

The Joint Participation Exception to the Marital Testimonial Privilege: Balancing the Interests "In Light of Reason and Experience"

I. INTRODUCTION

Since the adoption of the Federal Rules of Evidence in 1975, the Supreme Court of the United States has twice had the opportunity to recognize a joint participation exception to the marital testimonial privilege¹ in federal criminal cases. The Court declined both times² and thereby allowed a split of authority to develop in the circuit courts with respect to the recognition of such an exception. This split is evidenced by the recent decision in *In re Grand Jury Subpoena United States*.³ In that case, the United States Court of Appeals for the Second Circuit vacated a district court order which found the defendant's wife in contempt for refusing to answer grand jury questions concerning her husband's alleged conspiracy to communicate national defense information to a foreign government. The wife was alleged to have participated with her husband in the illegal activities.⁴ Her attempt to invoke the marital testimonial privilege was rejected by the federal district court based on the view that the privilege was subject to an exception for joint participation in criminal activity.⁵ On appeal, the Second Circuit Court of Appeals held that the privilege against adverse spousal testimony is not subject to such an exception.⁶ In so holding, the court aligned itself with decisions from the Third Circuit.⁷ The Second Circuit's holding, however, was in direct conflict with decisions from the Seventh and Tenth Circuit Courts of Appeals that held that joint participation in criminal activity rendered the privilege inoperative.⁸ The conflict in these decisions is rooted in

¹The marital testimonial privilege is sometimes referred to by courts and commentators as the privilege against adverse spousal testimony or the anti-marital facts privilege.

²*In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.), cert. denied sub nom. *United States v. Doe*, 459 U.S. 1015 (1982); *United States v. Trammel*, 583 F.2d 1166 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980).

³755 F.2d 1022 (2d Cir. 1985), vacated as moot sub nom. *United States v. Koecher*, 106 S. Ct. 1253 (1986).

⁴*Id.* at 1022-23.

⁵*In re Grand Jury Subpoena Koecher*, 601 F. Supp. 385 (S.D.N.Y. 1984), vacated sub nom. *In re Grand Jury Subpoena United States*, 755 F.2d 1022 (2d Cir. 1985), vacated as moot sub nom. *United States v. Koecher*, 106 S. Ct. 1253 (1986).

⁶*In re Grand Jury Subpoena United States*, 755 F.2d at 1025.

⁷*In re Grand Jury Matter*, 673 F.2d 688; *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980).

⁸*United States v. Clark*, 712 F.2d 299 (7th Cir. 1983); *United States v. Trammel*, 583 F.2d 1166 (10th Cir. 1978); *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir. 1974).

the courts' contrasting views of the public policy underlying the privilege and the varied means of dealing with the countervailing interests.

This Note will analyze the development of the joint participation exception to the marital testimonial privilege and examine the reasoning behind the conflicting decisions in light of the recognized justifications for the privilege. The Note will propose that the joint participation exception to the marital testimonial privilege be abrogated. In place of the exception, the federal courts should adopt a systematic procedure to weigh conflicting interests in order to circumvent the privilege in cases where the public interest mandates the admission of compelled spousal testimony.

II. HISTORICAL DEVELOPMENT OF THE MARITAL TESTIMONIAL PRIVILEGE THROUGH 1975

An analysis of the joint participation exception to the marital testimonial privilege requires a recognition that there are two distinct evidentiary privileges based on the marital relationship. The two privileges evolved from different policy considerations and are subject to different exceptions.⁹ The confidential marital communications privilege prohibits the testimony of a spouse or an ex-spouse regarding confidential communications which arise out of the marital relationship.¹⁰ Because the privilege is intended to promote communication between spouses without fear of disclosure in court, the privilege is possessed by the communicating spouse.¹¹ The marital testimonial privilege, to which this Note is addressed, is more sweeping than the communications privilege. It bars the prosecution from compelling a defendant's spouse to testify as to *any facts* contrary to the defendant's interest.¹² The predominant justification for the marital testimonial privilege is that it preserves marital harmony.¹³ The privilege is currently held by the witness spouse

⁹8 J. WIGMORE, EVIDENCE §§ 2227, 2332 (McNaughton rev. 1961).

¹⁰See *Blau v. United States*, 340 U.S. 332 (1951) (confidential communications between husband and wife are privileged). This confidential marital communications privilege does not prevent testimony about communications which were not intended to be confidential. See *Pereira v. United States*, 347 U.S. 1 (1954) (communications made in presence of third party and communications intended to be conveyed to third party are not confidential); *Tabbah v. United States*, 217 F.2d 528 (5th Cir. 1954) (statements not intended to be confidential). See generally 8 J. WIGMORE, *supra* note 9, §§ 2332-2341.

¹¹8 J. WIGMORE, *supra* note 9, § 2340.

¹²See generally *id.* §§ 2227-45.

