

1-1-2006

## Prosecuting Sham Marriage under 18 U.S.C. Sec. 1546: Is Validity of Marriage Material

Brian Thomas  
*Suffolk University Law School*

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

---

### Recommended Citation

11 Suffolk J. Trial & App. Advoc. 201 (2006)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact [dct@suffolk.edu](mailto:dct@suffolk.edu).

## PROSECUTING SHAM MARRIAGE UNDER 18 U.S.C. § 1546: IS VALIDITY OF MARRIAGE MATERIAL?

### I. INTRODUCTION

According to United States law, an alien may obtain permanent resident status by marrying a United States citizen.<sup>1</sup> Consequently, some people abuse this privilege by knowingly entering a “sham marriage,” an illegal practice whereby an alien marries a citizen for the sole purpose of gaining citizenship.<sup>2</sup> Most sham marriages involve an alien paying an American upwards of \$10,000 to enter the marriage, and the marriage is annulled shortly after the immigrant gains legal citizenship as result of the union.<sup>3</sup> In response, Congress enacted legislation that put severe restrictions on the benefits enjoyed by an alien who marries a citizen.<sup>4</sup> Despite

---

<sup>1</sup> See Immigration and Nationality Act § 319(a), 8 U.S.C. § 1430(a) (2005) (granting citizenship to the spouse of a United States citizen); see also 7-97 Gordon, Stanley Mailman, & Stephen Yale-Loehr, Immigration Law and Procedure § 97.03[1] – [2] (2005) (describing United States laws through which an alien gains citizenship by marrying a United States citizen). The application procedure for naturalization through marriage to a citizen is substantially the same as that of naturalization under the general provisions of law. 7-97 Gordon, Immigration Law and Procedure, § 97.03[6] (describing process by which an alien gains citizenship after consummating marriage with a United States citizen). Generally, before naturalization may be granted, the applicant must submit documents to support his or her claimed status, including a marriage certificate and proof of the citizen spouse’s United States citizenship (e.g., birth certificate). *Id.*

<sup>2</sup> See 4-42 Gordon, Immigration Law and Procedure § 42.01 (2005) (describing sham marriages generally); *Lutwak v. United States*, 344 U.S. 604, 617 (1953) (holding sham marriage are punishable as fraud against the United States). Immigration and Naturalization Services estimates that of all applications for citizenship resulting from marriage to a United States citizen, thirty percent involve marriage fraud. See Robert Pear, *In Bureaucracy, Aliens Find Another Unprotected Border*, N.Y. TIMES, Oct. 19, 1986 at 4:4 (discussing the increased frequency of sham marriage attempts in the United States).

<sup>3</sup> See Associated Press, *House Acts Against Aliens’ Sham Marriages*, N.Y. TIMES, Sept. 30, 1986 at A26 (describing Congressional action directed towards reducing sham marriages). Participants in the actual sham marriages are not the only people that may be convicted for the offense; many attorneys who facilitate the scam or knowingly complete the fraudulent paperwork for such an arrangement have also been charged and convicted as well. See generally Robert Pear, *Federal Officials Assert Lawyers are Aiding Immigration Frauds*, N.Y. TIMES, Oct. 21, 1985, at A1 (noting that in addition to sham marriage participants, lawyers who facilitate such unions may also be in violation of the law).

<sup>4</sup> See 4-42 Gordon, *supra* note 2, at § 42.01 (detailing the many restrictions placed on aliens who seek to obtain citizenship through marriage to a United States citizen); see also Immigration Marriage Fraud Amendments of 1986 (“IMFA”), 8 U.S.C. § 1186a (2005) (terminating a person’s permanent resident status where that person marries an alien for the

Congress' efforts, the sham marriage is the most common way immigrants attempt to gain United States citizenship illegally, posing a serious threat to the immigration process.<sup>5</sup>

The Supreme Court of the United States addressed sham marriage prosecution for the first time in the 1953 case, *Lutwak v. United States*.<sup>6</sup> Subsequently, circuit courts adopted conflicting interpretations of how the *Lutwak* holding should be applied to prosecution under 18 U.S.C. § 1546, a modern statute that punishes sham marriage participants for falsely representing their marital status for immigration purposes.<sup>7</sup> Specifically, the

---

purpose of procuring that alien's admission as an immigrant). Most notably, the IMFA compels a two-year conditional permanent resident status on certain classes of aliens who immigrate to the United States by way of marriage. *Id.* This conditional resident status affects alien spouses and their children only if they derived their status through a marriage that occurred less than two years before the beneficiary becomes a permanent resident. *Id.* At the end of this conditional period, the couple must file a joint petition to remove the condition imposed on the alien spouse and children. *Id.* In addition to IMFA, Congress passed many other statutory measures aimed at preventing sham marriages. See generally Immigration and Nationality Act § 204(c), 8 U.S.C. § 1101 (2006) (prohibiting classification of alien as immediate relative or preference beneficiary if that alien previously sought out or acquired immigration status by means of sham marriage); *id.* at § 237(a)(1)(G) (creating presumption that a marriage is a sham when the union took place less than two years before the alien became lawful resident and the marriage ends within two years after he becomes a resident); *id.* at § 275(c) (imposing criminal consequences for knowingly entering marriage with intent to evade an Immigration and Nationality Act provision); see also Charles Wheeler, *Until INS Do Us Part: A Guide to IMFA*, 90-3 Immigration Briefings (Mar. 1990) (providing a general summary of IMFA restrictions).

<sup>5</sup> See Scott Michels, Russ Rizzo, *Fake-Marriage Schemes Commonplace; The Short-Lived Unions are the Top Illegal Tactic of People Who Want to Become U.S. Citizens, and They're Difficult to Prevent*, NEWS & RECORD (Greensboro, NC), Apr. 25, 2005, at A1 (quoting Chris Bently, spokesperson for U.S. Citizenship and Immigration Services); see also Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, *Their Wed of Deceit Unraveled 53% Denied Green Cards*, DAILY NEWS (New York), Nov. 24, 2003, at 9 (noting that a record fifty-three percent of the 17,900 marriage-based petitions processed in fiscal year 2003 were denied); James R. Edwards Jr., *Immigration Soars to New Heights*, WASH. TIMES, Feb. 2, 2003, at B4 (citing sham marriages as reason for recent increases in legal immigrants in the United States); August Gribbin, *Study on Immigration Calls Fraud 'Rampant'*, WASH. TIMES, Feb. 23, 2002, at A1 (attributing recent surge in immigration fraud to sham marriage).

<sup>6</sup> *Lutwak*, 344 U.S. at 610-13 (1953) (affirming conviction of defendants who set up sham marriages by abusing the War Brides Act, which conferred citizenship on alien spouses of honorably discharged veterans of World War II); see War Brides Act, 8 U.S.C. § 232 (repealed in 1948). Although the *Lutwak* decision was the first Supreme Court decision to address sham marriage prosecution, the United States Court of Appeals for the Second Circuit dealt with the issue in 1945. See *United States v. Rubenstein*, 151 F.2d 915, 916-17 (2d Cir. 1945) (affirming defendant's conviction for conspiring to bring an alien into the country illegally via sham marriage). The Supreme Court relied upon the *Rubenstein* decision in *Lutwak*. *Lutwak*, 344 U.S. at 612.

<sup>7</sup> See 18 U.S.C. § 1546 (2005),

Whoever knowingly makes under oath, or...knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or

circuit courts disagree on how the *Lutwak* court's declaration that "we do not believe that the validity of marriage is material" should be applied to sham marriage prosecutions for false representation under 18 U.S.C. § 1546.<sup>8</sup> Circuits adopting the "literal interpretation" of *Lutwak* apply it universally, holding that validity of marriage is immaterial in all sham marriage prosecution, including false representation charges under 18 U.S.C. § 1546.<sup>9</sup> In contrast, circuits following the "narrow interpretation" hold that the defendants in *Lutwak* were not prosecuted for false representation of marital status, but instead for suppressing facts that indicated their marriage was a sham, constituting illegal concealment of a material fact.<sup>10</sup> According to this view, the *Lutwak* decision held that marriage validity is immaterial only when prosecuting sham marriage participants for concealment of a material fact, and therefore the validity of marriage is material when prosecuting participants for other crimes such as fraudulent misrepresentation under § 1546.<sup>11</sup>

This note focuses on the conflicting interpretations of how *Lutwak* should be applied to sham marriage prosecution under modern statutes, and more specifically, whether the validity of marriage is material in prosecu-

---

other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact...[s]hall be fined under this title or imprisoned not more than 25 years....

