Evidence - Privilege against Adverse Spousal Testimony - A Testifying Spouse May Invoke the Privilege against Adverse Spousal Testimony in a Grand Jury Proceeding Even Though the Government Has Promised That the Nontestifying Spouse Will Not Be Indicted by That Particular Grand Jury if the Nontestifying Spouse Is a Target of the Underlying Investigation

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EVIDENCE—PRIVILEGE AGAINST ADVERSE SPOUSAL TESTIMONY—A
TESTIFYING SPOUSE MAY Invoke THE PRIVILEGE AGAINST ADVERSE
SPOUSAL TESTIMONY IN A GRAND JURY PROCEEDING EVEN THOUGH
THE GOVERNMENT HAS PROMISED THAT THE NONTESTIFYING SPOUSE
WILL NOT BE INDICTED BY THAT PARTICULAR GRAND JURY IF THE
NONTESTIFYING SPOUSE IS A TARGET OF THE UNDERLYING
INVESTIGATION

In re Grand Jury Matter (1982)

A witness pleaded guilty to charges relating to involvement in an illegal
drug operation and was subpoenaed to testify before a grand jury investigating the drug operation in which she had participated. Although the witness was immunized against personal criminal liability stemming from her testimony, she refused to testify concerning the involvement of other parties in the drug operation on the basis of the privilege against adverse spousal testimony. The Government admitted that while the witness' testimony was sought in relation to the activities of third parties, the witness' husband was a target of its investigation. The Government further conceded that the witness' testimony could indirectly have a bearing on the husband's indictment in a subsequent proceeding.

The Government filed a motion to compel the witness' testimony and in support of such motion agreed to preclude the possibility that the specific grand jury before which the witness was asked to testify might indict her

1. In re Grand Jury Matter, 673 F.2d 688, 689 (3d Cir. 1982). The witness pleaded guilty to "one count of conspiracy to possess with intent to distribute and to distribute methamphetamine, a non-narcotic controlled substance, and one count of aiding and abetting the distribution of methamphetamine." Id.

2. The record in this case was ordered sealed and therefore, the names of the interested parties were not disclosed. Id. at n.1.

3. Id. at 689.

4. Id. at 689 & n.4. The witness was immunized under 18 U.S.C. § 6002 (1976). Id. This section authorizes a United States Attorney to grant use and derivative-use immunity to an individual who refuses to testify before a court or grand jury proceeding on the basis of the privilege against self-incrimination. The individual may then be compelled to testify because such testimony cannot be used against the witness, either directly or indirectly, in any criminal proceeding. Id. at 689-90 n.4. For a discussion of use and derivative-use immunity, see note 36 and accompanying text infra.

The privilege against self-incrimination is a constitutional privilege. See U.S. Const. amend. V. That amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Id.

5. 673 F.2d at 689-90. The privilege against adverse spousal testimony is a common law, not a constitutional, privilege. See notes 12-28 and accompanying text infra.

6. 673 F.2d at 690.

7. Id.

(820)
spouse. However, the Government did not conceal the fact that a separate grand jury would be empaneled before which the United States would seek the husband's indictment in the event that the witness' testimony implicated a third party, and that person was willing to testify against the witness' husband. The District Court for the Eastern District of Pennsylvania denied the Government's motion to compel her testimony and held that the indirect use of the witness' testimony contemplated by the Government would violate the witness' privilege. On appeal, the United States Court of Appeals for the Third Circuit affirmed the order of the district court, holding that

[W]hen . . . the Government openly seeks one spouse's testimony concerning the activity of a third party, who is alleged to have engaged in a common criminal scheme with a husband and his wife, and the Government thereby hopes also to reach the nonwitness spouse, the testimony sought is sufficiently adverse to the interests of the absent spouse to permit the invocation of the privilege against adverse spousal testimony.

8. Id. Initially, the Government filed an affidavit with the district court certifying that "nothing said by the witness before the grand jury would be used, 'either directly or indirectly, against her husband in any legal proceedings.'" Id. In effect, the Government appeared to be promising to confer use and derivative-use immunity on the nontestifying spouse, coextensive with that granted to the witness, as a method of respecting the witness' privilege against adverse spousal testimony while still securing the desired testimony which could be used against other members of the drug operation. Id.

However, in a subsequent affidavit, the Government attempted to narrow the scope of the immunity offered to the witness' husband by promising only to refrain from naming the witness' husband in an indictment presented to the specific grand jury before which the witness' testimony was sought. Id.

9. Id. In effect, the Government severed the husband's indictment from that of the other defendants in an attempt to respect the witness' privilege against adverse spousal testimony by ensuring that the grand jury before which the witness was sought to testify could not use the witness' testimony against her husband. Id. at 692. The Third Circuit had previously suggested by implication that such a procedural safeguard might adequately respect the privilege. See In re Grand Jury (Malfitano), 633 F.2d 276, 279 (3d Cir. 1980). For a discussion of Malfitano, see notes 44-49 and accompanying text infra.


[1]he only difference that exists in the present case from the Malfitano decision is that the testimony of the wife here will not directly implicate her husband before the same grand jury before which she is testifying. Rather, it will indirectly implicate her husband in a future legal proceeding. As such, the effect is the same; the danger to the marital relationship is as manifest.


11. The case was heard by Judges Adams, Sloviter, and Rosenn. Judge Rosenn wrote the opinion in which Judge Sloviter concurred except for footnote 12. Judge Adams wrote a dissenting opinion.
In re Grand Jury Matter, 673 F.2d 688, 692 (3d Cir. 1982).

