § 212(a)(28), 8 U.S.C. § 1182(a)(28) (1982).

80. See, e.g., INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982).

81. See, e.g., INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1982).

82. See, e.g., INA § 212(a)(6), 8 U.S.C. § 1182(a)(6) (1982).

83. See, e.g., INA § 212(a)(15), 8 U.S.C. § 1182(a)(15) (1982).

84. See, e.g., INA § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1982).

85. The definition of entry "encompasses every coming of an alien into the United States from a foreign port or place or from an outlying possession." C. GORDON & H. ROSENFIELD, *supra* note 76, at 111. Entry does not have to be legal.

86. INA § 241, 8 U.S.C. § 1251 (1982). See generally 1A C. GORDON & H. ROSENFIELD, *supra* note 76, at ch. 3.

87. See INA § 241(a), 8 U.S.C. § 1251(a) (1982).

Deportation and exclusion proceedings directly impinge on a person's fundamental right to liberty because they determine an alien's right to enter or remain in the United States. Accordingly, the Supreme Court established that aliens are entitled to some degree of due process. In the *Japanese Immigrant Case*,⁸⁸ the Court stated:

[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.⁸⁹

Because admission to the United States is a privilege granted by the sovereign government,⁹⁰ the Supreme Court has consistently upheld Congress's plenary power to make rules and policies regarding an alien's right to enter or remain in the United States.⁹¹ This power may be delegated to the Executive branch.⁹² Courts will refrain from looking behind discretionary action if the power is exercised "*on the basis of a facially legitimate and bona fide reason.*"⁹³ In exclusion

88. *Yamataya v. Fisher*, 189 U.S. 86 (1903).

89. *Id.* at 100-01.

90. *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *see also Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

91. In *Kleindienst v. Mandel*, the Court stated that Congress's plenary power to make rules and policies regarding the right of an alien to enter or remain in the United States has long been established. 408 U.S. 753, 770 (1972).

92. 408 U.S. at 770.

93. *Id.* *Mandel* was a Belgian author and a self-proclaimed "revolutionary marxist." The INS denied Mandel's application for a temporary visa on the grounds that he was excludable under section 212(a)(28). Mandel then sought a waiver, which was also denied. A group of United States citizens brought an action to "enforce their [First Amendment] rights [to hear Mandel speak], individually and as members of the American public." *Id.* at 762. The Court held, even in the face of a first amendment claim by United States citizens, the judiciary would not review a "facially legitimate and bona fide reason" for exclusion. *Id.* The Court reiterated this reasoning in *Fiallo v. Bell*, 430 U.S. 787 (1977). In *Fiallo*, the Court once again stated that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. *Id.* at 792 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); *see also Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953) (The power to exclude aliens is a fundamental sovereign power to be exercised by the political departments of the government.). The Court went on to state that Congress's exclusion of the relationship between an illegitimate child and his father

proceedings, "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁹⁴ Courts have announced a similar view with respect to deportation proceedings:

The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, "with such opportunity for judicial review of their action as Congress may see fit to authorize or permit." This power is, of course, subject to judicial intervention under the "paramount law of the Constitution."⁹⁵

Aliens in exclusion proceedings are entitled to notification of the hearing date and of their right to counsel.⁹⁶ At the proceeding, the immigration judge⁹⁷ must inform the alien of the charges against him. The judge must also reiterate the right to counsel and the availability of free legal services,⁹⁸ although not at the government's expense. The alien may present evidence and cross-examine witnesses,⁹⁹ and can appeal an adverse decision to the Board of Immigration Appeals.¹⁰⁰

Because deportation proceedings are instituted against aliens who have already made an entry into the United States and have established ties to the country, these proceedings must comport with the fifth amendment guarantee of due process.¹⁰¹ At the same time,

is a legislative policy decision. "It is clear from our cases . . . that these are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress." *Fiallo*, 430 U.S. at 798.

94. *Knauff*, 338 U.S. at 544; see also *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953). In *Mathews v. Diaz*, the Court stated:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other.

426 U.S. 67, 77-78 (1976) (citations omitted).

95. *Carlson v. Landon*, 342 U.S. 524, 537 (1952).

96. See 8 C.F.R. § 235.6(a) (1987).

97. The role of the immigration judge is questionable given the fact that most immigration judges are former INS officers. See Comment, *supra* note 80.