¹³*Id.* § 2228 at 216. Professor Wigmore noted a second justification for the privilege: There exists a "natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner." *Id.* at 217 (emphasis in original). Although Wigmore characterized this argument as "the real and sole strength of the opposition to abolishing the privilege," he rejected it as "not

only.¹⁴ Thus, a defendant spouse is unable to prevent voluntary testimony against him. The privilege ceases to exist when circumstances lead the court to recognize an exception to the privilege,¹⁵ and under such circumstances the witness spouse may be compelled to testify to facts adverse to the defendant spouse.¹⁶

The marital testimonial privilege is linked historically to the rule of spousal incompetency.¹⁷ The privilege emerged late in the sixteenth century¹⁸ and thus antedated the rule of spousal incompetency by at least half a century.¹⁹ Both evolved, at least in part, from the common law fiction that "husband and wife were not distinct individuals but a unified whole."²⁰ Parties were considered incompetent as witnesses at common law because of their strong motive for misstatement.²¹ Thus, it was but a short step to declare spouses of parties incompetent under the anciently settled concept of "oneness in law."²²

Because the common law rule that interested persons were incompetent was gradually abrogated,²³ it might well be thought the incompetency of one spouse to testify for or against the other would likewise

more than a sentiment," and "not posit[ing] any direct and practical consequence of evil." *Id.*

¹⁴*Trammel v. United States*, 445 U.S. 40 (1980). See also *infra* text accompanying notes 74-81.

¹⁵8 J. WIGMORE, *supra* note 9, § 2239.

¹⁶See *Shores v. United States*, 174 F.2d 838, 841 (8th Cir. 1949) ("the wife, not being within the privilege . . . stood in the same position as any other victim of another's criminal act, in the matter of the state's right to compel her to testify").

¹⁷See generally 8 J. WIGMORE, *supra* note 9, § 2227 at 211.

¹⁸See *Bent v. Allot*, 21 Eng. Rep. 50 (Ch. 1580). Privileges have been traced to the Roman law where the basis for excluding testimony was twofold. First, there existed a general moral duty not to violate the underlying fidelity upon which protected relationships were built. Second, a member of a family, as an interested party, could not be believed because he had a strong motive for misstatement. It is unknown whether the Roman concept of privilege influenced the recognition of the privilege in England. The policies underlying the privileges, however, are remarkably similar. See Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

¹⁹Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CALIF. L. REV. 1353, 1363 (1973). "Although the two concepts are often combined or confused, they are, in fact, different in both policy and effect. Under the . . . rule of incompetency, testimony was not a matter of choice by either witness or party spouse; it was simply forbidden, as would be that of a person incapable of expressing himself or of understanding the duty to tell the truth. The testimonial privilege, on the other hand, . . . could be waived by the party spouse and was subject to certain exceptions . . ." *Id.*

²⁰*In re Grand Jury Matter*, 673 F.2d at 696 (Adams, J., dissenting).

²¹C. McCORMICK, EVIDENCE § 66 at 144 (Cleary 2d ed. 1972).

²²"If they were admitted to be witnesses for each other they would contradict one maxim of law, *nemo in propria causa testie esse debet* . . ." ("No one ought to be a witness in his own case."). 1 E. COKE, A COMMENTARIE UPON LITTLETON 66 (1628).

²³C. McCORMICK, *supra* note 21, at 144.

be discarded. Nevertheless, it lingered because of a second reason adduced in its support — it fosters domestic harmony and prevents discord in a relationship fundamental to society.²⁴ Thus, it was, and to an extent still is, considered to be based on sound public policy.²⁵

The much anticipated demise of the spousal incompetency disqualification came in the United States Supreme Court's 1933 decision in *Funk v. United States*.²⁶ In *Funk*, the petitioner was convicted in federal district court for conspiracy to violate the prohibition law. At his trial, the petitioner called his wife to testify on his behalf, but she was not allowed to do so pursuant to her disqualification as an incompetent witness.²⁷ The Fourth Circuit affirmed the conviction.²⁸ The Supreme Court granted certiorari to decide "whether in a federal court, the wife of the defendant on trial for a criminal offense is a competent witness in his behalf."²⁹ The Court noted that "a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."³⁰ After observing the "manifest incongruity" of preventing a wife from testifying on behalf of her husband while permitting the husband to testify for himself,³¹ the Court held that spouses are competent to testify in favor of one another.³²

The question of whether a wife is a competent witness *against* her husband in the trial in which he is charged with a criminal offense was left open until 1958, when the Court, in *Hawkins v. United States*,³³ clearly set forth the rule that controlled the marital testimonial privilege for the following twenty-two years.³⁴ In *Hawkins*, the petitioner was arrested for violating the Mann Act after transporting a girl from Arkansas to Oklahoma to have her engage in prostitution. Despite the

²⁴5 B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE § 2128 at 4000-01 (2d ed. 1926).

²⁵*Id.*

²⁶290 U.S. 371 (1933).

²⁷*Id.* at 373.

²⁸*Funk v. United States*, 66 F.2d 70 (4th Cir. 1933).

²⁹290 U.S. at 373.

³⁰*Id.* at 381.