At common law husbands and wives were disqualified from testifying either for or against one another.\textsuperscript{12} Although the common law disqualification of the husband or wife to testify as a witness for the party-spouse may be of some historical relevance,\textsuperscript{13} it is entirely distinct from the privilege not to testify against one’s wife or husband.\textsuperscript{14}

While the historical reason for the birth of the privilege against adverse spousal testimony is not entirely clear,\textsuperscript{15} the modern justification for recognizing spousal privilege against adverse spousal testimony stem from the same source, it is clear that the viability of the disqualification as a matter of federal law is well settled today. The Supreme Court rejected the common law rule excluding testimony by spouses for each other in 1933. See Funk v. United States, 290 U.S. 371, 386 (1933). The Funk Court recognized that spousal disqualification was based on the practice of disqualifying witnesses with a personal interest in the outcome of a case. Id. at 376. However, the modern trend has become to admit “interested” testimony and to allow the jury to assess its credibility. Id. at 380. With the erosion of the underlying rationale for spousal disqualification, the Funk Court saw no merit in its continued recognition. Id. at 386.

\textsuperscript{12} C. McCormick, Handbook of the Law of Evidence § 66, at 144 (2d ed. 1972). Such disqualification has ancient roots in Anglo-American jurisprudence. Lord Coke wrote in 1628 that “it hath been resolved by the Justices that a wife cannot be produced either against or for her husband, [for they are two souls in one flesh]. . . .” E. Coke, A Commentarie upon Littleton 6b (1628). See also Hawkins v. United States, 358 U.S. 74, 75 (1958), overruled on other grounds, Trammel v. United States, 445 U.S. 40 (1980) (“The common-law rule, accepted at an early date as controlling in this country, was that husband and wife were incompetent as witnesses for or against each other.”).

\textsuperscript{13} Regardless of whether the common law spousal disqualification and the privilege against adverse spousal testimony stem from the same source, it is clear that the viability of the disqualification as a matter of federal law is well settled today. The Supreme Court rejected the common law rule excluding testimony by spouses for each other in 1933. See Funk v. United States, 290 U.S. 371, 386 (1933). The Funk Court recognized that spousal disqualification was based on the practice of disqualifying witnesses with a personal interest in the outcome of a case. Id. at 376. However, the modern trend has become to admit “interested” testimony and to allow the jury to assess its credibility. Id. at 380. With the erosion of the underlying rationale for spousal disqualification, the Funk Court saw no merit in its continued recognition. Id. at 386.

\textsuperscript{14} See 8 J. Wigmore, Evidence § 2227, at 211 (McNaughton rev. 1961). Speaking of the privilege against adverse spousal testimony, Wigmore states that it is odd that the privilege “comes into sight about the same time as the disqualification of husband and wife to testify on one another’s behalf. . . . for the two have no necessary connection in principle, and yet they travel together, associated in judicial phrasing, from almost the beginning of their recorded journey.” Id.

This spousal disqualification is said to result from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify on his own behalf because of his interest in the proceeding; second, the rule that a husband and wife were considered as one entity and because the wife had no recognized separate legal existence, the husband was that entity. Given these two rules, it logically followed that whatever statements were inadmissible for the husband were equally inadmissible for his wife. See Trammel v. United States, 445 U.S. 40, 44 (1980).

The privilege against adverse spousal testimony should be distinguished from the privilege which protects private marital communications. Both privileges are sometimes referred to as the “marital privilege.” Critics of the privilege against adverse spousal testimony remind that “[i]t is essential to remember that the . . . privilege is not needed to protect information privately disclosed between husband and wife in the confidence of the marital relationship.” Trammel v. United States, 445 U.S. 40, 51 (1980). Such confidential communications are privileged under an independent rule protecting confidential marital communications. See Blau v. United States, 340 U.S. 332 (1951); Wolfe v. United States, 291 U.S. 7 (1934).

\textsuperscript{15} Wigmore states that, “[p]ossibly the true explanation is, after all, the simplest one, namely that a natural and strong repugnance was felt . . . to condemning a man by admitting to the witness stand against him those who lived under his roof . . . .” J. Wigmore, supra note 14, § 2227, at 212. Others believe that the privilege
nizing the vitality of the common law privilege in the federal courts has been clearly defined by the Supreme Court to be "its perceived role in fostering the harmony and sanctity of the marriage relationship."\(^{16}\)

Professor Wigmore notes that "if the fear of causing marital dissension or disturbing the domestic peace were genuinely the ground of the privilege . . . , then the privilege should apply to testimony which in any way disparages or disfavors the other spouse, irrespective of his being a party to the cause."\(^{17}\) However, such a broad application of the privilege was rejected at common law and its scope was restricted to only such testimony as is adverse to the other spouse's legal interests in the very case in which the testimony is to be offered.\(^{18}\) This limitation on the scope of the privilege is continued and well established in the federal courts.\(^{19}\)

Although the advisability of recognizing the privilege against adverse spousal testimony has been seriously questioned in the modern era,\(^{20}\) the privilege continues to have viability.\(^{21}\) Rule 501 of the Federal Rules of Evidence provides in relevant part that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."\(^{22}\)

\(^{16}\) The


18. See generally J. Wigmore, supra note 14, § 2234, at 230-32. Professor Wigmore, who disapproved any recognition of the privilege against spousal testimony, noted that "[i]t is not to be regretted that . . . the privilege was wholesomely kept within some sort of bounds." See id. at 231.