18 U.S.C. § 1546 (2005); *see also infra* notes 30-33 and accompanying text (describing circuit split on the correct interpretation of *Lutwak* and the proper method of sham marriage prosecution).

<sup>8</sup> *Lutwak*, 344 at 611; *infra* note 31 and accompanying text (identifying the specific portion of the *Lutwak* decision subject to circuit court discord).

<sup>9</sup> *See infra* notes 64-70 and accompanying text (describing Fourth Circuit interpretation of *Lutwak* and stance on whether marriage validity is material in sham marriage prosecution).

<sup>10</sup> *See infra* notes 50-63 and accompanying text (describing Second and Seventh Circuit interpretation of *Lutwak* and distinguishing between false representation of a marital status and concealment of a material fact).

<sup>11</sup> *See infra* notes 50-63 and accompanying text (describing Second and Seventh Circuit interpretation of *Lutwak* and those circuits' stance on whether marriage validity is material in sham marriage prosecution). Although the Sixth and Ninth Circuits do not directly address the split nor expressly adopt one approach over the other, they nonetheless prosecute sham marriages using a method that is consistent with the logic and reasoning of the Second and Seventh Circuits. *See generally* *United States v. Zalman*, 870 F.2d 1047 (6th Cir. 1989) (following Second and Seventh Circuit approach when prosecuting an alien for participating in sham marriage); *United States v. Dedhia*, 134 F.3d 802 (6th Cir. 1998) (utilizing Second and Seventh Circuit approach in affirming an alien's conviction for sham marriage); *United States v. Qaisi*, 779 F.2d 346 (6th Cir. 1985) (using Second and Seventh Circuit approach when vacating an alien's conviction for sham marriage); *Johl v. United States*, 370 F.2d 174 (9th Cir. 1966) (affirming sham marriage conviction where concealed information that the alien defendant married a citizen to secure his immigration status was a material fact that reflected on the validity of the marriage).

tions under 18 U.S.C. § 1546. Part II first offers a summary of sham marriage prosecution, including investigatory procedures and relevant statutes.<sup>12</sup> Part II then explores the *Lutwak* decision and the body of case law decided in its wake, focusing on conflicting stances taken by circuits on whether the validity of marriage is material to sham marriage prosecution under § 1546.<sup>13</sup> Part III weighs the merits of each approach, and ultimately supports the “literal approach” because it adheres to Supreme Court precedent and reflects congressional intent.<sup>14</sup>

## II. SHAM MARRIAGE PROSECUTION UNDER 18 U.S.C. § 1546: IS MARRIAGE VALIDITY MATERIAL?

### A. The Sham Marriage

The United States grants citizenship to alien spouses of American citizens,<sup>15</sup> however, the Supreme Court of the United States acknowledged the authority of the Immigration and Naturalization Service (INS) to withhold this privilege from aliens who marry for the purpose of gaining citizenship.<sup>16</sup> Generally, the government establishes the existence of a sham

---

<sup>12</sup> See *infra* notes 15-32 and accompanying text.

<sup>13</sup> See *infra* notes 33-73 and accompanying text.

<sup>14</sup> See *infra* notes 74-92 and accompanying text.

<sup>15</sup> 8 U.S.C. § 1430(a) (2005) (providing citizenship to the alien spouse of an American citizen). According to this statute, the alien spouse receives citizenship only if: (1) “immediately preceding the date of filing the application for naturalization, the alien spouse has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years...”; (2) “during the three years immediately preceding the date of filing the application[,]” the alien spouse “has been living in marital union with the citizen spouse,...who has been a U.S. citizen during all of such period”; (3) during the three years immediately preceding the date of filing the application, the alien spouse has been “physically present in the United States for periods totaling at least half of that time”; and (4) the alien spouse “has resided within the state or the INS district in which the applicant filed the application for at least three months.” *Id.*

<sup>16</sup> See *Lutwak*, 344 U.S. at 611 (“Congress did not intend to 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”); *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982) (holding that marriages entered into by parties not intending to live together as husband and wife are not recognized for immigration purposes); *Garcia-Jaramillo v. Immigr. & Naturalization Serv.*, 604 F.2d 1236, 1238 (9th Cir. 1979) (refusing to grant citizenship to alien spouse because bride and groom did not intend to establish a life together at time of marriage); see also *In re McKee*, 17 I. & N. Dec. 332, 334 (B.I.A. 1980) (holding that sham marriage entered into for the purpose of circumventing immigration laws does not permit an alien spouse to gain immigration benefits); *Chan v. Bell*, 464 F. Supp. 125, 132 (D.D.C. 1978) (noting that marriage entered in order to obtaining an alien’s admission in the United States may be deemed invalid for immigration law purposes); *McLat v. Longo*, 412 F. Supp. 1021, 1025 (D.V.I. 1976) (noting that citizenship available to alien spouses of United States citizens is “neither automatic nor guaranteed”); *In re M---*, 8 I. & N. Dec. 217, 218 (B.I.A. 1958) (holding that where no bona fide husband-wife relationship is intended, a marriage between an alien spouse and United States citizen

marriage by using evidence that proves the union was transactional and not genuine.<sup>17</sup> Consequently, the INS conducts questioning of both spouses to determine if the marital relationship is "bona fide" for immigration purposes or merely contrived to avoid immigration laws.<sup>18</sup> According to the Supreme Court, a marriage is bona fide for immigration purposes if it falls within "the common understanding of a marriage," in which "two parties have undertaken to establish a life together and assume certain duties and obligations."<sup>19</sup> The bona fide status of a marriage under immigration law is evaluated differently than the validity of a marriage under state and federal law; therefore, a marriage that is valid under state law does not necessarily meet the federal immigration standard for a bona fide marriage.<sup>20</sup> Instead, whereas marriage validity under state or federal law hinges on the procedural steps a couple took in order to obtain lawful marital status, a bona fide marriage for immigration purposes depends on whether the couple joined together as husband and wife as that union is commonly understood.<sup>21</sup>

The central inquiry as to whether a couple entered a bona fide marriage for immigration purposes is the couple's intent at the time of their

---

is considered invalid for immigration purposes). In addition, an alien who seeks to gain citizenship by attempting to enter a marriage or by a marriage later found to be a sham is barred from being the beneficiary of a subsequent, valid visa petition. See 8 U.S.C. § 1154(c) (2005).

<sup>17</sup> See, e.g., *Lutwak*, 344 U.S. at 611-13 (stating that a sham may be proved by evidence that the marriage ceremony was accompanied by a separation agreement); *United States v. Sarantos*, 455 F.2d 877, 879-80 (2d Cir. 1972) (noting that a sham may be proved by evidence that the marriage ceremony was accompanied by divorce papers); *Rubenstein*, 151 F.2d at 918-19 (holding that a sham may be proved by the alien subsequently divorcing the citizen spouse after gaining entry to the U.S.).

<sup>18</sup> See generally, Note, *The Constitutionality of the INS Sham Marriage Policy*, 99 Harv. L. Rev. 1238, 1241-42 (1986) (describing interview procedure followed by the INS in investigating potential sham marriage participants).

<sup>19</sup> *Lutwak*, 344 U.S. at 611 (describing the federal standard of bona fide marriage for immigration purposes); see also *McLat*, 412 F. Supp. at 1027 (expanding upon the federal standard of bona fide marriage as defined in *Lutwak*). The Supreme Court held that Congress is constitutionally permitted to apply its own standards with respect to the status of familial relations, which enables them to adopt a federal standard of bona fides for the limited purpose of refusing immigration benefits to persons whose marriages do not meet that standard. See *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963).

<sup>20</sup> See *Diogo*, 320 F.2d at 905 (noting that marriage valid under state law may not be valid for immigration purposes).