³¹*Id.*

³²*Id.* at 387. The United States Court of Appeals for the Tenth Circuit addressed the question whether a wife is a competent witness *against* her husband in a federal criminal case in *Yoder v. United States*, 80 F.2d 665 (10th Cir. 1935). After recognizing that the question had not been authoritatively decided in *Funk*, the court observed trends challenging the denial of access to facts and committed itself to the view that a wife is a competent witness against her husband. *Id.* at 668. The Supreme Court expressly overruled *Yoder* twenty-two years later in *Hawkins v. United States*, 358 U.S. 74 (1958).

³³358 U.S. 74 (1958).

³⁴See *infra* text accompanying notes 74-81.

petitioner's objection, the district court allowed the girl, who had since become the petitioner's wife, to testify against him.³⁵ The petitioner was convicted and sentenced to five years imprisonment.³⁶ After the Tenth Circuit affirmed the decision,³⁷ the Supreme Court granted certiorari to decide whether to reject the longstanding rule prohibiting one spouse from testifying against the other without mutual consent. Justice Black observed:

While the rule forbidding testimony of one spouse *for* the other was supported by reasons which time and changing legal practices had undermined, we are not prepared to say the same about the rule barring testimony of one spouse *against* the other. The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.³⁸

Thus, the Court held that one spouse is barred from testifying against the other unless both consent.³⁹ The *Hawkins* rule, however, was tempered by the Court's recognition that the privilege remained open to further modification. Justice Black noted that "this decision does not foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'"⁴⁰ This concept was manifested by Congress' enactment in 1975 of Federal Rules of Evidence, Rule 501,⁴¹ which provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof 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. . . .⁴²

³⁵358 U.S. at 74-75.

³⁶*Id.* at 74.

³⁷*Hawkins v. United States*, 249 F.2d 735 (10th Cir. 1957).

³⁸358 U.S. at 77.

³⁹*Id.* at 79.

⁴⁰*Id.*

⁴¹*See generally* 1 BAILEY AND TRELLES, *THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS* (1980).

⁴²FED. R. EVID. 501. Congress substituted this single rule in place of thirteen proposed rules dealing with specific privileges drafted by the Judicial Conference Advisory Committee and prescribed by the Supreme Court. *See* FED. R. EVID., *Appendix of Deleted and*

In enacting rule 501, Congress intended to leave the law of privilege in its present state and to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis."⁴³

III. THE JOINT PARTICIPATION EXCEPTION

The common law recognized that the marital testimonial privilege was subject to an exception based on the "necessity to avoid that extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule."⁴⁴ Most commonly, the exception emerged in those situations involving a crime against the spouse.⁴⁵

In federal criminal cases, courts have continued to recognize that the privilege ceases to exist when one spouse commits a crime against the other.⁴⁶ The courts have also created exceptions when a spouse commits a crime against the other's children or property,⁴⁷ when two persons enter into a sham marriage for the exclusive purpose of obtaining the benefits of the privilege,⁴⁸ and when the marriage relationship is recognized to be beyond preservation and without hope of reconciliation.⁴⁹

Superseded Materials, Rules 501-13. The language of rule 501 is taken from former rule 26, Federal Rules of Criminal Procedure, which previously governed the admissibility of evidence in federal courts. The language of Federal Rule of Criminal Procedure 26 was taken from the decision in *Wolfe v. United States*, 291 U.S. 7, 12 (1934), in which the Supreme Court stated:

[T]he rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.

⁴³120 CONG. REC. H12253 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7108. From the outset, it was clear that the content of the proposed privilege provision was extremely controversial. The Chairman of the House Judiciary Subcommittee on Criminal Justice, upon presenting the Conference Report to the House, stated:

Without doubt, the privilege section of the rules of evidence generated more comment or controversy than any other section. I would say that 50 percent of the complaints received by the Criminal Justice Subcommittee related to the privilege section. The House rule on privilege is intended to leave the Federal law of privilege where we found it. The Federal courts are to develop the law of privilege on a case-by-case basis.

Id.

⁴⁴8 J. WIGMORE, *supra* note 9, § 2239 at 242.

⁴⁵*Id.*

⁴⁶*E.g.*, *Wyatt v. United States*, 362 U.S. 525 (1960) (wife-victim compelled to testify in husband's trial).

⁴⁷*E.g.*, *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975) (wife compelled to testify against husband for his attempted rape of daughter); *Herman v. United States*, 220 F.2d 219 (4th Cir. 1955) (wife's testimony to grand jury for husband's fraud).

⁴⁸*See, e.g.*, *United States v. Apodaca*, 522 F.2d 568 (10th Cir. 1975).

⁴⁹*See United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977) (marriage beyond hope of reconciliation). *But cf. United States v. Lilley*, 581 F.2d 182, 189 (8th Cir.