19. See In re Snoonian, 502 F.2d 110, 112 (1st Cir. 1974) ("the rule . . . has been limited to testimony which 'disfavors the other spouse's legal interests in the very case in which the testimony is offered' ") (quoting J. Wigmore, supra note 14, § 2234 at 231); United States v. Burks, 470 F.2d 432, 435 (D.C. Cir. 1972) ("The privilege applies only when the testimony of one spouse would favor or disfavor 'the other spouse's legal interests in the very case in which the testimony is offered.' "); United States v. Fields, 458 F.2d 1194, 1199 (3d Cir. 1973), cert. denied, 421 U.S. 897 (1973) (testimony of spouse of one defendant sought by co-defendant; proper procedure is to grant severance and then permit the witness to testify for the co-defendant). See also supra note 21.

20. For a discussion of the criticisms of the privilege, see note 30 and accompanying text infra.


22. Fed. R. Evid. 501. Thus, "[t]he Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials . . . ." Trammel v. United States, 445 U.S. 40, 47 (1980). The purpose of Rule 501 is to "provide the courts with the flexibility
Supreme Court has recently interpreted the scope of the privilege against adverse spousal testimony in Trammel v. United States, and modified the rule of Hawkins v. United States. In Hawkins, the Court found that the modern rationale for the privilege justified its continued recognition in the federal courts and held that a non-witness-spouse could invoke the privilege to prevent the witness-spouse from testifying against him. In Trammel, the Court modified the Hawkins rule "so that the witness-spouse alone has a privilege to refuse to testify adversely" but continued to view the privilege against adverse spousal testimony on a case-by-case basis, and to leave the door open to change.

Although the Federal Rules of Evidence generally do not apply to proceedings before grand juries, an exception is made with respect to privileges. See United States v. Calandra, 414 U.S. 338, 346 (1974) (grand jury may not violate a valid privilege).

23. 445 U.S. 40 (1980). In Trammel, the defendant-husband and two others were indicted for importing heroin into the United States. Id. at 42. The defendant's wife was named in the indictment as an unindicted co-conspirator. Id. The wife agreed to cooperate with the Government. Id. When the defendant-husband discovered that the Government intended to call his wife as an adverse witness, he moved to sever her case from that of the other defendants and asserted his claim to a privilege to prevent her from testifying against him. Id. The defendant-husband's motion to sever was denied by the district court, his wife was allowed to testify, and he was convicted on the basis of her testimony. Id. at 43. The case was appealed to the Supreme Court on the theory that the defendant's privilege against adverse spousal testimony was violated. Id.

24. 358 U.S. 74 (1958). In Hawkins, the defendant was convicted in federal district court of illegally transporting a girl from Arkansas to Oklahoma for immoral purposes. Id. at 74. The district court had permitted the Government, over the defendant's objection, to use his wife as a witness against him. Id. at 74-75. The case was appealed to the Supreme Court on the theory that the defendant's privilege against adverse spousal testimony was violated. Id.

25. Id. at 77-79. The Hawkins Court viewed the privilege as necessary to "foster peace." Id. at 77. The Court did not think that family harmony would be less disturbed by voluntary adverse spousal testimony than it would be by compelled adverse spousal testimony. Id. To the contrary, the Court thought bitterness would be more likely to arise in the instance of voluntary adverse spousal testimony. Id. Thus, to promote marital harmony, the acknowledged rationale for the privilege, the Court thought it proper to allow the non-witness-spouse to invoke the privilege in order to avoid an irreconcilable difference between a married couple. Id. at 78-79.

26. Id. at 79. "Hawkins, then, left the federal privilege for adverse spousal testimony where it found it, continuing 'a rule which bars the testimony of one spouse against the other unless both consent.'" Trammel v. United States, 445 U.S. 40, 46 (quoting Hawkins v. United States, 358 U.S. at 78). However, the Hawkins Court made it clear that its decision was not meant to "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'" 358 U.S. at 79.

27. 445 U.S. at 53. The Court, in justifying its modification of the Hawkins rule, noted that

[when] one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.
verse spousal testimony as a viable principle of federal law.\textsuperscript{28}

Although the privilege against adverse spousal testimony remains a principle of federal law\textsuperscript{29} it has been subjected to considerable criticism.\textsuperscript{30}

\textit{Id.} at 52.

This justification seems logical on its face but has received criticism. See Haney, \textit{The Evolutionary Development of Marital Privileges in Federal Criminal Trials}, 6 NAT'L J. CRIM. DEF. 99, 155-56 (1980). It has been observed that

[b]y propounding that adverse spousal testimony given for any reason is evidence that the marriage is in disrepair, the Court either overlooks, ignores, or rejects the obvious possibility that sometimes a testifying spouse may merely be selecting between such competing pressures as having to go to prison or testifying against a loved one. And . . . the Government or the trial judge may have purposely placed the witness in this predicament.

\textit{Id.} at 156.

\textsuperscript{28} 445 U.S. at 53. The Court did not abandon the privilege but merely modified it in order to further “the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.” \textit{Id.}

\textsuperscript{29} At least seventeen states have abolished the privilege altogether in criminal cases. See \textit{id.} at 48 n.9. This may be viewed as particularly significant since the Supreme Court has recognized that “the law of marriage and domestic relations are concerns traditionally reserved to the states.” \textit{Id.} at 50 (citing Sosna v. Iowa, 419 U.S. 393, 404 (1975)).


Professor Wigmore has termed the privilege “the merest anachronism in legal theory and an indefensible obstruction to truth in practice.” J. WIGMORE, \textit{supra} note 14, \S 2228, at 221. McCormick states that the “privilege is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relationship that is today outmoded.” C. MCCORMICK, \textit{supra} note 12, \S 66, at 145-46.