98. See 8 C.F.R. § 236.2(a) (1987).

99. *Id.*

100. See INA § 236(a), 8 U.S.C. § 1226(a) (1982).

101. See *Galvan v. Press*, 347 U.S. 522, 531 (1954).

deportation proceedings are civil, not criminal in nature; the procedural protections are limited as compared to those afforded persons in criminal proceedings.¹⁰² Because Congress has been given such a broad range of power over immigration, "[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy."¹⁰³ Under the INA, the alien must be given reasonable notice of the hearing, may be represented by counsel, and may present evidence and cross-examine witnesses.¹⁰⁴ The alien is not entitled to counsel at the government's expense.¹⁰⁵ Most importantly, the deportable alien has the burden of proof regarding the legality of his or her entry.¹⁰⁶

Section 5 of the Amendments does not directly interfere with the procedural due process afforded aliens in these proceedings. The alien receives notice of the hearing and of the right to counsel. The alien may present evidence and cross-examine witnesses *regarding the deportable offense*, and the alien may appeal the decision.

The alien may not, however, use the benefit of the marriage to suspend deportation. Because the Amendments conclusively presume the marriage is fraudulent, the alien is denied the opportunity to prove its validity. The alien is in proceedings because he or she has been charged with a deportable offense. The validity of the marriage is not directly related to that offense but is crucial to a determination of the alien's right to enter or remain in the United States.

Application of this provision may result in a violation of the alien's right to procedural due process because it creates a presumption of marriage fraud that may not be rebutted by the alien. Conversely, the provision may simply evidence a substantive change in congressional policy in the area of immigration.¹⁰⁷ Congress has plenary power over immigration policy, and marriage to an American may no longer be a basis for suspension of deportation. The government will be quick to point out that Congress could abolish preferential treatment altogether for immediate relatives of American citizens and/or lawful permanent residents. Instead, it has chosen an arguably more moderate form of policing immigration. The prevalence of

102. See *Carlson v. Landon*, 342 U.S. 524, 537 (1952).

103. *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982).

104. See INA § 242(b)(1)-(3), 8 U.S.C. § 1252(b)(1)-(3) (1982); 8 C.F.R. § 242.2(b) (1987).

105. See INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (1982); 8 C.F.R. § 242.2(a) (1987).

106. See INA § 291, 8 U.S.C. § 1361 (1982).

107. See *supra* note 93 and accompanying text.

immigration-related marriage fraud may provide the rational basis for section 5.

1. THE BALANCING TEST

If an alien brings a procedural due process challenge against section 5, the courts will utilize the balancing test set out in *Mathews v. Eldridge*,¹⁰⁸ to determine the validity of section 5. Under this test, the Court must weigh:

- 1) the private interest that will be affected by the official action;
- 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally 3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁰⁹

The Court applied the *Mathews* balancing test in *Cleveland Board of Education v. Loudermill*.¹¹⁰ A dismissed municipal employee alleged a deprivation of a property interest in his job without due process.¹¹¹ The Court held that a pretermination hearing was essential when the competing interests at stake were balanced.¹¹² The competing interests in *Loudermill* were "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination."¹¹³

Section 5 of the Amendments thrusts strong competing interests to the forefront. Both the alien and American spouse have strong private interests in remaining together as a family unit in the United States. The American spouse seeks to protect his fundamental right

108. 424 U.S. 319 (1976). The plaintiff in *Mathews* brought the action to determine whether the fifth amendment due process clause requires that recipients of Social Security disability benefits be afforded the right to an evidentiary hearing before termination of such benefits. The Court held that requiring such a hearing would create administrative burdens that would far outweigh benefits to the recipients. *Id.* at 348-49.

109. *Id.* at 335.

110. 470 U.S. 532 (1985).

111. Loudermill had been hired by the Cleveland Board of Education as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. After Loudermill had been hired, the Board discovered that he had been convicted of grand larceny and promptly dismissed Loudermill without affording him an opportunity to respond to the charges. Under Ohio state law, Loudermill was classified as a civil servant, and as such could only be terminated for good cause. The Supreme Court held that under the Ohio statute, Loudermill had a property right in his employment and thus had been deprived of his right to property without constitutionally adequate procedures. *Loudermill*, 470 U.S. at 538-40.

