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COMMENTS

**FAMILY UNITY DOCTRINE v. SHAM
MARRIAGE DOCTRINE**

INTRODUCTION

This comment concerns specific sections of the Immigration and Naturalization law as the law reflects, what the author has labeled, the Family Unity Doctrine and the Sham Marriage Doctrine. There exists a conflict between these sections as they have been interpreted by the courts of the United States and implemented by the Immigration and Naturalization Service.

Aliens who marry U.S. citizens for the primary purpose of evading the numerical limitations system of the U.S. immigration law have entered into, what the Service calls, a sham marriage. The immigration law makes strong provision against sham marriages, but the law also contains a little used, but potent, forgiveness section based on family unity. The main concern of this article is the application of the Family Unity Doctrine and the Sham Marriage Doctrine in a case where an alien gains admission into the United States by a sham marriage but is the spouse, parent, or child of a U.S. citizen. The Sham Marriage Doctrine makes the alien deportable for having a previous sham marriage but the Family Unity Doctrine exempts from deportation all aliens who are either the spouse, parent or child of a U.S. citizen and who gained admission into the U.S. by fraud or misrepresentation to evade the numerical limitations system.

The main concern ultimately resolves itself into a consideration of the issue of whether Congress intended that the Immigration Service should be denied as a matter of law the use of any discretion where appropriate cases involving previous sham marriages arise. There is not one actual case which could be found

by the writer where both the Family Unity Doctrine and the Sham Marriage Doctrine were considered in respect to the same fact situation. Therefore it is necessary to focus on two cases, each representing the application of one doctrine respectively, and compare the results of the two cases. The two cases are, *Scott v. Immigration and Naturalization*¹, a 1965 case decided by the Second Circuit and reviewed by the U. S. Supreme Court², and *Papageorgiou v. Esperdy*³, a 1963 case decided by the U. S. District Court, S.D. of New York.

SCOTT v. PAPAGEORGIU

In the case of *Scott*, the decision was later reversed by the U.S. Supreme Court in *Immigration and Naturalization Service v. Errico*.⁴ The Jamaican citizen in *Scott* contracted the marriage with a U.S. citizen by proxy for the sole purpose of obtaining non-quota status for entry into the United States. After entering the U.S. in 1958, she gave birth to an illegitimate child, who became an American citizen at birth. The U.S. Supreme Court reversed the Court of Appeals decision which called for the deportation of said Jamaican, using the provisions of Section 241(f)⁵ of the Immigration and Nationality Act of 1952 to grant her relief because of her family ties to U.S. citizens.

Contrasted with the humanitarian result of *Scott*, but with an exact opposite result, was the case of *Papageorgiou*. In *Papageorgiou* the husband entered the U.S. in 1956 as a seaman, overstayed his leave, upon appropriate proceedings was found deportable, and was granted the privilege of voluntary departure. Within two weeks thereafter, and before leaving the country, he married an American citizen. He then left for Greece where, as the husband of an American citizen he was granted a non-quota visa based upon the wife's petition. He re-entered the U.S. on that visa in June of 1957, and two months later the marriage was dissolved. Deportation proceedings were again brought against this alien but he was again given the privilege of voluntary departure which was extended from time to time. During the last extension

1. *Scott v. Immigration & Naturalization Service*, 350 F.2d 279 (2d Cir. 1965).

2. *Immigration & Naturalization Service v. Errico*, 385 U.S. 214 (1966).

3. *Papageorgiou v. Esperdy*, 212 F. Supp. 874 (S.D.N.Y. 1963).

4. *Errico*, *supra*.

5. 8 U.S.C. § 241(f) (1952); currently found in 8 U.S.C. § 1251(f) (1956).

the alien married another native born citizen of the U.S. and she became pregnant with his child. On June 27, 1962, his second and legitimate wife filed a petition with the Immigration Service asking that her husband be granted a non-quota status under the Act.⁶ The District Director, acting for the Attorney General, denied the application as a matter of law. The District Director's conclusion that he was without authority to act upon the petition was based upon an amendment to Section 1155 (c), 8 U.S. Code (1961) to be discussed in some detail, *infra*.