One commentator has capsulized the major criticisms of the privilege into the following sentence:

In general, the thrust of these criticisms is that (a) the [marital] “dissension” caused by adverse testimony is minimal or nonexistent; (b) the “re-pugnance” at spousal condemnation is “mere sentiment” unworthy of judicial recognition; and (c) whatever the validity of (a) and (b), neither policy is sufficiently important to justify interference with the fact-finding process.

Reutlinger, \textit{supra}, at 1386. Another commentator suggests that by deferring to the privilege, “[t]he courts, in some cases at least, are sacrificing justice to a questionable and, by this means, unenforceable ideal.” Hutchins, \textit{supra}, at 686.

The modern justification of the privilege, i.e., the notion that it fosters marital harmony, has been seriously questioned on an empirical basis. See Rosenberg, \textit{The New Looks in Law}, 52 MARQ. L. REV. 539, 541-42 (1969). The privilege has been said to be “based upon a supposititious impact of such testimony upon that interspousal relationship in the future, which impact has no support in any behavioral science evidence.” \textit{In re Grand Jury (Malfitano),} 633 F.2d 276, 281 (3d Cir. 1980) (Gibbons, J., concurring). In \textit{Hawkins}, Justice Stewart, in a concurring opinion, hinted that the majority of the Court may be “indul[g]ing in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquility.” 358 U.S. at 81-82 (Stewart, J., concurring).

In addition, the Committee on Improvements in the Law of Evidence of the American Bar Association called for the abolition of the privilege against adverse
This criticism was noted by the Trammel Court, but the Court, while restricting the privilege, refused to abolish it, finding that "the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice." It has never been suggested, even where the privilege against adverse spousal testimony is recognized, that it is an absolute privilege. One exception to the witness-spouse's right to invoke the privilege is made where either "transactional" or "use and derivative-use" immunity is granted to the nonwitness-spouse. Once the nonwitness spouse is granted immunity from spousal testimony, 63 AMERICAN BAR ASSOCIATION REPORTS 594-95 (1938). The American Law Institute, in its 1942 Model Code of Evidence, expressly rejected a privilege either in the witness-spouse to refuse to testify or in the party-spouse to prevent the other from testifying. See MODEL CODE OF EVID. Rule 213 comment a (1942). Similarly, in 1953 the Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws, "abolish[ed] the rule . . . of not requiring one spouse to testify against the other in a criminal action." See UNIF. R. EVID. 23(2) and comment (1953).

31. See 445 U.S. at 44-45. Even courts which recognize the Trammel privilege seem reluctant to do so. See In re Grand Jury (Malfitano), 633 F.2d 276 (3d Cir. 1980). In Malfitano, the Third Circuit recognized the Trammel privilege but evidently felt compelled to state that "we realize the possibility that the social benefit of the privilege may be minimal and that it could be dispensed with without serious erosion of marriages." Id. at 280.

32. See 445 U.S. at 50. The Trammel Court stated that the privilege "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" Id. (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). See also United States v. Nixon, 418 U.S. 683, 709-710 (1974).

It has been suggested that the Court has a "historical antipathy" for privileges in the federal courts. See Haney, supra note 27, at 157. The factual context of Trammel has been viewed as an opportunity which the Court seized to constrict the applicability of the privilege against adverse spousal testimony in federal courts. Id. at 157-58.

33. 445 U.S. at 51, 53.

34. See In re Snoonian, 502 F.2d 110, 112-13 (1st Cir. 1974); J. WIGMORE, supra note 14, § 2227, at 213-14. Wigmore states that even at the time of Coke's reference to the privilege in 1628, "it was already well understood to be subject to some exceptions in criminal cases." Id. See, e.g., Wyatt v. United States, 362 U.S. 525, 526 (1960). The decision in Wyatt recognized an exception to the privilege against adverse spousal testimony for cases in which one spouse commits a crime against the other. Id. The exception has been expanded since Wyatt to include crimes against the spouse's property. See, e.g., Herman v. United States, 220 F.2d 219, 226 (4th Cir. 1955). More recently, the exception has been further expanded to include crimes against children of either spouse. See, e.g., United States v. Allery, 526 F.2d 1362, 1367 (8th Cir. 1975).

35. See Kastigar v. United States, 406 U.S. 441, 443 (1972). The Supreme Court has defined transactional immunity to be "immunity from prosecution for offenses to which compelled testimony relates." Id.

36. See id. The Supreme Court has defined use and derivative-use immunity [sometimes called "use-fruits" immunity] to be "immunity from the use of compelled testimony and evidence derived therefrom." Id.

37. See In re Grand Jury (Malfitano), 633 F.2d 276, 281 (3d Cir. 1980) (Gibbons, J., concurring). Judge Gibbons noted that "the court has . . . inherent power to
prosecution, his spouse's testimony is in no meaningful way adverse to him and thus the privilege against adverse spousal testimony is unnecessary.38 Such a procedure was utilized in In re Snoonian39 where the Government sought to have the witness-husband held in contempt for refusing to testify.40 The purported danger to the wife arose solely because she had executed a joint tax return and because her husband's testimony might lead to a charge of fraud.41 In response to the witness-husband's claim of privilege against adverse spousal testimony, the Government had filed an affidavit with the district court which in effect secured use and derivative-use immunity for the nonwitneswife.42 The Snoonian court held that "the speculative nature of the threat to the wife, coupled with the Government's unequivocal and convincing promises not to use any of the testimony against her, nullifies any claim of privilege as grounds for [the husband's] refusal to testify."43

confer use-fruits immunity in order to obtain testimony which by virtue of the assertion of the marital testimonial privilege would be otherwise unavailable." Id.