<sup>21</sup> *Singh v. United States*, 370 F.2d 174, 177 (9th Cir. 1966) (distinguishing marriage validity under state law and bona fide marriage for immigration purposes). The bona fides of a marriage for immigration purposes is unrelated to the validity of marital union under state or foreign law, and the two concepts are judged independently. *Id.*; see also *Diogo*, 320 F.2d at 905 (holding marriage valid under state law need not be recognized as valid under immigration law). Therefore, in granting benefits to aliens who marry American citizens, immigration law is not concerned with the pure legality of the marriage, which depends solely on procedure. *Singh*, 370 F.2d at 177.

union; specifically, whether the bride and groom intended to establish a life together at the time they entered into marriage.<sup>22</sup> The INS may inquire into the couple's behavior before and after marriage, but such activity is only relevant to the extent that it relates to their intent at the time of marriage.<sup>23</sup> In particular, when determining if a couple entered a sham marriage, the fact-finder must evaluate the credibility of the parties, examine their conduct around the time of the marriage, and scrutinize the circumstances surrounding the marriage.<sup>24</sup>

If the INS establishes reason to doubt the legitimacy of an alien's marital relationship to a citizen, the alien must introduce evidence proving that the couple did not intend to dodge the immigration laws.<sup>25</sup> Such evidence may include, but is not limited to, proof that the petitioner listed his spouse on numerous legal transactions, as well as testimony regarding courtship, wedding ceremony, shared residence, and common experiences.<sup>26</sup> Consequently, if the couple cannot rebut the charge that their mar-

---

<sup>22</sup> See *Baria v. Leno*, 849 F. Supp. 750, 756 (D. Haw. 1994) (holding the central question when determining if a marriage is a sham is whether the bride and groom intended to establish a life together at time of marriage); *Bark v. Immigr. & Naturalization Serv.*, 511 F.2d 1200, 1202 (9th Cir. 1975) (holding that sham marriage inquiry hinges on whether the couple intended to establish a life together when they exchanged vows); *Bu Roe v. Immigr. & Naturalization Serv.*, 771 F.2d 1328, 1331 (9th Cir. 1985) (quoting *Bark* and holding that "[a] marriage is a sham if the bride and groom did not intend to establish a life together at the time they were married").

<sup>23</sup> See *Bark*, 511 F.2d at 1202 (finding the conduct of the parties relevant only to the extent that it bears upon their subjective state of mind at the time of marriage); *In re Patel*, 19 I. & N. Dec. 774, 784 (B.I.A. 1988) (finding that for sham marriage investigation, conduct of the parties after marriage is relevant to their intent at the time of marriage); *In re McKee*, 17 I. & N. Dec. at 334 (holding conduct of parties after marriage relevant only to extent that it bears upon their subjective state of mind at the time they were married).

<sup>24</sup> *Baria*, 849 F. Supp. at 756 (holding that a determination of intent to enter sham marriage requires evaluation of the "credibility of the parties along with the conduct of the parties and the circumstances involved."); *Espinoza Ojeda v. U.S. Immigr. & Naturalization Serv.*, 419 F.2d 183, 185-86 (9th Cir. 1969) (holding that a sham marriage prosecution was properly supported by various facts and circumstances existing before and after marriage). Generally, evidence that an alien offered to pay his future citizen spouse for a marriage and agreed to a subsequent divorce supports the conclusion that the marriage was a sham from its inception and was entered into solely for immigration purposes. See *Garcia-Jaramillo*, 604 F.2d at 1238. Further, where witnesses offer conflicting stories and the evidence shows that a couple is not in fact cohabiting, there is a sufficient basis to find a sham marriage. See *Horta-Ruiz v. U.S. Dep't of Justice Immigr. & Naturalization Serv.*, 635 F. Supp. 1039, 1040 (D.N.Y. 1986) (finding sham marriage where the husband "was only passingly familiar with the apartment in which [the couple] were supposedly residing and was unable to state within a decade his wife's correct age").

<sup>25</sup> *In re Soriano*, 19 I. & N. Dec. 764, 766 (B.I.A. 1988) (finding that where there is reason to doubt the validity of marriage, petitioner must prove the marriage was not entered into in order to evade immigration laws).

<sup>26</sup> *Soriano*, 19 I. & N. Dec. at 766 (holding that evidence proving a marriage was not a sham could include proof that petitioner listed his spouse on insurance policies, property leases, income tax forms, or bank accounts); *In re Phillis*, 15 I. & N. Dec. 385, 387 (B.I.A.

riage is a sham, they may be subject to various sanctions, including removal and criminal penalties.<sup>27</sup>

### *B. Prosecution Under 18 U.S.C. § 1546*

18 U.S.C. § 1546(a) punishes aliens who knowingly subscribe as true any false statement with respect to a material fact in any documentation required by immigration laws.<sup>28</sup> As a result, sham marriage participants violate 18 U.S.C. § 1546 by claiming they engaged in a bona fide marital union when in fact their marriage was meant only to confer citizenship on the alien spouse.<sup>29</sup> In that situation, the couple's assertion that their

---

1975) (evidence proving a marriage was not a sham could include evidence regarding courtship, wedding ceremony, shared residence and experiences); *see e.g.*, In re Ikpe, File No. A23 507 002, 13 Immigr. Rep. B1-78 (B.I.A. 1994) (holding marriage was sham where alien and U.S. citizen wife maintained separate apartments throughout marriage); In re Cochran, File No. A28 961 471, 9 Immigr. Rep. B1-167 (B.I.A. 1992) (finding perjury during interview casts serious doubt on bona fides of marriage, even if later recanted and supported by documentary evidence); In re Matti, 19 I. & N. Dec. 43, 44 (B.I.A. 1984) (finding sham marriage where husband and wife never lived together nor spoke the same language); In re Kitsalis, 11 I. & N. Dec. 613 (B.I.A. 1966) (ruling that a couple's marriage was a sham where husband and wife never lived together, although both remained in United States). In contrast, if there is subsisting marriage, the legal or physical separation of the parties does not affect the alien spouse's eligibility because the marriage has not been dissolved. *See* In re E---, 5 I. & N. Dec. 305, 305 (B.I.A. 1953). Moreover, post-marital separation is relevant only as a factor in assessing whether the couple had the requisite intent to live a life together at the time of their marriage. *See Bark*, 511 F.2d at 1202. Further, the existence of a bona fide marriage is not precluded where the parties live together but do not engage in sexual relations because of age or illness. *See* In re Peterson, 12 I. & N. Dec. 663, 664-65 (B.I.A. 1968).

<sup>27</sup> *See* 8 U.S.C. § 1227(a)(1)(G)(i)-(ii) (2005) (providing for deportation where an alien failed or refused to "fulfill the alien's marital agreement which...was made for the purpose of procuring the alien's admission as an immigrant"); 8 U.S.C. § 1325(c) (2005) (proscribing imprisonment and fines for "an individual who knowingly enters into a marriage for the purpose of evading...immigration laws"). The enactment of § 1352(c) is met with criticism, as critics question the need for an additional source of punishment for sham marriage, given the adequacy of existing statutes that punish sham marriage on grounds of perjury, false statements, fraud and conspiracy. *See* 4-42 Gordon, *Immigration Law and Practice*, § 42.08[5] (arguing that the addition of § 1325(c) does not add a meaningful sanction because existing statutes are seldom invoked); 92-10 Daniel Levy, *The Family in Immigration & Nationality Law: Part II*, Immigr. Briefings, at nn. 670-75 (Oct. 1992) (criticizing § 1325(c)).

<sup>28</sup> 18 U.S.C. § 1546(a) (2005). In addition, 18 U.S.C. § 1546 punishes any person who knowingly forges or misuses any visa, permit or other immigration documentation. *See generally* 18 U.S.C. § 1546(a)-(c) (2005).

<sup>29</sup> *See* *United States v. Kone*, 307 F.3d 430, 434 (6th Cir. 2002) (confirming conviction under 18 U.S.C. § 1546(a) where husband asserted marriage to his wife was bona fide but in reality, wife was paid to marry and spent less than one hour with husband before marriage); *United States v. Al-Kurna*, 808 F.2d 1072, 1074-75 (5th Cir. 1987) (finding a violation of 18 U.S.C. § 1546 when a husband asserted that he lived with his wife and shared a bona fide marriage when he was not living with his wife); *United States v. Yum*,

marriage is bona fide is a material fact that is knowingly misrepresented to the government.<sup>30</sup> In addition, a person who assists a violator of 18 U.S.C. § 1546 may be convicted as an aider and abettor of that crime.<sup>31</sup> Finally, under some circumstances, sham marriage participants convicted for false representation under 18 U.S.C. § 1546 may also be convicted under other related statutes.<sup>32</sup>

### *C. Conflicting Jurisdictional Approaches: Interpreting Lutwak v. United States*

The United States Circuit Courts of Appeals disagree on whether the validity of marriage is material where a sham marriage participant is

---

776 F.2d 490, 492-94 (4th Cir. 1985) (affirming conviction under 18 U.S.C. § 1546 for filing an immigration petition containing false representations of marital status); *Chin Bick Wah v. United States*, 245 F.2d 274, 277-78 (9th Cir. 1957) (holding an alien violated 18 U.S.C. § 1546 for falsely representing his marriage to a citizen was bona fide when it was a sham marriage intended to confer citizenship). *But see Diogo*, 320 F.2d at 903-5 (holding that because wife married in good faith and with no knowledge of ulterior motives to gain citizenship, representation by husband upon entering the country that he was a spouse of an American citizen was not a false representation in violation of 18 U.S.C. § 1546).