Both *Scott* and *Papageorgiou* can be defended by the Immigration and Naturalization Service, hereinafter referred to as I.N.S., against anyone who is willing to accept without question the strict interpretation of the Statute. What most reasonable men should not accept, however, is the harsh result in each of these cases with respect to the *people* involved. The *Scott* case, as announced in *Errico* by the U.S. Supreme Court was, by the Court's own words, ". . . a humanitarian result . . ." ⁷ *Scott* can be cited for the concept that family unity should be maintained wherever possible and that our immigration laws ought to be flexible enough to allow for such a result where the specific facts and situation call for it. Family unity has long been a goal of the U.S. Congress in drafting immigration laws. *Papageorgiou* was anything but a "humanitarian result" and the District Court therein recognized this point when they said of the U.S. citizen wife, "Undoubtedly her problem is a difficult one, but her personal plight, even though she be innocent of wrongful conduct, creates no constitutional barrier to the statute."⁸

THE FAMILY UNITY DOCTRINE

A major revision of the 1940 Nationality Act occurred when Congress, on June 27, 1952, passed H.R. 5678, commonly known as the "McCarran-Walter Act," over the veto by President Harry S. Truman.⁹ In his veto message, President Truman stated,

. . . In addition to removing racial bars to naturalization, the bill would permit American women citizens to bring their alien husbands to this country as non-quota immigrants, and enable alien husbands of resident women aliens to come in

6. 8 U.S.C. § 1101(a)(27) (1952).

7. *Errico*, *supra* at 225.

8. 212 F. Supp. 874, 877 (S.D.N.Y. 1963).

9. U.S. CODE CONG. & ADMN. NEWS, Vol. 1 at 921 (1952).

under the quota in a preferred status. These provisions would be a step toward preserving the integrity of the family under our immigration laws, and are clearly desirable.¹⁰

The President's veto was based upon his major objection that passage of the bill would result in maintenance of the strict national-origin quota system and that some of the new grounds for deportation were *unnecessarily severe*. The President stated that the bill would sharply restrict the prior law permitting citizens and alien residents to save family members from deportation.

Notwithstanding President Truman's veto, H.R. 5678 became law in June 1952, and subsequent legislation, such as the Immigration and Nationality Act of 1957, has sought to correct some of the harshness, e.g., by attempting to ensure that families of U.S. citizens and immigrants were united.

Scott was decided by the U.S. Supreme Court according to their interpretation of Section 241(f) of the 1952 Immigration and Nationality Act. Section 241(f) is currently found in 8 U.S. Code Section 1251(f), hereinafter referred to as the Family Unity Section.¹¹

The Family Unity Doctrine was a force behind the passage of the 1965 amendment to this latter section.¹² The minority report of the House rendered by James O. Eastland and John L. McClellan, specifically defined what this doctrine meant to Congress.

The Congress today and the Congress in the past has always been responsive to the basic need for retaining the immediate family unit intact. This unit consists of the husband, wife, and unmarried minor children.¹³

10. *Id.* at 921-922.

11. Section 1251(f) states, "The Provisions of this section relating to deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

12. The legislative history of Section 1251(f) indicates strong opposition of the minority on the Committee of the Judiciary of the House of Representatives to the passage of H.R. 2580 which ultimately was modified in conference with the Senate and passed as Public Law 89-236. Although the major disagreement in Congress appeared to concern the repeal of the national origins quota system, which did occur as a result of this legislation, the family unity doctrine was a strong motivating factor on both sides of the debate. U.S. CODE CONG. & ADMN. NEWS, Vol. 2 at 3328 (1965).

13. *Id.* at 3348.