A. Development of the Joint Participation Exception Under Hawkins

1. *United States v. Van Drunen*. — In 1974, the Seventh Circuit Court of Appeals became the first federal court of appeals to recognize an exception to the marital testimonial privilege when both spouses participate in criminal activity. In *United States v. Van Drunen*,⁵⁰ the defendant was convicted of illegal transportation of aliens, one of whom became his wife. On appeal, the defendant, relying on *Hawkins*, claimed that the trial court erred in refusing to exclude his wife's testimony.⁵¹ Although the case was one of first impression, the court observed that an exception to the somewhat related privilege of confidential communications was recognized when the communications involved unlawful activities in which both spouses participated.⁵² Persuaded that preservation of the family was the underlying reason for both privileges, the court seized the opportunity to create a joint participation exception to the marital testimonial privilege.⁵³

The primary rationale for the decision in *Van Drunen* was that the purpose of the privilege was outweighed by the unjust protection which "assur[es] a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness."⁵⁴ This reasoning had merit in light of the *Hawkins* rule that the witness spouse was precluded from testifying without the defendant's consent. Nevertheless, it had questionable applicability to the facts of the case. First, the witness was not the defendant's spouse at the time that he "enlisted" her aid in the crime.⁵⁵ Second, it is unclear from the case whether the witness spouse's testimony was even necessary for the defendant's conviction. If sufficient witnesses were available to obtain a conviction, disallowing the privilege appears to violate the spirit of the *Hawkins* rule by causing unnecessary conflict in the marriage.

A second reason intimated by the court for recognizing the exception was that preservation of the marriage was socially more desirable when the marriage might assist the defendant in his or her rehabilitation efforts; if the witness spouse is a participant in the crime, this partial function of the privilege is defeated.⁵⁶ This reasoning presupposes that a witness

1978) (court refused to condition the privilege "on a judicial determination that the marriage is a happy or successful one").

⁵⁰501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974).

⁵¹*Id.* at 1396.

⁵²*Id.* (citing *United States v. Kahn*, 471 F.2d 191 (7th Cir.), rev'd on other grounds, 415 U.S. 143 (1972)).

⁵³*Id.*; see also *infra* note 110 and accompanying text.

⁵⁴501 F.2d at 1396.

⁵⁵This fact provided an alternative ground for barring the privilege. The court held that another exception to the privilege arises when the facts to which the witness spouse testifies occurred prior to the marriage. *Id.* at 1397.

⁵⁶*Id.*

spouse who has participated in the criminal activity is less likely to aid in rehabilitative efforts than a spouse who is not a participant. The idea leaves no room for considering a spouse's potential contribution to the defendant's rehabilitation on a case-by-case basis. The court failed to cite any authority for this proposition, and no subsequent decisions indicate that other courts have found this reasoning persuasive.⁵⁷

The *Van Drunen* court did not view *Hawkins* as dispositive of the issue. It noted that even if the *Hawkins* case were treated as one involving joint criminal activity, the *sub silentio* holding that the marital testimonial privilege remains in such a case is of diminished precedential value.⁵⁸ Moreover, the court noted that the Supreme Court's post-*Hawkins* decision in *Wyatt v. United States*⁵⁹ had announced an exception to the privilege when one spouse commits a crime against the other.⁶⁰ Thus, the Seventh Circuit declined to read *Hawkins* as foreclosing the creation of other exceptions.⁶¹

The problems with the *Van Drunen* court's application of *Hawkins* and *Wyatt* are two-fold. First, the exception in *Wyatt* was not a newly-created exception to the marital testimonial privilege. Rather, it was based on over three hundred years of common law precedent.⁶² Second, the spousal-victim exception to the privilege is based on the view that the purpose of the privilege, preserving domestic harmony, would not be served in such a case. A crime against one's spouse is indicative of a marriage which is beyond preservation.⁶³ In the *Van Drunen* case, the court did not suggest that the marriage was unworthy of protection for any reason. Rather, the court found only that the public interest dictated that the privilege should be limited "to those cases where it makes the most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime."⁶⁴

2. *United States v. Trammel*. — In 1978, the reasoning in the *Van Drunen* opinion persuaded the Tenth Circuit Court of Appeals to recognize the joint participation exception to the marital testimonial privilege in *United States v. Trammel*.⁶⁵ *Trammel* involved a husband and wife who became extensively involved in criminal activity shortly following their marriage. Otis Trammel, along with two others, was indicted for

⁵⁷See *In re Grand Jury Subpoena Koecher*, 601 F. Supp. at 389 ("Van Drunen cited [no] authority for the proposition . . . and this Court can find none.").

⁵⁸501 F.2d at 1397.

⁵⁹362 U.S. 525 (1960).

⁶⁰501 F.2d at 1397.

⁶¹*Id.*

⁶²8 J. WIGMORE, *supra* note 9, § 2239.

⁶³*Id.*

⁶⁴501 F.2d at 1397.