112. *Id.* at 542.

113. *Id.* at 542-43.

to marry and still reside in his country. The government has a strong interest in retaining its control over immigration and in preventing marriage fraud. The "risk of erroneous deprivation" may be great because families are forced to live apart for two years. Others might view the risk of deprivation as minimal because the majority of aliens who marry during proceedings have fraudulent motives. This view may be balanced by the minimal degree of administrative burdens because the alien is already involved in proceedings. In fact, the Amendments increase the administrative burden because they require the alien to prove the validity of the marriage two years later in a different forum.

If the courts view the competing interests under section 5 as at least equal, the alien may be entitled to a validity hearing before leaving the country. If the courts view the governmental interest in preventing marriage fraud as more compelling, the alien will be required to leave. Given the deference the courts have always given Congress in the control of immigration, the courts will probably uphold section 5 against a procedural due process challenge.

2. THE IRREBUTTABLE PRESUMPTION DOCTRINE

A hybrid of the procedural due process argument, which has fallen into disuse in the courts, is the irrebuttable presumption doctrine. This doctrine combines procedural due process and equal protection to argue that the failure to individualize classifications may result in procedural insufficiencies.

Justice Stewart enunciated the doctrine in *Cleveland Board of Education v. LaFleur*,¹¹⁴ where the Court held that a school board regulation requiring pregnant teachers to take an unpaid maternity leave five months before the expected delivery date violated due process.¹¹⁵ According to the Court, the regulation created an irrebuttable presumption that pregnant teachers who are four or five months pregnant are incapable of teaching beyond that point.¹¹⁶ The Court held that the conclusive presumption was both arbitrary and irrational in that it did not exhibit a valid relationship to the state's interest in providing continuity of education.¹¹⁷

Section 5 also creates an irrebuttable presumption; marriages entered into during proceedings are fraudulent. Unlike aliens who

114. 414 U.S. 632 (1974); see also *Vlandis v. Kline*, 412 U.S. 441 (1973) (Connecticut statute created an irrebuttable presumption in denying reduced tuition fees to students transferring from out of state).

115. 414 U.S. at 651.

116. *Id.* at 641.

117. *Id.* at 647-48.

marry before the institution of proceedings (which may be the result of luck and nothing more), the alien subject to deportation or exclusion proceedings is not given the opportunity to prove the validity of the marriage and remain in the United States.

The irrebuttable presumption doctrine, however, contains an inherent flaw. Virtually every regulation creates a classification that irrebuttably presumes the problem the regulation seeks to remedy exists. Courts cannot invalidate every law. The question should turn on the degree to which the presumption affects the regulation. For this reason, the Court limited the doctrine in *Weinburger v. Salfi*.¹¹⁸ The facts of *Salfi* are particularly analogous to those presented by section 5.

Under the Social Security Act, the spouse of a wage earner was not eligible to receive benefits if the parties had not been married for at least nine months prior to the wage earner's death.¹¹⁹ The Act did not permit the spouse to prove the marriage was not entered into solely to obtain social security benefits.¹²⁰ In holding the durational requirement constitutional, the Supreme Court stated:

The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. We conclude the duration-of-relationship test meets this constitutional standard.¹²¹

Given the similarities between the regulation in *Salfi* and that in section 5, Congress can make a compelling argument that it has acted rationally in requiring the alien to leave for two years. This requirement severely limits occurrences of marriage fraud. The argument loses its strength, however, when balanced against the minimal degree of expense and difficulty in providing individual determinations. The aliens are already in judicial or administrative proceedings. To permit the alien to prove the validity of the marriage would not unreasonably burden those proceedings.

Furthermore, the regulation in *Salfi* did not intrude on the marital relationship to the same degree as does section 5. The *Salfi* regulations limited the financial benefits which may be derived from

118. 422 U.S. 749 (1975).

119. *Id.* at 754.

120. *Id.* at 784-85.

121. *Id.* at 777.

marriages entered into less than nine months before the wage earner's death, did not interfere with the marriage itself. In contrast, section 5 affects the marital relationship directly. The American spouse must leave with the alien, remain in the United States alone, or divorce the alien spouse.