<sup>30</sup> See *Kone*, 307 F.3d at 434 (confirming conviction under 18 U.S.C. § 1546(a) where husband asserted his marriage was bona fide but wife was paid to marry); *Chin Bick Wah*, 245 F.2d at 277-78 (finding a violation of 18 U.S.C. § 1546 when an alien falsely representing that his marriage to a citizen was bona fide when in fact it was not). As noted above, the INS will grant admission to an alien who enters a bona fide marriage with a United States citizen but will not allow entry for an alien who marries a citizen solely to gain citizenship. See *supra* notes 12-13 and accompanying text (explaining that an alien's marriage to a citizen must be bona fide to confer citizenship on that alien spouse).

<sup>31</sup> See *Kone*, 307 F.3d at 432 (affirming conviction for conspiracy to defraud the United States for arranging sham marriages); *Yum*, 776 F.2d at 491 (upholding conviction of defendant of immigration fraud for conspiring to gain illegal entry for an alien through sham marriage); *Sarantos*, 455 F.2d at 882-85 (confirming conviction of an attorney who assisted sham marriage participants as an aider and abettor of a 18 U.S.C. § 1546(a) violation); *Lutwak*, 344 U.S. at 606-7 (affirming defendants' conviction for conspiring to defraud the United States by facilitating illegal entry of three aliens through sham marriage); *Rubenstein*, 151 F.2d at 916 (upholding conviction for conspiracy to illegally bring an alien into the country via sham marriage).

<sup>32</sup> See 8-111 Gordon, *Immigration Law and Procedure*, § 111.08[4][a] (noting false representation may also constitute perjury under 18 U.S.C. § 1621 and/or making false statements to government officers under 18 U.S.C. § 1001). Beyond 18 U.S.C. § 1546, there are many statutes that sham marriage participants may be prosecuted under. See 18 U.S.C. § 1546 (2005) (making illegal false representation of marital status as fraud against the United States); 18 U.S.C. § 1001 (2005) (punishing concealment of facts); 8 U.S.C. § 1325(c) (2005) (punishing "any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws"); 8 U.S.C. § 1227(a)(1)(G) (2005) (proscribing "deportation for an alien who entered a marriage for the purpose of procuring admission as an immigrant"); 18 U.S.C. § 1621 (2005) (punishing perjury); 18 U.S.C. § 371 (making illegal conspiracy to defraud the United States).

charged with violating 18 U.S.C. § 1546.<sup>33</sup> Specifically, the circuits diverge on the meaning of the Supreme Court's declaration in *Lutwak* that "we do not believe that the validity of marriage is material" in sham marriage prosecutions for false representation under 18 U.S.C. § 1546.<sup>34</sup> Circuits adopting the "literal interpretation" of *Lutwak* hold that the validity of marriage is immaterial in all sham marriage prosecution, including false representation charges under 18 U.S.C. § 1546.<sup>35</sup> In contrast, circuits following the "narrow interpretation" construe the *Lutwak* decision as holding that marriage validity is immaterial only when prosecuting sham marriage participants for concealment of a material fact, and therefore the validity of marriage is material when prosecuting participants for other crimes such as fraudulent misrepresentation under § 1546.<sup>36</sup>

### 1. *Lutwak v. United States*

In *Lutwak*, five defendants carried out sham marriages through which two aliens gained illegal admission pursuant to the War Brides Act,<sup>37</sup> a statute which permitted alien spouses of honorably discharged veterans of World War II to enter the country.<sup>38</sup> One defendant, an honorably discharged veteran, traveled to France and married an alien for the

---

<sup>33</sup> See *infra* notes 34-36 (describing the circuit split with regard to 18 U.S.C. § 1546 prosecution and validity of marriage).

<sup>34</sup> *Lutwak*, 344 at 611; *infra* note 51 and accompanying text (identifying the specific portion of the *Lutwak* decision that is the subject of circuit court discord).

<sup>35</sup> See *infra* notes 67-73 and accompanying text (describing the "literal interpretation" of *Lutwak* followed by the Fourth Circuit). It is noted that no accepted moniker exists for either approach and therefore the terms "narrow interpretation" and "literal interpretation" are designations invented by the author for ease of distinguishing the two interpretations.

<sup>36</sup> See *infra* notes 53-66 and accompanying text (describing the "narrow" interpretation of *Lutwak* followed by the Second and Seventh Circuits). Although the Sixth and Ninth Circuits do not directly address the split nor expressly adopt one approach over the other, they nonetheless prosecute sham marriages using a method that is consistent with the logic and reasoning of the Second and Seventh Circuits. See generally *Zalman*, 870 F.2d at 1049 (following Second and Seventh Circuit approach when prosecuting an alien for participating in sham marriage); *Qaisi*, 779 F.2d at 347 (using Second and Seventh Circuit approach when vacating an alien's conviction for sham marriage); *Dedhia*, 134 F.3d at 803 (utilizing Second and Seventh Circuit approach in affirming an alien's conviction for sham marriage); *Johl*, 370 F.2d at 175 (affirming sham marriage conviction where concealed information that the alien defendant married a citizen to secure his immigration status was a material fact that reflected on the validity of the marriage).

<sup>37</sup> 8 U.S.C. § 232 (repealed 1948). The pertinent part of this expired statute read: "alien spouses...of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall...be admitted to the United States." *Id.*

<sup>38</sup> *Lutwak*, 344 U.S. at 606-07, 609 (recounting defendants' sham marriage scheme and describing the War Brides Act); see also 8 U.S.C. § 233 (expired 1948).

sole purpose of obtaining admission for that alien in the United States.<sup>39</sup> Similarly, two defendants paid two veterans to travel abroad and marry aliens for the same illegal purpose.<sup>40</sup> Upon arriving in the country, the three arranged couples deceived immigration authorities by claiming a desire to live together in the United States as husband and wife, when they had no intention of doing so.<sup>41</sup> True to their plan, the couples never consummated their marriages and separated shortly after gaining citizenship and entry to the country.<sup>42</sup>

The *Lutwak* court affirmed the defendants' conviction for conspiring to defraud the United States in violation of 8 U.S.C. § 220(c),<sup>43</sup> the since repealed predecessor of 18 U.S.C. § 1546, which also forbade entry into the United States by false statement or misleading representation.<sup>44</sup>

---

<sup>39</sup> *Lutwak*, 344 U.S. at 608 (describing the marriage between the citizen husband and his alien aunt). Although the husband did not receive compensation for his participation, both benefited by gaining citizenship for the otherwise ineligible alien aunt. *Id.*

<sup>40</sup> *Id.* at 608-10 (noting that for these two instances, both of the veterans that traveled abroad to marry an alien spouse received a substantial fee for participating in the ceremony).

<sup>41</sup> *Id.* (noting that the marriages were "never consummated and...never intended to be."). By claiming to be the bona fide spouse of an honorably discharged veteran of World War II, the alien spouses attempted to take advantage of immigration benefits conferred by the War Brides Act, which allowed citizenship for such individuals. *See supra* note 37 (describing 8 U.S.C. § 232, the since expired War Brides Act).