⁶⁵583 F.2d 1166 (10th Cir. 1978), *aff'd on other grounds*, 445 U.S. 40 (1980).

importation and conspiracy to import heroin.⁶⁶ Trammel's wife was arrested while returning from Thailand when a customs search revealed heroin in her possession. She agreed to testify as a government witness against her husband and the other conspirators under a grant of immunity.⁶⁷

At a hearing on a motion to sever his case from the other defendants, Otis Trammel asserted both the marital testimonial privilege and the confidential marital communications privilege. The district court ordered that all confidential communications were to be excluded, yet denied Otis Trammel's assertion of the marital testimonial privilege. Accordingly, the wife was permitted to give testimony which resulted in Otis Trammel's conviction.⁶⁸ Except for the testimony of Trammel's wife, there was no other evidence presented against Otis Trammel from which a jury could have convicted him.⁶⁹

On appeal, the Tenth Circuit upheld the conviction and ruled that the *Hawkins* rule did not apply to the testimony of a spouse who appeared as an unindicted co-conspirator under a grant of immunity.⁷⁰ The court recognized, in keeping with the mandate of Federal Rule of Evidence 501, that it had the right and responsibility to determine whether "reason and experience" dictated alteration of the privilege in this case. Persuaded that *United States v. Van Drunen* provided the applicable rule and reason upon which to base its decision, the court concluded that the privilege, based on the policy of preserving domestic harmony, had to give way to the more compelling public need for the testimony necessary to convict Otis Trammel.⁷¹ The court failed to articulate why joint participation in criminal activity makes a marital relationship less worthy of protection.

In a dissenting opinion, one judge was unconvinced that the record supported the majority's finding that the Trammels had not established a home with any of the usual attributes of a family life and that there was no domestic harmony to be preserved.⁷² He suggested that the majority's findings reflected the view that "spouses who commit crimes are incapable of achieving a harmonious marriage."⁷³

3. *Modification of the Hawkins Rule.* — In 1980, the Supreme Court of the United States unanimously affirmed Otis Trammel's conviction, but on different grounds.⁷⁴ The Court ignored the joint partic-

⁶⁶*Id.* at 1167.

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹445 U.S. at 43.

⁷⁰583 F.2d at 1169.

⁷¹*Id.* at 1169-70.

⁷²*Id.* at 1173 (McKay, J., dissenting).

⁷³*Id.*

⁷⁴445 U.S. 40.

ipation exception and seized the opportunity to alter the *Hawkins* rule by allowing the witness spouse to give voluntary testimony against the defendant spouse without the defendant's consent.⁷⁵

The Court recognized that the long history of the privilege and its tendency to protect domestic harmony suggested that it should not be casually set aside.⁷⁶ Nevertheless, the Court echoed the sentiments articulated in *Funk v. United States*⁷⁷ by noting that "the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change."⁷⁸

After reviewing the significant erosion and criticism of the marital testimonial privilege in state jurisdictions, Chief Justice Burger noted that the trend toward rejection of the privilege was based on the maxim that " 'the public . . . has a right to every man's evidence.' "⁷⁹ Thus, the Court stated that the appropriate analysis in this case was to "decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice."⁸⁰ After finding the ancient foundation and contemporary justifications for the *Hawkins* rule unpersuasive, the Court held:

"[R]eason and experience" no longer justify so sweeping a rule. . . . Accordingly, we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification — vesting the privilege in the witness-spouse — furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.⁸¹

In light of the *Trammel* holding that a "witness may be neither compelled to testify nor foreclosed from testifying," it should be noted that the Supreme Court did not preclude recognition or creation of exceptions to the marital testimonial privilege. Thus, compelling a witness spouse to testify does not violate the *Trammel* holding when circumstances give rise to an exception.

⁷⁵*Id.* at 53. The *Trammel* decision did not affect the independent marital communications privilege. The Court expressly noted the need to protect confidential communications between husband and wife, priest and penitent, attorney and client, and physician and patient. *Id.* at 51.

⁷⁶*Id.* at 48.

⁷⁷290 U.S. 371 (1933).

⁷⁸445 U.S. at 48.

⁷⁹*Id.* at 50 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

⁸⁰*Id.* at 51.

⁸¹*Id.* at 53.

B. The Joint Participation Exception Following Trammel

1. Appeal of Malfitano. — The Third Circuit Court of Appeals unanimously rejected the recognition of the joint participation exception in *Appeal of Malfitano*,⁸² a case in which the government claimed that a wife and husband were co-offenders in a scheme to obtain illegal loans from a union pension fund. The district court denied the wife's attempt to assert the marital testimonial privilege based on her alleged joint participation in the criminal activity.⁸³ Upon her refusal to testify, the district court issued an order holding her in contempt.⁸⁴ On appeal, the Third Circuit emphatically rejected a broad rule that marriages involving partners in crime should not be protected.⁸⁵ Instead, the court sought to determine only whether the rationale of the marital testimonial privilege would be served in that case.⁸⁶

The court's rejection of the joint participation exception was based on four underlying observations. First, the court could find no public policy supporting the proposition that a marriage should be dissolved when the partners engage in crime. The court detected an impropriety in using evidentiary rules to impose a penalty on a marital relationship when neither state nor federal substantive law attaches such a penalty to spouses engaged in a crime.⁸⁷

Second, the court observed that the marital relationship may deserve protection because of its rehabilitative effect on the individuals and its "restraining influence on couples against future antisocial acts."⁸⁸ These first two arguments assume that compelling a witness spouse to testify will tend to trigger a marital dissolution. This hypothetical impact on the marital relationship, however, has little or no evidentiary support in behavioral science.⁸⁹

Third, the court conceded that the joint participation exception might be justified in cases where a particular marriage has no social value. The court was not confident, however, that judicial tribunals are capable of assessing the social worthiness of particular marriages.⁹⁰

Finally, the court indicated a concern that recognition of the joint participation exception would open the door for prosecutorial abuse. The court stated, "[T]he very nature of conspiracy cautions against this exception. . . . Where the spouse does not want to testify, the only way

⁸²633 F.2d 276 (3d Cir. 1980).