Courts, however, might have another justification for applying the irrebuttable presumption doctrine. In rejecting the doctrine in *Salfi*, the Court distinguished *Lafleur* and *Vlandis v. Kline*,¹²² which struck down irrebuttable presumptions, on the ground that those cases did not involve a noncontractual claim to receive funds from the public treasury.¹²³ Such claims to government benefits do not enjoy constitutionally protected status.¹²⁴

Courts may be able to limit the application of *Salfi* to claims that only involve monetary government benefits and resurrect the irrebuttable presumption doctrine. Although section 5 also grants a government benefit, it is not monetary in nature. Furthermore, the conclusive presumption in section 5 is crucial to the proceedings and has a direct effect on the alien's right to enter or remain in the United States. Accordingly, courts may find use of the doctrine both appropriate and meritorious.

B. *Equal Protection*

The equal protection doctrine requires that persons in similar circumstances be treated alike.¹²⁵ Courts, therefore, attempt to restrict legislative action that classifies persons in a manner not bearing a "fair relationship to a legitimate public purpose."¹²⁶

Under an equal protection analysis of section 5, courts must first determine if aliens who marry during proceedings and aliens who marry before the initiation of such proceedings are similarly situated. Precedent indicates that all aliens are not similarly situated merely because they fall under the general class of "aliens."

In *Mathews v. Diaz*,¹²⁷ a subclass of aliens raised an equal protection argument based on their right to receive the same supplemental medical insurance as American citizens and resident aliens who had

122. 412 U.S. 441 (1973).

123. *Salfi*, 422 U.S. at 772.

124. *Id.*

125. Equal protection claims against state regulations are brought under the fourteenth amendment. Equal protection claims against discriminatory federal regulations must be brought under the due process clause of the fifth amendment. U.S. CONST. amends. V, XIV § 1; see also *Plyler v. Doe*, 457 U.S. 215, 216 (1982).

126. *Plyler*, 457 U.S. at 216.

127. 426 U.S. 67 (1976); see *supra* note 108.

lived in the United States for five years.¹²⁸ These aliens did not qualify under the five year residency requirement. In addressing the equal protection argument, the Court stated that "the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country."¹²⁹ The Court stressed that Congress has chosen to provide certain benefits to some aliens; Congress is not required to provide those same benefits to all aliens.¹³⁰ Aliens who marry during proceedings and aliens who marry before proceedings, however, may be similarly situated for other reasons than merely alienage. Both classes of aliens marry an American citizen or permanent resident. Under the Amendments, one class is given the opportunity to prove the validity of the qualifying marriage; one class is not.

If the classes are similarly situated, courts must apply at least a "rational basis" test to determine the validity of section 5. Under this analysis, Congress must show that the differential classification bears a "fair relationship to a legitimate public purpose."¹³¹ Few persons would argue with the supposition that controlling immigration and deterring marriage fraud are legitimate public interests. The question remains if the presumption of fraud created by section 5 fairly relates to those interests.

The rational basis test requires minimal judicial scrutiny, particularly in the field of immigration law.¹³² "Rational" is defined as "having reason or understanding."¹³³ The courts will construe the provision as valid if Congress can proffer a "reason" to differentiate between aliens who marry before proceedings and those who marry during proceedings. In *Mathews*, the Court stated that Congress must draw some line regarding aliens who may receive welfare benefits.¹³⁴ Congress made a policy decision based on the character and duration of an alien's residence in the United States.¹³⁵ The Court stated:

[I]t remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have greater affinity with the United States than those who do not.¹³⁶

The *Mathews* court viewed the line drawn by Congress as a difference

128. *Mathews*, 426 U.S. 67 (1976).

129. *Id.* at 78-79.

130. *Id.* at 82-83.

131. *Id.* at 83.

132. See *supra* note 103 and accompanying text.

133. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1885 (1981)

134. *Mathews*, 426 U.S. at 83.

135. *Id.* at 84.

136. *Id.*

in degree and not a difference in character of the respective claims.¹³⁷ Accordingly, the Court would not substitute its judgment for that of Congress.¹³⁸

It may be argued that Congress made a similar policy decision in enacting section 5 of the Amendments. The difference between the eligible and ineligible is a difference of degree: those who marry before proceedings begin and those who do not. It is not surprising that Congress would presume that aliens who marry during proceedings have fraudulent motives. Aliens in proceedings are allegedly in the United States illegally or fall into an "undesirable" category. Furthermore, deported aliens are barred from re-entering the United States for at least five years,¹³⁹ which may provide a greater incentive to commit fraud. These reasons, however, should not automatically provide a basis for differentiating between the two classes of aliens.