<sup>42</sup> *Lutwak*, 344 U.S. at 608-10 (observing that in two of the three marriages the couples "never lived together as husband and wife"). In the third marriage, the couple never lived together as husband and wife until they appeared before a grand jury more than two years after their marriage ceremony. *Id.*

<sup>43</sup> 8 U.S.C. § 220(c) (repealed by Act of June 25, 1948, ch. 645, §21, 62 Stat. 862, now covered by 18 U.S.C. § 1546). The statute mandated punishment for "[w]hoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations." *Id.* The content of the former statute is now covered by 18 U.S.C. § 1546, as noted in the *Lutwak* decision. *See Lutwak*, 344 U.S. at 608; 18 U.S.C. § 1546. In addition to 8 U.S.C. § 220(c), the defendants in *Lutwak* were also convicted of conspiring to violate 8 U.S.C. § 180a, however, this statute is not discussed because it has since been repealed and its contents merged into 18 U.S.C. § 1546. Stat. 1551, 8 U.S.C. § 180a (1929) (punishing "[a]ny alien who...obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.").

<sup>44</sup> *Lutwak*, 344 U.S. at 620 (finding no reversible error in the record). Language in *Lutwak* addressing 8 U.S.C. § 220(c) applies directly to the current interpretation of 18 U.S.C. § 1546 because the former statute, since repealed, is now covered by the latter. *See* 18 U.S.C.A. § 1546 (2005) (noting 18 U.S.C. § 1546 is based on former 8 U.S.C. § 220); *Lutwak*, 344 U.S. at 608 (acknowledging 18 U.S.C. § 220 as predecessor to 18 U.S.C. § 1546). In turn, modern courts rely on *Lutwak*'s application of 8 U.S.C. § 220(c) and explanatory language as precedent when prosecuting sham marriages under 18 U.S.C. § 1546. *See e.g.*, *Yum*, 776 F.2d at 492 (relying on *Lutwak* as precedent for sham marriage prosecution under 18 U.S.C. § 1546); *United States v. Lozano*, 511 F.2d 1, 4 (7th Cir. 1975) (quoting *Lutwak* as a model for sham marriage prosecution under 18 U.S.C. § 1546); *Diogo*, 320 F.2d at 903 (citing *Lutwak* as precedent for sham marriage prosecution under 18 U.S.C. § 1546). In addition, modern courts rely on *Lutwak* as precedent for sham marriage prosecu-

The Supreme Court reasoned that when Congress enacted the War Brides Act to confer citizenship to "alien spouses" of veterans, Congress intended the common understanding of marriage, in which two parties undertake to establish a life together and assume certain duties and obligations.<sup>45</sup> Therefore, when each couple told immigration officials they were married and omitted the true transactional nature of their marital relationship, they falsely represented that they shared a bona fide marriage as required by the statute.<sup>46</sup> In turn, their statement constituted a false representation in violation of 8 U.S.C. § 220(c) because it carried with it implications of a state of facts that proved false.<sup>47</sup>

Conflicting interpretation arises from the *Lutwak* court's response to the defendants' argument that informing immigration officials of their marital status was not a false representation. Despite the contractual nature of their union, the defendants contended that their marriages were valid

---

tion where the defendant is charged with violating statutes other than 18 U.S.C. § 1546. See *Johl*, 370 F.2d at 175 (relying on *Lutwak* as a guide for sham marriage prosecution under 18 U.S.C. § 1001); *United States v. Pantelopoulos*, 336 F.2d 421, 424 (2d Cir. 1964) (citing *Lutwak* as precedent for sham marriage prosecution under 18 U.S.C. § 1001).

<sup>45</sup> *Lutwak*, 344 U.S. at 611 (reciting Congress' understanding of bona fide marriage for immigration purposes); see *supra* notes 16-18 and accompanying text (describing the congressionally defined standard for bona fide marriage). The *Lutwak* decision further noted that by enacting the War Brides Act, Congress intended to make it possible for veterans who married aliens to have their families join them in the United States. *Lutwak*, 344 U.S. at 611. According to the Supreme Court's interpretation, however, Congress did not intend to provide aliens with a means to circumvent immigration laws by entering fake marriages in which neither party intended to enter a bona fide marital relationship. *Id.*

<sup>46</sup> *Lutwak*, 344 U.S. at 611-12. The *Lutwak* court noted that the defendants' understanding of a "bona fide marriage" and their intentional misrepresentation of their union as such is evidenced by their care in concealing from immigration authorities the true transactional nature of their marriage. *Id.* at 611. In addition, the Supreme Court relied in part on the *Rubenstein* decision, in which the Second Circuit addressed two persons who entered a marriage for the sole purpose of facilitating the alien's entry into the country with no intention to enter the marital relationship as it is commonly understood. See *Lutwak*, 344 U.S. at 612-13 (showing approval of the *Rubenstein* holding); *Rubenstein*, 151 F.2d at 918-19. The *Rubenstein* court affirmed the defendants' conviction for violating a statute that condemned false representation and willful concealment of material fact. *Rubenstein*, 151 F.2d at 919. The court reasoned that couples' agreement to separate upon the alien spouse's entry was a material fact, and by intentionally failing to inform immigration officials of this scheme, the couple violated the statute by suppressing this material fact. *Id.* at 918. Accordingly, the court held that such suppression is fraud, "even though the marriage is valid." *Id.*

<sup>47</sup> *Lutwak*, 344 U.S. at 611-12 (observing that "[n]o one is being prosecuted for an offense against the marital relation" but instead for "commit[ting] offenses against the United States"). The Supreme Court also noted an alternative ground for convicting the defendants of false representation via sham marriage. *Id.* at 610-11. In particular, the Court reasoned that if two persons, as part of a plan to evade immigration laws, agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they were never married at all. *Id.* Therefore, by representing that they were married, the defendants falsely represented their marital status because in the eyes of the law they were never married at all. *Id.*

under French law.<sup>48</sup> Rejecting this argument, the Supreme Court held that under the circumstances, the validity of marriage was immaterial because the marriage ceremonies were only a step in the defendant's overall fraudulent scheme.<sup>49</sup> Instead, the Court reasoned that the couples' false representation stemmed from their intentional concealment from immigration authorities that they were never to live together as husband and wife and planned to separate immediately after entry into the country.<sup>50</sup> Despite the seemingly clear language of this decision, Justice Minton's declaration in *Lutwak* that "we do not believe that the validity of the [defendants'] marriages is material" resulted in circuit courts adopting conflicting stances on the reach of that statement with regard to sham marriage prosecution under 18 U.S.C. § 1546.<sup>51</sup> Specifically, the circuits disagreed as to whether that statement applied universally to all sham marriage prosecutions, or alternatively, only to certain violations resulting from a sham marriage scheme, such as concealment of a material fact.<sup>52</sup>

## 2. Narrow Interpretation of *Lutwak*

According circuits following the "narrow interpretation" of *Lutwak*, the validity of the marriage in question is material in a prosecution under 18 U.S.C. § 1546 for making false representations of marital status.<sup>53</sup> Although this view is shared by the Second, Sixth, Seventh, and Ninth Circuits, it was the Second Circuit that gave birth to the rule in the 1963 case

---

<sup>48</sup> Compare *infra* notes 67-73 and accompanying text (describing analysis of circuits that interpret the *Lutwak* court's response literally) with *infra* notes 50-63 and accompanying text (describing analysis of circuits that interpret the *Lutwak* court's response narrowly). See generally *Lutwak*, 344 U.S. 610-13 (describing petitioners' objection on appeal and affirming the lower court's conviction).

<sup>49</sup> *Lutwak*, 344 U.S. at 611 (remarking that the defendants' actions were part of a conspiracy). The *Lutwak* decision noted that the defendants were not being prosecuted for an offense regarding the legality or validity of their marital relation. *Id.* at 610. Instead, while the marriage ceremonies did result in a valid marriage, these ceremonies and their validity were only considered as part of the defendants' fraudulent conspiracy to defraud the United States. *Id.*

<sup>50</sup> *Lutwak*, 344 U.S. at 611. The *Lutwak* court also noted that the defendants' care in concealing the transactional nature of their marriage from immigration authorities proved that they were aware that the statute was meant to benefit only those couples that enter marriage with the intent to live together as husband and wife. *Id.*

<sup>51</sup> *Lutwak*, 344 U.S. at 611 (supplying the language upon which this debate is grounded); see also *infra* notes 53-73 and accompanying text (detailing differing interpretations of *Lutwak* with regard to sham marriage prosecution under 18 U.S.C. § 1546).

<sup>52</sup> See *infra* notes 53-73 and accompanying text (noting the conflicting explanations of *Lutwak* with regard to sham marriage prosecution under 18 U.S.C. § 1546).