⁸³*Id.* at 277.

⁸⁴*Id.* at 276.

⁸⁵*Id.* at 278.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹See Rosenberg, *The New Looks in Law*, 52 MARQ. L. REV. 539, 541-42 (1969).

⁹⁰633 F.2d at 279.

to get her testimony will be to accuse her."⁹¹ This concern is persuasive in light of the fact that conspiracy is such a flexible concept. A similar problem already exists under the *Trammel* rule vesting the privilege in the witness spouse. Under *Trammel*, the government may accuse a defendant's spouse of conspiracy and then dismiss the charge in return for "voluntary" testimony. The witness spouse could, however, refuse to testify without fear of being held in contempt. Recognition of the joint participation exception would carry the problem one step further. If the government successfully charged the spouse as a co-conspirator, the government could compel the witness spouse to testify without any agreement to dismiss the charge. If the witness spouse refused, a contempt order would issue.

Neither the Seventh nor the Tenth Circuit Courts of Appeals have addressed this problem of potential prosecutorial abuse. Neither has suggested, however, that a simple allegation of conspiracy would be an adequate basis for recognizing the exception. Presumably, the government would have to make an adequate offer of proof regarding the spouse's participation in joint criminal activity.

The primary distinction between *Malfitano* and those cases recognizing the joint participation exception is that the *Malfitano* court's analysis focused on whether the policy underlying the privilege would be served in that particular case. The Seventh and Tenth Circuits attempted to balance the underlying policy against the unjust protection of joint participants in criminal activity. Although the *Malfitano* court recognized that "[i]n any case where a proposed exception to a privilege is asserted there must be a balancing of the need for the evidence against the validity of the privilege,"⁹² the court failed to analyze what, if any, specific countervailing considerations pertaining to the public's interest in ascertaining the truth might justify a denial of the privilege.

2. *United States v. Clark*.—The Seventh Circuit Court of Appeals followed its *Van Drunen* holding in *United States v. Clark*,⁹³ the only post-*Trammel* decision to recognize the joint participation exception to the marital testimonial privilege. Prior to their marriage, Richard Clark and his wife, Christine, were involved in a scheme to steal money from a bank where Christine worked. She set up an account in the name of "Eric Westberg" and allegedly caused two cashier's checks to be drawn

⁹¹*Id.* This observation echoes the concern articulated by Justice Stewart twenty-two years earlier. When considering whether to vest the privilege solely in the witness spouse, he noted:

[S]uch a rule would be difficult to administer and easy to abuse. Seldom would it be a simple matter to determine whether the spouse's testimony were really voluntary, since there would often be ways to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent.

Hawkins v. United States, 358 U.S. at 83 (Stewart, J., concurring).

⁹²633 F.2d at 280.

⁹³712 F.2d 299 (7th Cir. 1983).

on the account in the name of two of Clark's friends. The friends then gave the money to Clark. Clark was convicted for his role in the scheme and received a two-year sentence.⁹⁴ At Christine's trial, the government subpoenaed Clark as a hostile witness. Clark asserted the marital testimonial privilege. The district court found the privilege did not apply because of Clark's joint participation in the criminal activity. After Clark refused to testify, the court held him in contempt.⁹⁵

The Seventh Circuit Court of Appeals upheld the contempt conviction because of Clark's joint participation in the crime.⁹⁶ The court expressly rejected the holding of the Third Circuit in *Malfitano*, complaining that the *Malfitano* court had failed to consider the principal rationale in *Van Drunen*.⁹⁷ The *Clark* court reaffirmed the *Van Drunen* position that the public interest in discouraging a criminal from enlisting the aid of his spouse as an accomplice outweighs the interest in protecting the marriage.⁹⁸ This rationale, however, retained only questionable vitality following the Supreme Court's holding in *Trammel* granting the privilege to the witness spouse only. Because a defendant can no longer prevent a spouse from testifying, a criminal can no longer be assured that he can enlist the aid of his spouse without creating another potential witness.⁹⁹

The creation of the joint participation exception in *Van Drunen* was necessary to obtain voluntary testimony. The *Clark* court, however, failed to reassess the rationale or articulate any additional justification for using the exception to compel spousal testimony. The *Clark* court merely deemed it consistent with the general policy of narrowly construing the privilege.¹⁰⁰ Moreover, the court did not suggest that the marriage was unworthy of protection. It spoke of balancing interests, yet it applied the joint participation exception as a rigid evidentiary rule. In so doing, the court pigeonholed the case and based its decision on established precedent rather than subjecting the facts to careful scrutiny and balancing the specific interests.¹⁰¹

⁹⁴*Id.* at 300.