SHAM MARRIAGES

Marriage of an alien to a citizen of the U.S. has not conferred direct citizenship upon said alien since passage of the act of Congress dated September 22, 1922, commonly known as the Cable Act. However, the Nationality Act of 1940 contained provisions for "expeditious naturalization."¹⁴

In 1961, Congress finally became seriously concerned over the problem of sham marriages to evade the immigration laws. The legislative history for the First Session of the 87th Congress indicates the reasoning behind an amendment to Section 1155, Title 8 U.S. Code, the section dealing with revocation of approval of petitions for change of status from non-immigrant to an immigrant admitted for permanent residence. Section 1155(c) hereinafter will be referred to as the Petition Refusal Section.¹⁵ The amendment,

. . . proposes to strengthen existing law by giving the Attorney General a new legal instrumentality to counteract the increasing number of fraudulent acquisitions of non-quota status through sham marriages between aliens and U.S. citizens, often prearranged by racketeers. The Attorney General has recently reported to the Congress about increasing number of such sham marriages indicating the existence of marriage schemers operating in various parts of the country, particularly on the water fronts, and arranging for high fees for deceitful marriages involving in most instances, alien seamen.¹⁶

Title 8, Section 1251(c), hereinafter referred to as the Deportable Marriage Section, gives the District Directors the authority for deportation of aliens who are guilty of fraudulent entry based on marriage. This Section is used in cases where the

14. Sections 310 thru 312 of the 1940 Nationality Act allowed expeditious naturalization for an alien married to an American citizen, ". . . if such person shall have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization . . . upon compliance with all requirements of the naturalization laws." HACKWORTH, DIGEST OF INTERNATIONAL LAW, Vol. III at 88 (1942).

15. The 1961 amendment to Section 1155(c) provided, in brief, that no petition shall be approved if the alien had previously been accorded a non-quota status under Section 1101(a) (27) (A) of this title, or a preference quota status under Section 1153(a)(3) of this title, by reason of marriage entered into to evade the immigration laws. U.S. CODE CONG. & ADMN. NEWS, Vol. 1 at 735 (1961).

16. U.S. CODE CONG. & ADMN. NEWS, Vol. 2 at 2980 (1961).

petition described above has been approved but where fraud is found to have existed in obtaining said petition's approval. Section 1251, it will be remembered, also contains those provisions of "forgiveness" under which Scott was allowed to remain in the U.S. despite a sham marriage and a non-quota status obtained thereby; the Family Unity Section was applied in *Scott*.¹⁷ There is very little in the legislative history which explains the legislative intent behind passage of the Deportable Marriage Section.¹⁸

The magic number of 2 years chosen by the Congress as the period by which to measure the validity of a marriage is not explained in the analysis of the bill and appears to be merely arbitrary. The Deportable Marriage Section does give the District Directors of Immigration, via the Attorney General's delegation, the discretionary authority to look at all the facts in a particular case and decide whether the marriage was not contracted for the purpose of evading any provisions of the immigration laws. But once a District Director makes this determination against a specific alien, said alien by law may never have approved another petition for a preference quota status based on the relationships described in the law.¹⁹ The District Director's discretion, if we are to accept the interpretation of this in *Papageorgiou*, ends the first time the Deportable Marriage Section is decided against an alien.

The obvious inequity of terminating the application of discretion by the District Director is shown by the result in *Papageorgiou*.

17. Section 1251(c) states, ". . . An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) or Section 1182(a) of this title, and to be in the United States in violation of this chapter within the meaning of subsection (a)(2) of this Section, if (1) hereafter he or she obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such entry of the alien and which within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws: or (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant." 8 U.S.C. § 1251(c) (1952).

18. In the analysis of the bill which gave birth to Section 241(c) the following comment appears, "This provision is of particular importance in view of the extension of the privilege of non-quota status to a large group of aliens on the basis of a marriage to a citizen of the United States." U.S. CODE CONG. & ADMN. NEWS, Vol. 2 at 1716 (1952).

19. 8 U.S.C. § 1154(c) (1964).