<sup>53</sup> See *Diogo*, 320 F.2d at 905 (holding validity of marriage material to sham marriage prosecution under 18 U.S.C. § 1546); see generally *Lozano*, 511 F.2d at 5 (deciding that in a sham marriage prosecution under 18 U.S.C. § 1546, marriage validity is material).

*United States v. Diogo*.<sup>54</sup> The defendants in *Diogo* appealed convictions under 18 U.S.C. § 1546 for falsely representing to immigration authorities that they were married when they entered sham marriages in order to obtain entry to the United States.<sup>55</sup> On appeal, the *Diogo* court reversed the convictions for false representation under § 1546, holding that because the defendants' marriages were valid under state law, their representations as such to immigration authorities could not be considered false.<sup>56</sup>

At the heart of the *Diogo* decision and the "narrow interpretation" of *Lutwak* is the notion that because false representations require proof of actual falsity, a defendant cannot be convicted for falsely representing that a marriage is valid unless that marriage was in fact invalid.<sup>57</sup> Specifically, the *Diogo* court reasoned that because the defendants' marriages were valid under New York law, they could not be convicted of falsely representing that their marriages were valid when they were in fact valid under state law.<sup>58</sup> According to this approach, the validity of marriage is material

---

<sup>54</sup> *Diogo*, 320 F.2d at 905. It is noted that no Sixth or Ninth circuit case directly addresses the circuit split on this issue, however, both prosecute sham marriages using 18 U.S.C. § 1546 and 18 U.S.C. § 1001 in a manner that is consistent with the logic and reasoning of the Second and Seventh circuits. See generally *Dedhia*, 134 F.3d at 803 (utilizing Second and Seventh Circuit approach in affirming an alien's conviction for sham marriage); *Zalman*, 870 F.2d at 1048 (following Second and Seventh Circuit approach when prosecuting an alien for participating in sham marriage); *Qaisi*, 779 F.2d at 347 (using Second and Seventh Circuit approach when vacating an alien's conviction for sham marriage); *Johl*, 370 F.2d at 175 (affirming sham marriage conviction where concealed information that the alien defendant married a citizen to secure his immigration status was a material fact that reflected on the validity of the marriage).

<sup>55</sup> *Diogo*, 320 F.2d at 900-02. As part of their scheme, the defendants paid an American citizen to go through with a marriage ceremony. *Id.* at 901-02. The couples never lived together nor consummated their marriage. *Id.* The defendants were also convicted of 18 U.S.C. § 1001, however, the *Diogo* court concluded that the statutory pattern revealed that acts sufficient to constitute violation of the relevant clause of 18 U.S.C. § 1546 also constitutes a violation of 18 U.S.C. § 1001. *Id.* at 902. Therefore, the court reviewed the counts under the two statutes as the same charge and in turn, the Government's failure to prove a violation under either statute would reverse all convictions under both. *Id.*

<sup>56</sup> *Diogo*, 320 F.2d at 903 (holding that the marriage was valid when represented to the immigration authorities).

<sup>57</sup> *Id.* at 905 (holding that because falsity is an element of prosecution for false representation of marital status, validity of marriage must be material to such prosecution); see *Lozano*, 511 F.2d at 5 (holding that a knowingly false statement may not be found where the challenged assertion is literally true, even if false by implication or omission). The *Lozano* court reasoned that such logic is consistent with the Supreme Court's construction of the related federal perjury statute in *Bronston v. United States*. See *Lozano*, 511 F.2d at 5 (citing *Bronston v. United States* and the cases cited therein); *Bronston v. United States*, 409 U.S. 352, 360 (1973) (holding that perjury statutes are not to be "loosely construed, nor...invoked simply because a wily witness succeeds in derailing the questioner -- so long as the witness speaks the literal truth").

<sup>58</sup> *Diogo*, 320 F.2d at 905-06 (focusing on whether representations of marriage made by the defendants were literally false and known to be false when made to immigration authorities); see *Lozano*, 511 F.2d at 5 (reversing sham marriage participants' convictions

to every false representation charge under 18 U.S.C. § 1546 because it is impossible to determine whether a defendant made a false representation as to the validity of his marriage unless it is proved that his marriage was either valid or invalid.<sup>59</sup>

To square the *Diogo* holding with the *Lutwak* court's declaration that marriage validity is immaterial in sham marriage prosecution, circuits following the narrow interpretation rely on the notion that 18 U.S.C. § 1546 and its predecessor encompass two distinct offenses: concealment of a material fact and false representation.<sup>60</sup> These circuits construe the *Lutwak* defendants' plan to separate upon gaining admission for the alien as a material fact, concealment of which constituted a violation of the concealment tier of 18 U.S.C. § 1546.<sup>61</sup> Therefore, the "narrow interpretation" approach concludes that the sole ground for conviction in *Lutwak* was concealment of a material fact, and not false representation.<sup>62</sup> Thus, because

---

for falsely representing their marital status under 18 U.S.C. § 1546 because their marriage was in fact valid under state law). Inherent in the *Diogo* court's reasoning is their finding that the defendant couple represented that their marriage was valid under state law only, and did not knowingly represent that their union met the federal immigration standard for bona fide marriage. *Diogo*, 320 F.2d at 905-06. The court further noted that had it been proved that the defendants were aware that their marriage did not meet the immigration standard for bona fide marriage but they nonetheless represented their union as such, those statements would constitute concealment of a material fact in violation of 18 U.S.C. § 1546. *Id.* at 907.

<sup>59</sup> See *Diogo*, 320 F.2d at 905 (observing that if the court found otherwise, it would incorporate the offense of concealment into the separate crime of false representations). According to the *Diogo* court, false representations are similar to common law perjury in that both require proof of actual falsity. *Id.* at 902.

<sup>60</sup> See *Pantelopoulos*, 336 F.2d at 424 (distinguishing between charges of false representation of marital status and concealment of a material fact); *Diogo*, 320 F.2d at 902 (differentiating between charges of false representation of marital status and concealment of a material fact). The *Diogo* court argued that acts adequate to comprise a violation of 18 U.S.C. § 1546 also constitute a violation of 18 U.S.C. § 1001, suggesting that both statutes may be understood collectively. *Diogo*, 320 F.2d at 902. The opinion further contended that the relevant sections of 18 U.S.C. § 1001 and 18 U.S.C. § 1546 include two distinct offenses: concealment of a material fact and false representation. *Id.* According to the *Diogo* court, both false representation and concealment of a material fact are committed when a defendant creates a misconception of the true state of affairs on the part of the government, however, what must be shown to establish each offense differs greatly. *Id.*

<sup>61</sup> See *Diogo*, 320 F.2d at 905 (interpreting *Lutwak*). Courts following the "narrow interpretation" approach apply this general logic to prosecutions under 18 U.S.C. § 1546 for similar factual situations. See *Johl*, 370 F.2d at 177 (holding concealed information that the defendant married a citizen to secure admission was a material fact); *Diogo*, 320 F.2d at 905 (noting that deviation from Congress' definition of "normal" marriage is a material fact, the concealment of which violates 18 U.S.C. § 1546).

<sup>62</sup> See *Diogo*, 320 F.2d at 904 (quoting *Lutwak*). In addition, the Second Circuit construed *Lutwak* as holding that because Congress only grants entry to aliens whose marriage to a citizen conforms with the "common understanding" of that relationship, any deviation from that normal form of the relationship is a material fact in an application for such a priority. *Id.*; *supra* note 19 (describing the "common understanding" of marriage as defined by Congress and used as a standard for immigration purposes). Therefore, according

the language in the *Lutwak* decision focused only on concealment of a material fact, the *Lutwak* court's declaration that marriage validity is not material to sham marriage prosecution only applies to charges of concealment, not to false representation.<sup>63</sup>

Proponents of the "narrow interpretation" contend that the *Diogo* court did not abandon Supreme Court precedent by holding that marriage validity is material to false representation charges under § 1546.<sup>64</sup> Specifically, these circuits argue that although *Lutwak* held that marriage validity is immaterial to prosecution for concealment of a material fact under § 1546, that court did not intend to extend this holding to charges of false representation under the same statute.<sup>65</sup> The effect of this interpretation is two fold; first, participants in a sham marriage may be convicted under 18 U.S.C. § 1546 for concealing material facts about the true state of their marriage and second, they may also acquitted of making false statements about their marital status under the same statute if that statement is technically true because their marriage is valid within the jurisdiction in which it was carried out.<sup>66</sup>

### 3. Literal Interpretation of *Lutwak*

In contrast to the "narrow interpretation" of *Lutwak*, the Fourth Circuit adopts a "literal interpretation," holding that the validity of marriage under state or foreign law is immaterial when prosecuting a sham marriage

---

to the "narrow interpretation," *Lutwak* instructs that sham marriage participants conceal a material fact in violation of 18 U.S.C. § 1546 when they knowingly represent to immigration authorities that they entered a bona fide marriage, and omit to explain the true nature of their marital relationship. *Diogo*, 320 F.2d at 904-05.