Under the Amendments, both classes of aliens have the burden of proof regarding the validity of the marriage. In essence, Congress has presumed all immigration-related marriages are fraudulent; the only difference being one class may prove the validity of the marriage and one may not. Congress should be required to justify the differential classification. A review of the Amendment's legislative history provides no assistance. The government does not offer any statistics indicating that aliens in proceedings commit marriage fraud more often than aliens not in proceedings. If the government can provide such information, courts will find the "rational basis" for the regulation. Without substantial evidence courts may still uphold the classification as rational out of deference to continued political control over immigration.

There are specific instances, however, in which courts may apply a strict scrutiny review to regulations that differentiate between similarly situated persons. The Supreme Court of the United States has held classifications that disadvantage a "suspect class"¹⁴⁰ or inhibit

137. *Id.* at 80-81.

138. *See supra* note 103.

139. INA § 212(a)(17), 8 U.S.C. § 1182(a)(17) (1982). Section 212(a)(17) reads as follows:

(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this chapter or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title, and who seek admission within five years of the date of such deportation or removal, unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission.

8 U.S.C. § 1182 (a)(17) (1982).

140. *Plyler v. Doe*, 457 U.S. 215, 216 n.14.

the exercise of a fundamental right to be presumptively invidious and warrant strict scrutiny review.¹⁴¹

1. SUSPECT CLASSES

"Suspect" classifications encompass classifications based on race and nationality.¹⁴² Such classifications strike at the very heart of this country's political system and are "irrelevant" to any permissible government objective.¹⁴³ "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."¹⁴⁴

The Court has developed a similar, if less strict, approach to classifications based on alienage.¹⁴⁵ Most state classifications based on alienage are constitutionally suspect and warrant strict scrutiny review.¹⁴⁶ Certain state regulations that are political in nature, however, may be exceptions because of legitimate state objectives.¹⁴⁷

The Supreme Court has never held that federal classifications based on alienage are "suspect" or "irrelevant" to any permissible

141. *Id.* at 216-17.

142. *See* *McLaughlin v. Florida*, 379 U.S. 184 (1964) (Florida statute prohibiting an unmarried interracial couple from living together violated equal protection); *Oyama v. California*, 332 U.S. 633 (1948) (California statute prohibiting ownership of property based on parent's country of origin violated equal protection).

143. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (citations omitted).

144. *Id.*

145. *See generally* Comment, *Aliens and the Federal Government: A Newer Equal Protection*, 8 U.C. DAVIS L. REV. 1 (1975).

146. *See* *Sugarman v. Dougall*, 413 U.S. 634 (1973) (New York civil service statute providing that only United States citizens may hold civil service positions violated equal protection clause of the fourteenth amendment); *In re Griffiths*, 413 U.S. 717 (1973) (Connecticut state statute prohibiting resident aliens from practicing law because of state citizenship requirement violated equal protection); *Graham v. Richardson*, 403 U.S. 365 (1971) (Arizona statute denying welfare benefits to resident aliens who have not resided in the United States for 15 years violated equal protection); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (California statute denying issuance of fishing licenses to persons ineligible to citizenship violated equal protection). In *Takahashi*, the Court stated:

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.

Id. at 419 (citation omitted).

147. *See* *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (state restriction that requires "peace officers" to be United States citizens serves a political function and is not subject to strict scrutiny).

federal objective. Indeed, the federal government has been given plenary power to make such classifications.¹⁴⁸ The Court, in *Hampton v. Mow Sun Wong*,¹⁴⁹ however, did invalidate a federal regulation promulgated by the Civil Service Commission (CSC) which barred noncitizens from employment in the civil service. In so doing, the Court did not apply strict scrutiny review but rather focused on the illegitimacy of the regulation.¹⁵⁰ The Court may have acted more favorable to the federal government if the CSC had been directly responsible for protecting the national interests asserted or if Congress or the President had expressly mandated the regulation.¹⁵¹

Aliens who marry during proceedings are not a "suspect" class for purposes of reviewing federal legislation. The Court in *Hampton* indicated that it would not have invalidated the CSC regulation had it been promulgated by Congress or the President. Congress has both promulgated the Amendments and asserted the compelling national interest in protecting the borders through the deterrence of marriage fraud.