⁹⁵*Id.*

⁹⁶*Id.* at 300-02. The court also relied on the rationale that the acts about which Clark would have testified occurred prior to marriage. *Id.* at 302. The Seventh Circuit had previously created this "pre-marital facts" exception in *United States v. Van Drunen* because of a concern that collusive marriages would interfere with the factfinding process. *Id.* The *Clark* court found such a general rule desirable to avoid "mini-trials" on the issue of sincerity of the parties' marriage. *Id.*

⁹⁷712 F.2d at 301-02.

⁹⁸*Id.* at 302.

⁹⁹See *In re Grand Jury Subpoena Koecher*, 601 F. Supp. 385, 389 (S.D.N.Y. 1984) ("[S]ince *Trammel*, a defendant can no longer prevent his spouse from voluntarily testifying against him. The assurance the *Van Drunen* court spoke of is thus no longer absolute — it accrues only to a criminal with a loyal spouse.').

¹⁰⁰712 F.2d at 302.

¹⁰¹As one commentator noted, "[T]he [*Clark*] opinion . . . is unsound, and it strikes in the most outrageous way at the very heart of the privilege. . . . [T]he only real question

3. *In re Grand Jury Subpoena United States*. — In February, 1985, the Second Circuit Court of Appeals held, in agreement with the Third Circuit and in conflict with the Seventh and Tenth Circuits, that the marital testimonial privilege is not subject to a joint participation exception.¹⁰² In vacating the district court's contempt order against the defendant's wife, the court noted that if the Supreme Court had looked upon the joint participation exception with favor, it was peculiar that it affirmed the *Trammel* case on different grounds.¹⁰³

The Second Circuit rejected the rationale supporting the exception in *Van Drunen*. Since *Trammel*, "[a] person desiring to enlist the aid of his spouse as an accomplice . . . takes the risk that the spouse may choose to testify."¹⁰⁴ As for the *Van Drunen* court's assertion that in circumstances of joint participation, the marriage is less likely to contribute to the defendant's rehabilitation, the Second Circuit stated, "[R]ehabilitation ha[s] never been regarded as one of the interests served by the spousal privilege and . . . participation in a joint crime would not necessarily remove the remorse which would trigger rehabilitation."¹⁰⁵

The court also rejected the government's attempt to analogize the joint participation exception to similar exceptions applicable to the attorney-client privilege and the confidential marital communications privilege. For example, courts recognize an exception to the attorney-client privilege for communications made to enable or aid anyone to commit a crime.¹⁰⁶ Also, a number of jurisdictions recognize an exception to the confidential marital communications privilege when the communications are made in furtherance of a criminal activity.¹⁰⁷ In disposing of the first analogy, the Second Circuit merely asserted that "[t]he attorney-client relationship, valuable as it is, is hardly of the same social importance as that of husband and wife."¹⁰⁸ With respect to the confidential marital communications privilege, the court noted a distinction between the purposes of the marital testimonial privilege and the confidential marital communications privilege. The communications privilege seeks to promote communications by protecting their intimacy. Those

which remains after such an assault on the privilege is whether there is enough left to be worth preserving." D. LOUISELL AND C. MUELLER, FEDERAL EVIDENCE § 218 at 407 (Supp. 1984).

¹⁰²*In re Grand Jury Subpoena United States*, 755 F.2d 1022, *vacated as moot sub nom.* *United States v. Koecher*, 106 S. Ct. 1253 (1986).

¹⁰³*Id.* at 1026.

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*See, e.g., In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982).

¹⁰⁷*See, e.g., United States v. Kapnison*, 743 F.2d 1450 (10th Cir. 1984); *United States v. Neal*, 743 F.2d 1441 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1848 (1985); *United States v. Broome*, 732 F.2d 363 (4th Cir.), *cert. denied*, 105 S. Ct. 181 (1984).

¹⁰⁸755 F.2d at 1027.

discussions regarding criminal activity are justifiably excluded from protection. The marital testimonial privilege, however, is concerned with protecting domestic harmony. Thus, compelled testimony may cause the debilitating effect on the marriage which the privilege was designed to avoid.¹⁰⁹

This reasoning is flawed in two respects. First, compelled testimony involving confidential communications may also cause a negative impact that the communications privilege was designed to protect. Forcing disclosure of communications intended to be confidential may have a chilling effect on husband-wife communications. Second, courts and commentators are not all in agreement on the purpose of the confidential communications privilege. Some would suggest that the purpose underlying both privileges is to protect marital harmony.¹¹⁰ If the purpose of the two privileges is identical, then an exception which permits the introduction of confidential communications but bars all other testimony seems illogical.¹¹¹

Another factor persuading the Second Circuit to reject the joint participation exception was the difficulty of establishing the witness spouse's role in the criminal activity without invalidating the privilege.¹¹² This argument echoes the *Malfitano* court's concern with prosecutorial abuse.¹¹³ In *In re Grand Jury Subpoena United States*, the witness spouse continually maintained that she did not participate in her husband's affairs, despite their twenty-one-year marriage. The court was reluctant to find that their close marriage provided a sufficient basis to conclude that both spouses were involved in the alleged conspiracy.¹¹⁴

In concluding its opinion, the Second Circuit indicated its reluctance to assume a definite responsibility for any modification of the privilege: "[I]n light of its existence since the early days of the common law and of the importance of the interests which the marital privilege serves, we would leave the creation of exceptions to the Supreme Court or to Congress."¹¹⁵

In taking a conservative approach, the court failed to articulate what countervailing interests might be at stake. Because the case arose in the context of espionage and concerns with national security, the case raises questions regarding the public's substantial interest in ascertaining the

¹⁰⁹*Id.* at 1027-28.