<sup>63</sup> See *Diogo*, 320 F.2d at 904 (interpreting the language in *Lutwak*); *Lozano*, 511 F.2d at 4-5 (explaining that *Lutwak* "has been interpreted as relying on the concealment theory" and endorsing that line of thought).

<sup>64</sup> *Diogo*, 320 F.2d at 905 (arguing the *Diogo* decision adheres to Supreme Court precedent).

<sup>65</sup> See *Diogo*, 320 F.2d at 904 (holding that the *Lutwak* defendants' concealment of their agreements to separate was the ground relied upon by the *Lutwak* court). In support of this contention, circuits following the narrow approach assert that because falsity is an element of prosecution for false representations of one's marital status, it follows that validity of marriage must be material to such prosecution. *Id.* at 905. The *Diogo* court contended that interpretation of *Lutwak* as a prosecution for false representation would "distort the language of the statute and assimilate the separate offense of concealment into the different one of false representation solely because of a similarity of prohibited objectives." *Id.*

<sup>66</sup> See *Diogo*, 320 F.2d at 909 (affirming convictions against sham marriage participants for concealment of a material fact under 18 U.S.C. § 1546 but reversing charges of false representation of marital status); *Lozano*, 511 F.2d at 6 (affirming convictions against sham marriage participants for concealment of a material fact under 18 U.S.C. § 1546 but reversing charges of false representation of marital status).

participant for fraudulently misrepresenting their marital status under 18 U.S.C. § 1546.<sup>67</sup> According to this approach, a correct reading of *Lutwak* instructs that for a marriage to be bona fide for immigration purposes, the couple must enter the marital relationship as it is commonly understood and not merely as a pretense used to deceive others.<sup>68</sup> Therefore, when the alien spouse in *Lutwak* told immigration officials he entered a bona fide marriage with a citizen and withheld the true transactional nature of his union, he falsely represented that his marriage met the common understanding of marriage and was prosecuted upon those grounds.<sup>69</sup> Accordingly, the Fourth Circuit understands the Supreme Court's express declaration that "we do not believe that the validity of marriage is material" to apply to sham marriage prosecution for false representation of marital status.<sup>70</sup> As a result, circuits following the literal interpretation assert that the validity of a sham marriage under state or foreign law is immaterial to prosecution for false representation because the defendant is charged with

---

<sup>67</sup> See *Yum*, 776 F.2d at 492 (holding that where sham marriage participants told immigration officials that they were married, validity of marriage is not material to prosecution for false representation under 18 U.S.C. § 1546). Second Circuit Judge Clark provided the logic comprising the "literal interpretation" of *Lutwak* in his dissenting opinion in *Diogo*. *Diogo*, 320 F.2d at 909-10 (Clark, J., dissenting) (expressing inability to perceive why *Diogo* was not "precisely governed" by the declaration in *Lutwak* that validity of marriage is immaterial to false representation prosecutions against sham marriage participants). Additionally, the U.S. Air Force Court of Military Review accepted the Fourth Circuit's interpretation. See *United States v. Bolden*, 23 M.J. 852, 855 (C.M.R. 1987) (affirming conviction under a different offense but approving the "literal interpretation" of *Lutwak* set forth in *Yum* and Judge Clark's dissenting opinion in *Diogo*).

<sup>68</sup> See *Yum*, 776 F.2d at 492 (citing *Lutwak* and setting forth their interpretation of the case). Citing *Lutwak* as precedent, the *Yum* court contends that a bona fide marriage as it is commonly understood is a marriage in which the two parties undertake to establish a life together and assume specific duties and obligations. *Id.* at 492-93; see *Lutwak*, 344 U.S. at 611 (describing the common understanding of marriage as defined by Congress and used for immigration purposes).

<sup>69</sup> See *Yum*, 776 F.2d at 492 (noting that the "Supreme Court has clearly held immaterial the validity of a marriage undertaken as a part of a conspiracy to defraud the United States"). In addition, the Fourth Circuit cites the *Rubenstein* holding that no marriage is formed at all if the spouses marry for the purpose of representing it as such to the outside world and with the understanding that their union will be ended once it serves its purpose of deceiving immigration officials. *Id.* at 493 (citing *Rubenstein*); see also *Rubenstein*, 151 F.2d at 918. According to this logic, when the sham marriage participants in *Lutwak* told immigration officials that they were married, their actions constituted a false representation because for immigration purposes, they were not married at all. *Id.* Although *Rubenstein* is a Second Circuit decision and as a result is not binding on the Fourth Circuit, the logic within that case is cited with approval by the Supreme Court and the Fourth Circuit in formulating their "literal interpretation." See *Lutwak*, 344 U.S. at 612-13 (citing *Rubenstein* directly and endorsing Second Circuit logic in that case); *Yum*, 776 F.2d at 493 (citing *Rubenstein* and endorsing Second Circuit's logic).

<sup>70</sup> See *Yum*, 776 F.2d at 492 (noting the Supreme Court held validity of marriage immaterial to sham marriage prosecution for false representation); *Lutwak*, 344 U.S. at 611 (stating "we do not believe that the validity of marriage is material").

misrepresenting that his union met the federal standard of bona fide marriage, not for falsely representing that their marriages are valid under state or foreign law.<sup>71</sup> In support of their “literal interpretation” of *Lutwak*, the Fourth Circuit rejects the “narrow interpretation” followed by the Second, Sixth, Seventh and Ninth Circuits, dismissing that approach as a failure to adhere to straightforward Supreme Court precedent set forth in *Lutwak*.<sup>72</sup> Furthermore, proponents of the “literal interpretation” contend that the “narrow interpretation” frustrates legislative intent by allowing aliens avoid prosecution under 18 U.S.C. § 1546 despite entering a marriage that is meant only to confer immigration benefits but is valid under state law.<sup>73</sup>

### III. ANALYSIS

In *Lutwak*, the Supreme Court held that because the defendants falsely represented that their marriages fell within the common understanding of marriage as defined by Congress, it was immaterial whether their unions were valid under state or foreign law.<sup>74</sup> The *Lutwak* court deemed the validity of the defendants’ marriage under state or foreign law incident-

---

<sup>71</sup> See *Yum*, 776 F.2d at 492-93 (noting that validity of marriage has no bearing on whether the sham marriage participant falsely represented the nature of their marriage).

<sup>72</sup> See *Yum*, 776 F.2d at 493 (rejecting the Second and Ninth Circuit holding that validity of marriage is material to prosecution for false representation of marital status). Compare *Yum*, 776 F.2d at 492 (asserting that the Supreme Court’s declaration that “we do not believe that the validity of marriage is material” applies to prosecution for sham marriage generally) with *Diogo*, 320 F.2d at 904 (holding that Supreme Court’s declaration that “we do not believe that the validity of marriage is material” applied only to sham marriage prosecutions for concealment of a material fact and not to prosecutions for false representation). See also *Diogo*, 320 F.2d at 909-10 (Clark, J., dissenting) (accusing the majority of quoting *Lutwak* out of context). Brushing aside any factual or legal distinction between *Lutwak* and *Diogo*, Judge Clark expressed inability to perceive why *Diogo* was not “precisely governed” by the declaration in *Lutwak* that the validity of marriage is immaterial to false representation prosecutions against sham marriage participants. *Id.* Judge Clark labeled the majority’s distinction between charges of false representation and charges of concealment of a material fact as an unsuccessful attempt to fragmentize the facts so as to look for differences in representations made by the defendants in *Diogo* and those appearing in earlier cases. *Id.* at 910. In contrast to the allegedly flawed logic of the majority, Judge Clark called attention to the similarity between the facts in *Lutwak* and the facts of *Diogo*, and asserted “what more precise testimony of obviously and knowingly making a false claim against the government could not be imagined.” *Id.*

<sup>73</sup> See *Diogo*, 320 F.2d at 910 (Clark, J., dissenting) (arguing that the majority validated the business of sham marriages by creating an exploitable gap in immigration law); *supra* note 13 and accompanying text (noting that in granting immigration benefits to alien spouses of citizens, Congress did not intend to provide aliens with means to circumvent immigration law via sham marriages).