Cases can be cited for the correct and equitable application of the Deportable Marriage Section as applied without the Petition Refusal Section. One such case was *Todardo v. Pederson*²⁰ where the U.S. District Court, Northern District of Ohio, applied the Deportable Marriage Section equitably to an Italian who attempted a sham marriage with a U.S. citizen. The alien gave the citizen \$500.00 as consideration for marriage. The citizen gave the money back to the alien and no marriage took place. Then said alien returned to Italy where he found that his former wife had become an American citizen. The alien thereupon re-married his former wife, obtained a non-quota immigration visa, and returned with his wife and mother-in-law, to the U.S., all at the mother-in-law's expense. Before he had been married 2 full years, and without ever consummating the marriage or co-habiting with his wife, the alien obtained a divorce from her. The alien petitioner accused his mother-in-law of breaking up the marriage but the court found that the evidence did not support this contention, and the petitioner was deported pursuant to the Deportable Marriage Section.

Another case example similar to *Todardo* is *Hamadeh v. I.N.S.*²¹ In both *Todardo* and *Hamadeh* the U.S. Supreme Court denied certiorari.

PETITION REFUSAL & DEPORTABLE MARRIAGE SECTIONS COMPARED WITH THE FAMILY UNITY SECTION

Read together, the Petition Refusal Section and the Deportable Marriage Section appear to say quite clearly that any alien who obtains entry into the United States on the basis of preference granted by sham marriage to a U.S. citizen, is guilty of misrepresentation of fact and subject to deportation. In order for the alien to rebut the presumption of a sham marriage he must prove that he was married for at least two years prior to entry into the U.S. and/or stay married for at least two years subsequent to entry. Taken together, these two sections may be said to constitute the Service's Sham Marriage Doctrine and henceforward will be so designated without further explanation.

If the alien has once been found to have obtained preference

20. *Todardo v. Pederson*, 205 F. Supp. 612 (N.D. Ohio 1961).

21. *Hamadeh v. I.N.S.*, 343 F.2d 530 (7th Cir. 1965), *cert. denied*, 382 U.S. 838 (1965).

by a marriage determined by the I.N.S. to have been a sham, said alien cannot again obtain a preferential status even if he has made a second successful marriage with a U.S. citizen and begun to raise a U.S. citizen-child. Together, these two sections constituting the Sham Marriage Doctrine clearly make misrepresentation by sham marriage an unforgivable act against the U.S. government regardless of the consequences to U.S. citizens who may be adversely affected thereby.

The Family Unity Section presents an apparent conflict with the Sham Marriage Doctrine. The Family Unity Section is based on the concept that the misrepresentation of an alien made in order to obtain a preference status and evade the numerical limitations system is excusable if the alien is a parent, spouse or child of a U.S. citizen or of an alien lawfully admitted for permanent residence. The law is not explicit as to the point in time at which the alien must be a parent, spouse or child of a U.S. citizen but in the case of *Scott* the alien woman did not become a parent of a U.S. citizen until after the alien had misrepresented her marital status and had entered the United States. The U.S. Supreme Court held that *Scott* came within the Family Unity Section. The writer contends that Congress should not do away with the Family Unity Section, rather Congress should clarify the relationship between these conflicting sections and provide for the exercise of sound discretion in the application of the Petition Refusal Section.

The Family Unity Section has not enjoyed the wide application that the Sham Marriage Doctrine has. Part of the reason for this lack of application most certainly lies in the fact that the former section is designed to be pleaded more as a defense by the alien against his deportation, while the latter sections are the everyday tools of the Immigration Service in their actions against aliens who have violated immigration law.

The scope of the Family Unity Section announced by the majority in *Scott* is impressively broad, ". . . the administrative authorities have consistently held that Section 241(f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought" ²² This section was applied in the case of *Muslemi v. I.N.S.*, decided by the U.S. Court of Appeals of the Ninth Circuit on March 17, 1969. ²³ In *Muslemi* the petitioner

22. Errico, *supra* at 217.

23. *Muslemi v. I.N.S.*, 408 F.2d 1196 (9th Cir. 1969).