38. See 445 U.S. at 50. The Trammel Court explicitly stated that the privilege must be strictly construed and allowed only to the very limited extent that the public good (the promotion of marital harmony) transcends the need for probative evidence. Id. Without the danger of prosecution stemming from the testimony, the danger of serious marital discord is removed and there is no public good to transcend the need for probative evidence.

39. 502 F.2d 110 (1st Cir. 1974). In Snoonian, a husband testifying before a grand jury investigating extortionate extensions of credit attempted to assert the privilege against adverse spousal testimony. Id. at 111.

40. Id.

41. Id.

42. Id. at 111-12. The affidavit stated: "On behalf of the United States Government, I hereby represent and agree that no testimony of Gary Snoonian [the witness-spouse] before the Grand Jury, or its fruits, will be used in any way in any proceeding against his wife." Id. at 112. The Snoonian court acknowledged the effectiveness of such a grant of immunity by noting that "[w]ere the Government to renege on its sworn promise, it is hard to conceive of a court failing to find an estoppel." Id.

43. Id. at 113. The Snoonian court noted that the privilege against adverse spousal testimony has been limited to testimony which "disfavors the other spouse's legal interests in the very case in which the testimony is offered." Id. at 112 (citing J. Wigmore, supra note 14, § 2234, at 231 (emphasis in original)). The court acknowledged that "[a]lthough no one is meaningfully a 'party' in a grand jury proceeding, the privilege still applies," 502 F.2d at 112 (citing United States v. Calandra, 414 U.S. 338, 346 (1974); In re Loichtatto, 497 F.2d 803 (1st Cir. 1974)). In light of the Government's promise not to use anything said by the husband, or any fruits thereof, against the wife, the Snoonian court concluded that "this effectively removes the wife from any category which can remotely be likened to a 'party' to the grand jury proceedings." 502 F.2d at 112

It should be noted that Snoonian was decided several years before Trammel. See notes 23 & 39 supra. In the context of discussing the effects of the Trammel decision, at least one commentator has stated that

the modified privilege developed in Trammel is still supported by the rationale of promoting domestic harmony. Whenever a case is presented to the Court in which it is called upon to decide an issue pertaining to the new modified Hawkins privilege, it will probably only allow this exclusionary device to prevail in cases where it clearly furthers this policy. Even where some justification for it can be advanced, the Court will likely require it to meet the test which the Hawkins privilege failed in Trammel: it must pro-
In *In re Grand Jury (Malfitano)*,44 the United States Court of Appeals for the Third Circuit recently decided a case involving the Government's attempt to circumvent the privilege against adverse spousal testimony by promising a limited type of immunity to the nonwitness-spouse.45 In that case, the Government sought to compel a witness-wife's testimony before a grand jury investigating her husband's activities by promising not to use her testimony against her nontestifying spouse in future proceedings.46 The Malfitano court refused to find that the wife's privilege was vitiated by the Government's promise.47 The court noted that "[e]ven if [the wife's] testimony is not used in later proceedings, it seems there is nothing to prevent this grand jury from considering the [wife's] testimony in deciding whether to indict."48 The court held that compelling the wife to testify would strain the marital relationship and therefore allowed the wife to invoke the privilege against adverse spousal testimony.49

Haney, supra note 27, at 158 (quoting Trammel v. United States, 445 U.S. at 51).

If such an analysis is correct, the Snoonian decision could be equally justified today on grounds other than those forwarded by the Snoonian court. It seems that a court would be justified in holding that the privilege should not be applicable because the rationale for recognizing the privilege is the promotion of domestic harmony and because the danger of engendering marital discord is far less where the nonwitness-spouse is granted use and derivative-use immunity. Thus, the interest could be deemed not sufficiently important to "outweigh the need for probative evidence in the administration of criminal justice." See 445 U.S. at 51.

44. 633 F.2d 276 (3d Cir. 1980). In Malfitano, the witness' husband was one of the targets of a grand jury investigation relating to the husband's alleged attempt to secure a loan from the Teamsters Union Pension Fund by paying an illegal kickback. Id. at 276-77. The witness-wife was subpoenaed and when she appeared before the grand jury she refused to answer questions on the ground of marital privilege. Id. at 277. The court concluded that the wife's answers would presumably have implicated her husband. Id. at 279.

45. Id. at 279.

46. Id.

47. Id. at 279-80.

48. Id. at 279. The Malfitano court by implication suggested a method by which the Government might be able to compel the witness' testimony and still respect her privilege. The court implied that if the Government "sever[ed] the husband's indictment from that of the other defendants to ensure that the grand jury does not use [the wife's] testimony against her husband," the privilege might thereby be respected. Id. at 279.

49. Id. at 280. The court noted that

[that the grand jury will consider [the wife's] testimony and possibly indict her husband will put a strain on their marriage. The husband will be subjected to a trial due to an indictment based in part on [the wife's] testimony. This is no less of a strain on the marriage than if the wife testified at his trial.

Id. Snoonian was distinguished on the basis that the witness' spouse in Snoonian was a target of the grand jury investigation and in fact the Government had granted use and derivative-use immunity to the nonwitness-spouse. Id. For a discussion of the immunity granted in Snoonian, see note 42 and accompanying text supra.

The Malfitano court allowed the invocation of the privilege only after focusing upon whether "the rationale for the privilege does not apply here. . . ." 633 F.2d at
Against this background, the United States Court of Appeals for the Third Circuit considered whether a witness testifying before a grand jury may invoke the privilege against adverse spousal testimony where the Government had promised only that the nontestifying spouse, who was conceded to be a target of investigation, would not be indicted by the specific grand jury before which the potentially incriminating testimony was sought.