<sup>74</sup> See *supra* notes 9, 43-47, 67-71 and accompanying text (detailing the *Lutwak* holding).

tal to their overall conspiracy to defraud the United States.<sup>75</sup> Therefore, by holding marriage validity immaterial in sham marriage prosecutions for false representation under 18 U.S.C. § 1546, the “literal interpretation” of *Lutwak* follows Supreme Court precedent and reflects the legislative goal of extending immigration benefits to only those aliens whose marriage to a citizen falls within the common understanding of that union, as defined by Congress.<sup>76</sup> As a result, the “literal interpretation” constitutes a continuation of the Supreme Court’s declaration that “we do not believe the validity of the marriages is material.”<sup>77</sup>

In contrast, the “narrow interpretation” inaccurately interprets the rationale of *Lutwak*.<sup>78</sup> By holding that the validity of marriage is material when prosecuting sham marriage participants for false representation under 18 U.S.C. § 1546, circuits following the “narrow interpretation” veer inexorably from Supreme Court precedent.<sup>79</sup> In particular, the “narrow interpretation” erroneously concludes that the *Lutwak* defendants were prosecuted for concealment of a material fact, not false representation.<sup>80</sup> As such, courts following this approach claim that the Court’s declaration that marriage validity is immaterial only applies to concealment charges and not to prosecution for false representation.<sup>81</sup> This approach misinterprets why the *Lutwak* court recognized that the defendants’ concealed the transactional nature of their marriage.<sup>82</sup> The Supreme Court cited the concealment as proof that the defendants knowingly and affirmatively misrepresented their marriage as bona fide for immigration purposes, not as the foundation of a concealment of material fact charge as the narrow interpretation contends.<sup>83</sup> In fact, the Supreme Court expressly stated that by

<sup>75</sup> See *supra* notes 49-50 and accompanying text (noting that validity of marriage was immaterial because the marriage ceremonies in *Lutwak* were only one step in the defendant’s fraudulent scheme).

<sup>76</sup> See *supra* notes 9, 19-22, 45-47 and accompanying text (illustrating the Congressionally-defined common understanding of marriage).

<sup>77</sup> See *supra* notes 67-71 and accompanying text (describing the literal interpretation of *Lutwak*).

<sup>78</sup> See *supra* note 71 and accompanying text (explaining the narrow interpretation of *Lutwak*).

<sup>79</sup> See *supra* note 71-73 and accompanying text (explaining how the narrow interpretation of *Lutwak* disregards Supreme Court precedent).

<sup>80</sup> See *supra* notes 10-11, 52, 56, 58-62 and accompanying text (providing the rationale behind the “narrow interpretation” conclusion that the defendants in *Lutwak* were prosecuted for concealment of a material fact).

<sup>81</sup> See *supra* notes 10-11, 62 and accompanying text (stating the “narrow interpretation” approach that the sole ground for conviction in *Lutwak* was concealment of a material fact, not false representation).

<sup>82</sup> See *supra* note 46, 50, 71 and accompanying text (identifying the conflicting theories on why the *Lutwak* court recognized that the defendants hid the transactional nature of their marriage).

<sup>83</sup> See *supra* notes 47, 50, 68 and accompanying text (explaining why the Supreme Court cited the defendants’ concealment of their transactional marriage).

falsely claiming to have engaged in a union that meets the immigration standard of bona fide marriage, the defendants engaged in false representation because their statements were intended to carry with them implications of a state of facts which were not in fact true.<sup>84</sup> The *Lutwak* opinion is devoid of any mention of charges for concealment of a material fact.<sup>85</sup>

Additionally, the narrow interpretation of *Lutwak* allows aliens to avoid prosecution under 18 U.S.C. § 1546 despite entering a marriage that is meant only to confer immigration benefits.<sup>86</sup> Under the narrow interpretation, an alien who entered a purely transactional marriage that is nonetheless valid under some state or foreign law would avoid prosecution for false representation because their marriage is legally valid.<sup>87</sup> By interpreting *Lutwak* to allow for this result, the “narrow interpretation” disregards Congressional intent to award immigration benefits to only those aliens that enter bona fide marriages, regardless of their validity under state law.<sup>88</sup> Moreover, the “narrow interpretation” disables the government’s ability to use § 1546 as a tool to prosecute aliens with valid marriages under state law, but who falsely represented that their marriage is bona fide when it is an illegal union meant only to grant citizenship upon an alien.<sup>89</sup> A correct reading of *Lutwak* confirms that the Supreme Court recognized and affirmed Congressional intent to grant immigration benefits only to aliens who enter a bona fide marriage, whereby the couple undertakes to establish a life together and assume certain duties and obligations.<sup>90</sup> It was with this intent that the Supreme Court declared that marriage validity is immaterial when prosecuting sham marriage participants for false representation because the legality of a marriage under state or foreign law is not considered when determining whether a marriage is bona fide for immigration pur-

---

<sup>84</sup> See *supra* notes 46-47, 68, 70 and accompanying text (describing the substance of the *Lutwak* defendants’ false representation).

<sup>85</sup> See *supra* notes 50, 71 and accompanying text (holding that each couples’ false representation stemmed from their intentional concealment that they were not to live as husband and wife and planned to separate after entry).

<sup>86</sup> See *supra* note 73 and accompanying text (noting that Congress did not intend to allow aliens to circumvent immigration law by granting immigration benefits to alien spouses of citizens).

<sup>87</sup> See *supra* note 73 and accompanying text (explaining that Congress did not intend to allow aliens to avoid immigration law).

<sup>88</sup> See *supra* notes 18-22, 68, 73 and accompanying text (explaining Congressional intent to award an alien spouse citizenship only if the marital relationship is “bona fide” for immigration purposes, but not if the union was contrived to avoid immigration laws).

<sup>89</sup> See *supra* note 66 and accompanying text (noting that under the narrow interpretation, participants in a sham marriage may be convicted under 18 U.S.C. § 1546 for concealing material facts but acquitted of making false statements about their marital status under the same statute).

<sup>90</sup> See *supra* notes 19-22, 45, 67, 70 and accompanying text (specifying Congressional intent to grant immigration benefits only to aliens who enter a bona fide marriage).

poses.<sup>91</sup> Finally, it is doubtful that in passing 18 U.S.C. § 1546, Congress intended to create such an obvious gap in the immigration laws, allowing for such convenient exploitation of otherwise strict procedures.<sup>92</sup>

#### IV. CONCLUSION

Congress statutorily grants citizenship to aliens who marry citizens in good faith and plan to live with that spouse as husband and wife. The Supreme Court recognized that this privilege has limits, holding that transactional sham marriage does not qualify an alien spouse for citizenship but instead may result in prosecution under false representation statutes such as 18 U.S.C. § 1546. In turn, by holding that marriage validity is material to prosecutions under 18 U.S.C. § 1546, the “narrow interpretation” of *Lutwak* ignores congressional intent and allows sham marriage participants to escape punishment under 18 U.S.C. § 1546 as long as the union is valid in the state or country in which it was granted. This interpretation undermines one reason Congress enacted 18 U.S.C. § 1546—to punish those who falsely represent that their marriage meets the common understanding of marriage when in reality the union was transactional and meant only to confer citizenship on the alien spouse. In contrast, the “literal interpretation” of *Lutwak* follows Supreme Court precedent and reflects congressional intent by holding that marriage validity is immaterial to sham marriage prosecution under 18 U.S.C. § 1546. Specifically, this approach denies immigration benefits to aliens who enter sham marriages and falsely represent that the union is bona fide, regardless of whether that marriage is technically valid under state or foreign law.

*Brian Thomas*

---

<sup>91</sup> See *supra* notes 9, 20-21, 35, 49-50, 66, 70 and accompanying text (explaining the Supreme Court holding that marriage validity is immaterial when prosecuting sham marriage participants for false representation).

<sup>92</sup> See *supra* notes 4, 13, 19-21, 45, 72 and accompanying text (describing Congressional limits on an alien’s ability to gain citizenship through marriage to a citizen).