sought review of a final deportation order of the Board of Immigration Appeals, and the sole issue before the court was whether petitioner was entitled to the benefit of the Family Unity Section. Petitioner was a native of India and a citizen of Iran who, in 1965, had obtained a visitor's visa to the U.S. upon advice that the quotas for both India and Iran for the year had been filled. He stated that his intentions were to stay in the U.S. for only 3 months, but the Service determined from the petitioner's own self-defeating statements that he had intended to remain in the U.S. permanently. Deportation proceedings were instituted against petitioner on September 2, 1966, but 5 days later he married an American citizen whom he had previously met in India. The couple had planned to marry as soon as she had obtained a divorce from her husband, which she did obtain upon her return from India. The Court reversed the deportation order and remanded the cause for determination of whether petitioner was *otherwise admissible at the time of his entry*. In arriving at the decision, the Court satisfied itself that petitioner's fraud in concealing his intention to remain permanently in the U.S. was well within the scope of protection offered by the Family Unity Section.

Although the court did not discuss in detail the fact of the petitioner's marriage to the American citizen, which marriage had been planned in India prior to petitioner entering the U.S., this would have been the most significant fact in the case had deportation been brought against petitioner under the Deportable Marriage Section instead of pursuant to Sections 1182(a)(20) and 1251(a)(1).²⁴ The latter two sections in substance charged that petitioner entered the country without a valid immigrant visa, and that he was therefore excludable at the time of entry. One can only speculate regarding the reasons for bringing deportation proceedings as the Service did in this case; such speculation suggests that the Service did not have any other evidence except petitioner's own statement that the marriage had been planned in India. The question to be decided by the court in the event that deportation had been brought pursuant to the Deportable Marriage Section would have presented directly to the court the conflict which exists between this section and the Family Unity Section. Without the Deportable Marriage Section barrier, the court could have made four alternative decisions: (1) apply the Family Unity Doctrine as provided in the Family Unity Section; (2) apply the prohibition

24. 8 U.S.C. § 1182(a)(20) & § 1251(a)(1) (1964).

against sham marriages of the Deportable Marriage Section; (3) balance the provisions of both the Family Unity Section and the Sham Marriage Section and arrive at some combination of both; or, (4) apply one of the first three alternatives previously mentioned together with one or more punitive sections of the law.

SHAM MARRIAGES—PUNISHABLE AS A CRIME

In the case of *U.S. v. Diogo*²⁵ decided by the U.S. Court of Appeals on June 28, 1963, criminal charges were brought against appellants Jose Diogo, Manual Gonzalez and Domingo Costa all of whom allegedly entered into sham marriages with American citizens in order to obtain non-quota immigrant status.²⁶ Trial was had and all appellants were therein convicted of (1) falsely representing to the Immigration authorities that they were actually married²⁷ and (2) that each had entered into a conspiracy with the alleged instigator of the scheme, Adria Gonzalez, and others to commit the substantive offenses charged.²⁸

In the cases of Diogo and Gonzalez, both aliens had specific understandings with the women they married that the marriages would never be consummated and that the parties would never live together as man and wife. Both aliens paid their wives \$500.00 each which the respective wives shared with Adria Gonzalez the alleged instigator. However, the woman who married Costa was not paid by Costa and agreed in all good faith to marry Costa after Adria Gonzalez convinced her that she would meet some young men and probably get married if she agreed to make a trip to Europe. Costa and his wife consummated their marriage and remained in Europe for two months where she had met Costa and where the marriage took place.

The question on appeal was whether the government had carried the burden of proof as the government must in order that the previous convictions might stand. Compare the burden of proof herein with that required in the administrative action brought by the I.N.S. In the latter, the burden was on the alien, i.e., pursuant to the Deportable Marriage Section the alien must prove to the satisfaction of the Attorney General that he did not marry for the purpose of evading any provisions of the immigra-

25. *U.S. v. Diogo*, 320 F.2d 898 (2d Cir. 1963).

26. 8 U.S.C. § 1101(a)(27) (1952).

27. 18 U.S.C. § 1001 & § 1546 (1948).