Judge Rosenn began his analysis by acknowledging that, in fact, what was being decided by the court was the adequacy of the procedure impliedly suggested by the Third Circuit in *Malfitano*, whereby the marital privilege might be rendered inapplicable if the Government “sever[ed] the husband’s indictment from that of the other defendants to ensure that the grand jury does not use [the wife’s] testimony against her husband.” He then framed the issue before the court to be “whether the testimony which the Government is eliciting from the witness amounts to testimony ‘against . . . her spouse in a criminal proceeding.’

Turning to a comparison of the note case and *Malfitano*, Judge Rosenn noted that “as in *Malfitano*, the wife’s testimony is sought with the understanding that it is likely to implicate her husband.” He further noted that the only difference between the Government’s actions in *Malfitano* and the Government’s actions in the case before him was that in the latter, “the Government seeks to accomplish indirectly what in *Malfitano* we prohibited it from doing directly.”

The majority opinion then concluded that “the potential disruption to marital harmony is in no sense diminished because the impact of the

277. The *Malfitano* court also held that the privilege applies to spousal testimony before a grand jury where both husband and wife are alleged to have participated in the crime under investigation. *Id.* at 279.

50. 673 F.2d at 689-90.

51. *Id.* at 690. See note 8 and accompanying text *supra*.

52. 673 F.2d at 692. For a discussion of the procedure suggested in *Malfitano*, see note 48 and accompanying text *supra*.

53. 673 F.2d at 692 (quoting *In re Grand Jury (Malfitano)*, 633 F.2d at 279).

54. *Id.* (quoting *In re Grand Jury (Malfitano)*, 633 F.2d at 277).

55. See *id.* at 692-93.

56. *Id.* at 692.

57. *Id.* at 692-93. What the Government was prevented from “doing directly” was defeating a wife’s marital privilege not to testify before a grand jury investigating her husband, among others, by promising only that the wife’s testimony would not be used in later proceedings against her husband. See notes 46-49 and accompanying text *supra*.

Judge Rosenn recognized that at common law the privilege could not be invoked when the testimony was not used in a proceeding in which the nonwitness-spouse was a party. 673 F.2d at 693 n.11. The Judge, however, stated that “we do not believe that the Government should be permitted to bootstrap into two proceedings a prosecution based on a single common scheme for the sole purpose of circumventing the privilege.” *Id.*

58. 673 F.2d at 693. The promotion of marital harmony is the modern justification for the privilege against adverse spousal testimony in the federal courts. See note 16 and accompanying text *supra*.
spouse’s testimony is delayed.” 59 Therefore, in order to maintain the “integrity of the privilege,” 60 the court held that “the testimony sought is sufficiently adverse to the interests of the absent spouse to permit invocation of the privilege against adverse spousal testimony.” 61

In a closing footnote, Judge Rosenn expressed his concern over the court’s “categorical enforcement of the privilege . . . which thereby protects a third party who has no entitlement whatsoever to the benefits of the privilege.” 62 Prompted by this concern, he suggested a way by which “the district court can respect the witness’ privilege . . . without also interfering with the Government’s attempted prosecution of the third party, about whose activity the wife is being asked to testify.” 63 Judge Rosenn thought that it would be permissible for the district court to confer use and derivative-use immunity on the witness’ spouse which would in turn enable the court to compel the witness’ testimony. 64

Disagreement with the dictum 65 contained in that closing footnote served as the sole reason for Judge Sloviter’s decision to write separately. 66 Judge Sloviter noted that “the only issue considered by the district court and the parties was the scope of the marital privilege” and that therefore Judge Rosenn’s footnote was “akin to an advisory opinion.” 67

Judge Adams dissented because he “believe[d] that [the majority’s]

59. 673 F.2d at 693.
60. See id.
61. Id. at 692. Judge Rosenn stated that a wife who asserts the privilege should not be compelled to testify before a grand jury when her spouse is a target of the same underlying investigation as the party against whom she is called to testify and her testimony is sought with the expectation that it may lead to his indictment by a subsequent grand jury.

Id. at 693.

Judge Rosenn defended his decision against the dissent’s charge that it represents an unwarranted expansion of the privilege as defined by the Trammel Court. Id. at 693 n.11. He listed three reasons for why such a charge was unfounded: 1) although the Trammel Court did note the disfavor with which the privilege has been viewed, the Court did not abandon the privilege; 2) Malisiano demonstrated that the privilege is a forceful one in the Third Circuit; and 3) the court’s decision properly executed the directive of Fed. R. Evid. 501 to apply the rule in the light of reason and experience. Id. The Judge also disagreed with the dissent’s view that the link between the wife’s testimony and her husband’s future indictment is too speculative to allow the wife to invoke the privilege. Id.
62. Id. at 694 n.12.
63. Id.
64. Id.
65. See id. Judge Rosenn admits that “this note expresses a personal comment only . . . and is not a judgment of the court.” Id. at 695 n.12.
66. Id. at 695 (Sloviter, J., concurring).
67. Id. Judge Sloviter noted that as an advisory opinion, Judge Rosenn’s suggestion “suffers from the objections which have been recognized as attending advisory opinions.” Id. (citing United States v. Fruehauf, 365 U.S. 146, 157 (1961)). She also recognized that “neither the government nor the counsel for the witness have been heard on the practical problems which the court’s assumption of such power might present” and therefore concluded that there was “no good reason to reach to
holding unduly extend[ed] the marital privilege and contravene[d] the dictates of the Supreme Court's recent decision in Trammel v. United States.\textsuperscript{68} Judge Adams noted that although Trammel did not abandon the marital privilege, it did set a strict standard for its application.\textsuperscript{69} In the light of such precedent, the dissent concluded "it would appear difficult to justify any expansion in the scope of the rule."\textsuperscript{70}