2. RIGHT TO MARRIAGE AND FAMILY ASSOCIATION

Although aliens are not a "suspect" class, the courts may still apply strict scrutiny review to section 5 because Congress is impinging on the American spouse's fundamental right to marry. Section 5 forces the American who marries an alien to leave the United States for two years or remain in the United States without his spouse. Court decisions involving the constitutional right to marry find their origins in *Loving v. Virginia*,¹⁵² in which the Supreme Court held a

148. U.S. CONST. art. I, § 8, cl. 4.

149. 426 U.S. 88 (1975).

150. *Id.* at 103. The Court stated that *some* form of judicial scrutiny is constitutionally mandated when a federal rule deprives a specific class of persons of their right to liberty. *Id.* The Court did not require strict scrutiny review. In the *Hampton* litigation subsequent to the Supreme Court decision, the district court stated that "[w]hereas a state must show a compelling governmental interest to sustain a law discriminating against noncitizens, judicial review of federal enactments regarding alienage and immigration is narrow." *Hampton v. Mow Sun Wong*, 435 F. Supp. 37, 42-43 (N.D. Cal. 1977), *aff'd sub nom. Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

151. *Hampton*, 426 U.S. at 116. The Court concluded:

Since these residents were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States, due process requires that the decision to impose that deprivation of an important liberty be made either at a *comparable* level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency.

Id.

152. 388 U.S. 1 (1967).

Virginia statute unconstitutional because it forbade "any white person in [the] state to marry any save a white person, or a person with no other admixture of blood than white and American Indian."¹⁵³ In *Griswold v. Connecticut*,¹⁵⁴ the Court held that a Connecticut statute forbidding the use of contraceptives violates the fundamental right of marital privacy, a right within that penumbra of guarantees provided by the Bill of Rights. The Court stated:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁵⁵

The Court quoted both *Loving* and *Griswold* in *Zablocki v. Redhail*,¹⁵⁶ upholding the constitutional right to marry as a fundamental liberty protected by the due process clause. The Court went on to state that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate those interests."¹⁵⁷

In writing the opinion for the Court, Justice Marshall was careful to clarify the Court's holding. Every state regulation that "relates in any way to the incidents of or prerequisites for marriage" will not be subject to strict scrutiny.¹⁵⁸ Only those regulations that have a direct and substantial impact on the right to marry will be strictly scrutinized.¹⁵⁹

The Seventh Circuit has held that state or local regulations are not unconstitutional violations of the right of family association "unless they regulate the family directly."¹⁶⁰ The collateral consequences of regulations not directed at the family, such as regulations

153. *Id.* at 5 n.4.

154. 381 U.S. 479, 485-86 (1965).

155. *Id.* at 486.

156. 434 U.S. 374 (1978).

157. *Id.* at 388; see also *Franz v. United States*, 707 F.2d 582, 607 (D.C.Cir. 1983) ("The Constitution requires that there be more than a determination that the Federal 'interest' would be marginally advanced by taking action in a particular case; there must be a showing that the governmental interest would be promoted in ways sufficiently substantial to warrant overriding basic human liberties.").

158. *Zablocki*, 434 U.S. at 386.

159. *Id.* at 387.

160. *Hameetman v. City of Chicago*, 776 F.2d 636, 643 (7th Cir. 1985).

designed to keep illegal aliens out of the country, do not bring the constitutional rights of family association into play.¹⁶¹

Section 5 does not forbid an American citizen to marry an alien, and thus it may be argued that this section of the Amendments does not regulate marriage or family association directly. The Amendments may, however, force a *de facto* deportation of the American spouse because the spouse is given the option to remain in the United States alone or leave with the alien.