28. 18 U.S.C. § 371 (1948).

tion laws. In the former criminal action, the burden was on the government to prove the misrepresentation, deceit, or conspiracy by the accused alien. The greater weight of proof being required of the government in a criminal action explains one major reason why more criminal actions are not brought in sham marriage cases between aliens and U.S. citizens. The cornerstone of these prosecutions was 18 U.S.C. Section 1001.²⁹

Section 1001 encompasses two separate offenses, concealment of a material fact and false representations. In the instant case the appellants were accused of making false representations with respect to their marital status. False representations, like common law perjury, require proof of actual falsity.³⁰

The Appellate Court reversed appellants' convictions on the grounds that according to New York law, where the marriages of Diogo and Gonzalez were performed, these were legal marriages. The Court said, "It is as reasonable to suppose . . . that appellants' statements were made with the New York law in mind as that they were made with the Congressional intent that prompted the enactment of 8 U.S.C. Section 1101(a)(27)(A) in mind."³¹

The result of the case of *Diogo*, however, did not destroy the effect of the conviction of Adria Gonzalez whose action as a marriage schemer brought these sham marriages about. It will be recalled that the Congress intended to get at the marriage schemers such as Adria Gonzalez when they passed in 1961 the amendment to Section 1155, herein labeled the Petition Refusal Section.

There was a strong dissent in the *Diogo* case by Circuit Judge Clark in which he pointed out that the majority of the Court failed to follow the established precedent in the case of *Lutwak v. U.S.*³² where the majority of the U.S. Supreme Court considered that proof was lacking that the marriages were invalid or at least only voidable where made. However, the Court in *Lutwak* went on to conclude that the validity of the marriages was immaterial.³³

29. Section 1001 of 18 U.S.C. states, "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

30. *U.S. v. Diogo*, *supra* at 902.

31. *Id.* at 907.

32. *Lutwak v. U.S.*, 344 U.S. 604 (1953).

33. *Id.* at 611.

It is somewhat beyond the scope of this article to discuss the *Diogo* and *Lutwak* conflict. It should be sufficient for the present analysis to recognize that there exist some serious problems of evidence in the criminal prosecution of alleged sham marriages entered into between U.S. citizens and aliens for the purpose of expeditious immigration and naturalization. However, these very questions of evidence should not bar the use of criminal prosecution of allegedly sham marriages where the criminal prosecution might be the only just approach for all parties.

For example, in *Papageorgiou* the government did not even consider criminal prosecution of the alien for his first sham marriage but, instead, the I.N.S. applied the Sham Marriage Doctrine literally and strictly. A more just result in *Papageorgiou* would have been to extend the Family Unity Doctrine and grant this particular alien relief thereunder. Another alternative open to the I.N.S. was to prosecute Papageorgiou under the criminal statutes for his first sham marriage. The result of such prosecution would have been, at the most, a fine of \$10,000 and imprisonment for not more than five years. It seems unlikely that the Service would ask for the maximum penalty for a first offense, or if it did, that any judge or jury would be so harsh as to award the maximum penalty. But at any rate, Papageorgiou could have served his criminal sentence and then resumed his role as *bona fide* father and husband of U.S. citizens, respectively. By taking the latter approach at least the family unit would have had a chance to exist within the geographical boundaries of the United States.

SUMMARY

The main concern of this article is the application of the Family Unity Doctrine and the Sham Marriage Doctrine in a case where an alien gained admission into the United States by a sham marriage but was the spouse, parent or child of a U.S. citizen. A further issue discussed is whether the Congress intended that the Immigration Service should be denied as a matter of law the use of any discretion in appropriate cases involving sham marriages between U.S. citizens and aliens for the purpose of evading the immigration laws. Sections 1155(c), 1251(c), and 1251(f) of the Immigration and Naturalization Code have been discussed in some depth as they present the apparent conflict between the Sham Marriage Doctrine and Family Unity Doctrine. Under the Family Unity Section, so designated herein to describe Section

1251(f) of Title 8 U.S.C., the Service has discretion which may be used to preserve the family unit. However, according to a literal interpretation of the Sham Marriage Doctrine, so designated herein to describe Sections 1251(c) and 1155(c), as a matter of law the Service must deny petitions and deport all aliens who have had a previous sham marriage. The courts have sustained the Service's literal interpretation of the Sham Marriage Doctrine and injury has occurred in at least one case, *Papageorgiou v. Esperdy*,³⁴ to a U.S. citizen wife and her anticipated issue.