Judge Adams disagreed with the majority's conclusion that "[t]he potential disruption to marital harmony is in no sense diminished because the impact of the spouse's testimony is delayed."\textsuperscript{71} He also disagreed with the majority's opinion that "[i]t would be anomalous to permit the Government to do indirectly what it is forbidden to do directly."\textsuperscript{72} He stated the rule to be that "[t]he privilege cannot be invoked when the testimony is elicited in another, separate proceeding and is not used in the proceeding in which the non-witness spouse is a party."\textsuperscript{73} He indicated that Malfitano did not support the majority's opinion as was claimed, and he distinguished that case on the basis of the fact that there, "the grand jury before which the [witness-spouse] was called could indict the non-witness spouse."\textsuperscript{74} Judge Adams' analysis of the applicability of the privilege against adverse spousal testimony led him to conclude that, because the witness' husband was not, and could not be, a target of the particular grand jury investigation before which she had been addressed a difficult legal issue in a vacuum, particularly when the conclusion is ... far from clear." \textit{Id}.

\textsuperscript{68} Id. at 696 (Adams, J., dissenting).

\textsuperscript{69} Id. at 697 (Adams, J. dissenting). For a discussion of the strict standard for the applicability of the privilege, see note 32 and accompanying text supra.

\textsuperscript{70} 673 F.2d at 698 (Adams, J., dissenting).

\textsuperscript{71} Id. (quoting 673 F.2d at 692). Judge Adams thought that although the indirect use of the witness-spouse's testimony could possibly cause stress in the marital relationship, there is a "qualitative difference in impact between testimony that itself causes a grand jury to indict the non-witness spouse, and testimony against a third party, who eventually may testify against the spouse before another grand jury." \textit{Id}.

Judge Adams stated that it was only in the former situation that one spouse actually speaks the words that condemn the other and that it is only this direct use of adverse testimony—not a speculative and attenuated use—which justifies the invocation of the privilege against adverse spousal testimony. \textit{Id}.

\textsuperscript{72} Id. (quoting 673 F.2d at 693 n.1). Judge Adams noted that the courts have historically limited the applicability of the marital privilege only to testimony used in the very proceeding at which the non-witness-spouse is indicted or tried. \textit{Id}. For a discussion of this limitation, see note 18 and accompanying text supra. Thus, Judge Adams recognized that, at common law, such an "anomalous" result was both accepted and necessary to reconcile the "tension between the 'right to every man's evidence' and society's interest in excluding adverse testimony by one spouse against the other." 673 F.2d at 698 (Adams, J., dissenting) (quoting Trammel v. United States, 445 U.S. at 50-51).

\textsuperscript{73} 673 F.2d at 698-99 (Adams, J., dissenting) (citing United States v. Burks, 470 F.2d 432, 435-36 & n.6 (D.C. Cir. 1972) (privilege not applicable because husband's legal interests were "in no way at stake in this case"); United States v. Fields, 458 F.2d 1194, 1199 (3d Cir. 1972), cert. denied, 412 U.S. 927 (1973)) (testimony of spouse of one defendant sought by co-defendant; proper procedure is to grant severance and then permit the witness to testify for the co-defendant).

\textsuperscript{74} Id. at 699 (Adams, J., dissenting).
subpoenaed to testify, the witness could not invoke the privilege.75

Reviewing the court's opinion, it is submitted that the majority was doubtlessly correct in recognizing that in the case before it, the Government was seeking to accomplish indirectly what the Third Circuit in Malfitano had already prohibited it from doing directly.76 Apparently the majority found this consideration to be significant enough to carry the case. The dissent, however, correctly noted that another equally important consideration was the historical limitation placed on the applicability of the privilege.77 Although the majority recognized that the privilege was confined at common law "to only such testimony as is adverse to the other spouse's legal interests in the very case under consideration,"78 it failed to attempt to reconcile its decision with that common law rule which is not without support in federal case law.79 The majority ignored this consideration when it framed the issue to be "whether the testimony which the Government is eliciting from the witness amounts to testimony 'against . . . her spouse in a criminal proceeding.'"80 The majority again ignored this consideration when it held that, given the facts of the case, "the testimony sought is sufficiently adverse to the interests of the absent spouse to permit invocation of the privilege against adverse spousal testimony."81

75. Id. at 700 (Adams, J., dissenting).
76. See id. at 693 n.11. For a discussion of what the Government was seeking to accomplish indirectly, see notes 50-51 and accompanying text supra.
77. See 673 F.2d at 698-99 (Adams, J., dissenting). See also notes 72-74 and accompanying text supra.
78. See 673 F.2d at 691.
79. See note 19 supra.
80. 673 F.2d at 692 (emphasis added) (quoting In re Grand Jury (Malfitano), 633 F.2d at 277). The use of the phrase "a criminal proceeding" used in this context implies a meaning equivalent to "any criminal proceeding."