The courts have rejected the *de facto* deportation argument in situations analogous to section 5. In *Newton v. INS*,¹⁶² the Sixth Circuit held the deportation of alien parents of children who were American citizens did not violate the children's constitutional rights of citizenship.¹⁶³ In so holding, the court stated that the children would always be United States citizens, who upon reaching the age of majority, could decide to return to the United States.¹⁶⁴ The court also noted that the deportation order did not require the aliens to take their children with them.¹⁶⁵

Section 5 operates in a similar manner. The American spouse will always retain his or her citizenship and may return to the United States at any time. Furthermore, requiring the alien to leave does not *specifically require* the American spouse to leave. The government can argue that any marriage between two persons may cause the relocation of one of the spouses. Section 5 requires no more. The government's argument, however, is flawed in one respect. Married couples usually relocate to obtain benefits or further careers. Section 5 requires relocation of the spouse in order to retain a *right*—the right

161. *Id.*

162. 736 F.2d 336 (6th Cir. 1984); *see also* *Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977); *Mendez v. Major*, 340 F.2d 128 (8th Cir. 1965). In *Acosta*, the Court elucidated the reasoning for its conclusion:

It is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel. It is the right to exercise choice of residence, not an obligation to remain in one's native country whether one so desires or not, as is required in some totalitarian countries.

Acosta, 558 F.2d at 1157. The Eighth Circuit in *Mendez* voiced a similar viewpoint:

There can be no doubt that Congress has the power to determine the conditions under which an alien may enter and remain in the United States . . . even though the conditions may impose a certain amount of hardship upon an alien's wife or children.

Mendez, 340 F.2d at 131-32.

163. *Newton*, 736 F.2d at 343.

164. *Id.* at 342-43.

165. *Id.* at 343.

to marry. Section 5 may not directly regulate the right to marry, but it does directly interfere with that right.

3. FUNDAMENTAL RIGHT VS. COMPELLING GOVERNMENT INTEREST

If the courts were to construe section 5 as impinging on the American spouse's fundamental right to marry, then the government must show that its classification of aliens under this section "has been precisely tailored to serve a compelling governmental interest."¹⁶⁶ It is well-established that Congress and the President have virtually unrestricted power over immigration and naturalization.¹⁶⁷ Control over the influx of immigrants and nonimmigrants has always been a compelling national interest. The concern over immigration-related marriage fraud is a necessary corollary to that interest. Courts must analyze section 5, however, to determine if the requirement that aliens who marry during proceedings leave for two years has been precisely tailored to serve the government's interest in deterring marriage fraud. In so doing, the Court will not apply a strict scrutiny review. Because of the deference given Congress in the area of immigration, the Court instead will follow the *Hampton* analysis and look to the legitimacy of the regulation.

Under section 5, Congress requires an alien who marries while facing exclusion or deportation from the United States to remain outside the country for two years. Without the benefit of marriage to an American, the alien might face exclusion or deportation for a minimum of five years. Because Congress allows the alien to return to the United States after two years, as opposed to five years if the alien is deported, courts will find that Congress has addressed marriage fraud in a both a reasonable and legitimate manner.

IV. CONCLUSION

Immigration-related marriage fraud evokes cries of concern from the INS, Congress and its constituents. The Immigration Marriage Fraud Amendments represent a direct response to these concerns. Sections two through four address the concerns in a rational or legitimate manner. Section two requires a two year conditional residency period for aliens who marry (or have been married for less than two years) as of November 6, 1986. The conditional period imposes no additional hardships. Aliens may work and receive benefits. More-

166. *Plyler*, 457 U.S. at 217.

167. See *supra* note 93 and accompanying text.

over, the conditional period will not affect the alien's eligibility for citizenship. Section three requires that aliens and their spouses have met in person within the last two years before the INS will grant a fiance visa. Because the Attorney General may waive this requirement, the Amendments will not interfere with cultural beliefs or practices. Furthermore, Congress is within its power to permanently bar aliens who attempt to fraudulently enter or remain in the United States through marriage to an American citizen or lawful permanent resident.

Congress will face its greatest challenge in the courts in defense of section five. Aliens who marry during judicial or administrative proceedings and those who marry before such proceedings are similarly situated. Both classes attempt to enter or remain in the United States by marrying an American. In denying one group of aliens the opportunity to prove the validity of the marriage, Congress has violated the alien's right to procedural due process and equal protection under the law.

The courts will probably find a "rational basis" for denying the alien the opportunity to be heard. The courts *should* find, however, that section five violates the American spouse's constitutional right to marry because it is a direct and substantial interference of that right. Nonetheless, the courts most likely will conclude that Congress has a compelling interest in controlling immigration. This interest will outweigh any violation of individual rights.

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This Comment is dedicated with love to my parents and to my partner for life, Wes Parsons.