RECOMMENDATIONS

The fruit of the preceding presentation is not easily harvested. It is commonly known that to criticize is one matter, which often comes too easily, but to make constructive recommendations for improvement is altogether a separate and more difficult matter.

The author admits of some favoritism in respect to the maintenance of genuine family unity. At the same time, the author recognizes the situation presented by sham marriages as a counterforce destructive of the validity of the family unit. A balancing process is obviously at work in the daily application of immigration law in respect to these two forces. But, proper balancing depends upon many things, basic to which is the availability of discretion to the District Directors of Immigration to apply the law to specific fact situations and achieve the best results for all concerned.

The author makes the following recommendations tempered with the knowledge that the present inquiry has occurred in the law library, and not on the job as a law maker, or on the firing line as an immigration officer. Both of these positions deserve our respect and praise. These recommendations are in no way meant to be exhaustive of the many possibilities for change present in the law. Rather, they are made as stimuli to prompt further response such as investigation and action.

RECOMMEND that the U.S. Congress:

- A. give further consideration to the Family Unity Doctrine and the sham Marriage Doctrine, particularly in regard to the question of misrepresentation by aliens, and
- B. amend the Sham Marriage Doctrine to allow the District Directors of Immigration the discretion, in appropriate cases,

34: 212 F. Supp. 874 (S.D.N.Y. 1963).

to apply the Family Unity Doctrine even where there has been a previous sham marriage, and

C. appoint a special committee of the House of Representatives and the Senate, to study the area of the Alien—American family and the impact of Immigration Law thereon.

RECOMMEND that the Immigration & Naturalization Service:

A. reevaluate their operating procedures as regards the deportation of aliens who have allegedly committed sham marriages and exercise their full discretion in cases where the maintenance of family unity is called for, and

B. inform the U.S. Congress, as objectively as possible, regarding specific cases where the Immigration Law is inflexible and difficult to administer as regards the maintenance of family unit, and

C. use the criterion of the following type in administration of their discretion as regards maintenance of family unity:

1. Does the U.S. spouse endorse the request of the alien spouse to remain in the United States?

2. Is the alien spouse employed and providing support for his family, and/or

3. Is the alien spouse employable and willing to support his family, and/or

4. Is the alien spouse educable or retrainable and willing to undergo such education or training at his own expense, and/or

5. Is the U.S. spouse capable of, and willing to support her alien spouse, including the latter's education or training?

6. Do U.S. spouse and alien spouse have issue and is any present issue a U.S. citizen?

The responses to questions of the preceding variety will obviously aid the I.N.S. in their determination of the existence of a family unit and whether the unit is self supporting or not. The I.N.S. probably asks the same or similar questions as part of their present procedure in processing of requests for a change of status. These questions are merely demonstrative of the type that may be accorded additional weight in respect to the use of the responses in making a final decision regarding possible deportation or change of status of an alien who has had a previous sham marriage.

RECOMMEND that the U.S. Courts:

- A. take notice of the case of *Scott v. I.N.S.*³⁵ as interpreted by the *I.N.S. v. Errico*³⁶, where actions brought by the Immigration Service pursuant to the Sham Marriage Doctrine are appealed on the basis of the Family Unity Doctrine, and
- B. continue the broad interpretation given to the Family Unity Doctrine in *I.N.S. v. Errico*.

RECOMMEND that Defense Counsel:

- A. plead the Family Unity Doctrine as supportive of other grounds in defense of deportation of aliens who have established *bona fide* U.S. families, and
- B. plead the Family Unity Doctrine in the alternative, especially in cases where the deportation of the alien spouse is grounded upon fine technicalities of Immigration Law, e.g., the fact that the alien evaded the numerical limitations system by engaging in a previous sham marriage, and
- C. urge alternative solutions to the ultimate punishment of deportation, e.g., the intelligent use of available penal statutes.

Ben Echeverria

35. 350 F.2d 279 (2d Cir. 1965).

36. 385 U.S. 214 (1966).