It should be noted that although this is in fact a quotation from Malfitano, it does not represent the holding of Malfitano and is therefore used by this court somewhat out of context. The majority implies, through its use of the Malfitano quote, that it is using the test used by the Malfitano court to determine whether the privilege is applicable. In fact, the quote was used by the Malfitano court as an introductory statement to its discussion of the privilege against adverse spousal testimony. See 633 F.2d at 277. It is incorrect to imply that the Malfitano court held that the test for the applicability of the privilege is whether the testimony might adversely affect the witness' spouse in any proceeding because in Malfitano the witness' spouse was a target of the very grand jury proceeding before which the witness was subpoenaed to testify. Id. See note 48 and accompanying text supra.
81. 673 F.2d at 692 (emphasis added). The adverseness of the testimony is not the only factor to be considered in determining the applicability of the privilege. See notes 18-19 and accompanying text supra. The witness' spouse must also have some legal interest in the proceeding in which testimony is sought. See In re Snoonian, 502 F.2d at 112. The Snoonian court acknowledged that the test for the applicability of the privilege is two-part:

There is a dearth of precedent as to how closely the supposedly endangered spouse must be the "target" of the grand jury's investigation before the privilege may be invoked. . . . It is also unclear how obviously the questions asked one spouse must adversely affect the interests of the other spouse to warrant the former's refusal to respond.
The dissent, therefore, appears to be justified in criticizing the majority for "extend[ing] the marital privilege."\textsuperscript{82} This, however, does not in and of itself render the majority's conclusion erroneous. It is submitted that the bottom line is that Federal Rule of Evidence 501 dictates that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience."\textsuperscript{83} The majority stated that it "believe[d] that [its] decision properly execute[d] that directive."\textsuperscript{84} It is submitted that one would be hard pressed to claim that the "light of reason and experience" did not shine on the majority when it decided as it did. Admittedly the dissent's opinion is well supported in the law and if precedent were the only consideration, it might be the better opinion. However, the majority's decision, in its maintenance of the "integrity of the privilege"\textsuperscript{85} and in its adherence to the commonsensical notion that it would be unjust to allow the Government to do indirectly what it could not do directly, seems to more closely follow the direction of Federal Rule of Evidence 501 to apply "reason and experience."

Perhaps the majority's opinion might be less offensive to those preferring the dissent's reasoning if Judge Rosenn viewed the decision as not "extending the marital privilege," but instead as broadening the interpretation of when a nontestifying spouse has a legal interest in the case where the witness-spouse is sought to testify.\textsuperscript{86} In this light, the rule which confines the privilege to only such testimony as is adverse to the other spouse's legal interest in the very case under consideration remains preserved.

Although the majority's decision is a justifiable one,\textsuperscript{87} it is submitted that it does, as the dissent charged, breathe some additional life into the privilege against adverse spousal testimony. At the very least, the privilege is now recognized in one instance where the nontestifying spouse does not have

\textit{Id.} (citations omitted) The quote recognizes the "same proceeding" requirement, distinct from the "adverseness" requirement. \textit{See id.}

82. 673 F.2d at 694 (Adams, J., dissenting). It does seem that the majority has made an exception to the rule that the privilege can be invoked only when the testimony is adverse to the other spouse's legal interests in the very case in which testimony is sought. \textit{See id.} To the extent that making such an exception expands the utilization of the privilege, the dissent has correctly characterized what the majority has done. Perhaps, however, it is more helpful to view the majority's holding as creating an exception to the old rule rather than to view it as looking towards a new rule recognizing a more encompassing marital privilege.

83. \textit{See FED. R. EVID. 501} (emphasis added). For a discussion of Rule 501, see note 22 and accompanying text \textit{supra}.

84. \textit{See} 673 F.2d at 693 n.11.

85. \textit{See id.} at 693. \textit{See also} note 60 and accompanying text \textit{supra}. It should be observed that the Trammel Court did recognize the privilege against adverse spousal testimony to be a viable principle in the federal courts. \textit{See} 445 U.S. at 46. \textit{See also} note 28 and accompanying text \textit{supra}. Therefore it is understandable that the court felt obligated to preserve a living and forceful marital privilege instead of one which could easily be sidestepped by the Government once it learned the proper procedural loopholes.

86. \textit{See} note 88 and accompanying text \textit{infra}.

87. \textit{See} text accompanying notes 83-85 \textit{supra}.
a direct\textsuperscript{88} legal interest in the proceeding at which testimony is sought. It is unclear as to how serious of an inroad has been made into the rule that confines the privilege to testimony which is adverse to the other spouse's legal interest in the very case under consideration. Given the long-standing common law recognition of the rule,\textsuperscript{89} it is unlikely that the court intended a substantial alteration of the rule. Perhaps the inroad is properly to be limited to those instances where the Government has attempted to do indirectly what it "has been forbidden to do directly."\textsuperscript{90}

One might be tempted to criticize the court for creating some uncertainty where once it was thought there existed a seemingly well-defined rule.\textsuperscript{91} Yet, if certainty were of paramount importance, Federal Rule of Evidence 501 would not read as it does.\textsuperscript{92} The federal rules of privilege were intended "to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis and to leave the door open to change."\textsuperscript{93} Therefore, although the court's decision heightens the uncertainty surrounding the privilege, it seems to be compatible with Rule 501.

\textit{Gary S. Lewis}

\textsuperscript{88}See note 57 and accompanying text \textit{supra}. It is suggested that the nontestifying spouse may have an indirect interest in the proceeding which justifies his spouse's invocation of the marital privilege. \textit{Id.}

\textsuperscript{89}See 673 F.2d at 691. \textit{See also} notes 18-19 and accompanying text \textit{supra}

\textsuperscript{90}See note 57 and accompanying text \textit{supra}. The fact that the Third Circuit so characterized the government's conduct certainly was a factor in the court's decision. \textit{Id.}

\textsuperscript{91}See note 18 and accompanying text \textit{supra} for a discussion of this rule.

\textsuperscript{92}See Fed. R. Evid. 501. \textit{See also} note 22 and accompanying text \textit{supra} for a discussion of Rule 501.

\textsuperscript{93}See 445 U.S. at 47. \textit{See also} note 22 \textit{supra}. 