¹¹⁰*See* *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978); *United States v. Mendoza*, 574 F.2d 1373 (5th Cir. 1978).

¹¹¹*See In re Grand Jury Subpoena Koecher*, 601 F. Supp. at 390.

¹¹²755 F.2d at 1028.

¹¹³*See* *Appeal of Malfitano*, 633 F.2d at 299; *see also supra* text accompanying note 91.

¹¹⁴755 F.2d at 1028.

¹¹⁵*Id.*

truth. The court interpreted the marital testimonial privilege and Federal Rule of Evidence 501 in a manner indicating its eagerness to protect the marriage from society. In so doing, the court may have failed to protect society from the marriage.

IV. RECONCILING THE DIFFERENCES: A PROPOSED SOLUTION

Although evidentiary rules protecting marital harmony have prevailed for over four hundred years in Anglo-American jurisprudence, they have been subjected to numerous attacks.¹¹⁶ Critics of the marital testimonial privilege argue that the stability of the family depends little upon a spouse's immunity from compulsory testimony,¹¹⁷ that it is unjust and illogical to permit a wrongdoer to secure immunity from giving redress in the name of preserving his own marital peace,¹¹⁸ and that there is an inconsistency in providing the privilege to spouses while denying it to parents, children, and siblings, because the peace of the family is no less dependent on the harmony of those relationships.¹¹⁹ Ultimately, society may benefit more from the marital partners' incarceration than it would from making every effort to preserve their marital relationship.

The exclusionary effect of the marital testimonial privilege is also inconsistent with the general principle that "the public has a right to every man's evidence." Limitations upon this principle are acceptable "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 the truth."¹²⁰ Thus, the Supreme Court has admonished the judiciary to construe privileges narrowly.¹²¹

It is clear today that the marital testimonial privilege is to be construed in accordance with its purpose of protecting the family as a socially beneficial institution. Like other rules of exclusion, however, it should not be applied without a judicial inquiry into whether the application will promote its objectives sufficiently to justify the substantial cost to society of excluding probative evidence.¹²²

¹¹⁶See 8 J. WIGMORE, *supra* note 9, § 2228 at 216-17; C. McCORMICK, *supra* note 21, § 66 at 162-63 ("The privilege is an archaic survival of a mystical religious dogma and a way of thinking about the marital relation that is today outmoded."); see also Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUMB. L. REV. 307 (1976).

¹¹⁷See 8 J. WIGMORE, *supra* note 9, § 2228 at 216. See generally Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 682 (1929).

¹¹⁸8 J. WIGMORE, *supra* note 9, § 2228 at 216-17.

¹¹⁹*Id.* at 217 n.2.

¹²⁰Trammel v. United States, 445 U.S. at 50 (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

¹²¹See United States v. Nixon, 418 U.S. 683, 710 (1974).

¹²²The Supreme Court, for example, has held that a balancing test weighing the costs and benefits of preventing the use of evidence seized in violation of the fourth amendment

Most courts have consistently allowed the marital testimonial privilege to be asserted unless circumstances indicate that the particular marriage is undeserving of protection. Some courts, however, have gone beyond a judicial determination of whether the marriage is worthy of protection. They have sought to decide whether the countervailing interest in receiving material information outweighs the concern for protecting marital harmony. A classic example of this type of analysis is found in *United States v. Allery*.¹²³ In *Allery*, the defendant was convicted of the attempted rape of his daughter following damaging testimony from his wife.¹²⁴ Analyzing the marital testimonial privilege "in light of reason and experience," the United States Court of Appeals for the Eighth Circuit held that an exception to the privilege exists in cases involving crimes against either spouse's child.¹²⁵ The court stated:

We recognize that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that a serious crime against a child is an offense against that family harmony and to society as well. Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. Third, we recognize that . . . "[a]ny rule that impedes the discovery of truth in a court of law impedes as well the doing of justice."¹²⁶

A spouse's crime committed against his child is not necessarily indicative of a marriage relationship which is unworthy or undeserving of protection. Yet, the *Allery* court determined that the problem of child abuse in the home outweighs any concern with marital tranquility.¹²⁷

The disagreement among the federal circuit courts of appeals in recognizing the joint participation exception may be partially explained by the courts' different modes of analysis. Both approaches are policy oriented, but each emphasizes different factors. The Second and Third Circuits, in rejecting the joint participation exception, seek to determine only if the purpose of the privilege would be served by allowing the privilege to be asserted.¹²⁸ This approach takes the view that joint

be used rather than indiscriminately applying the exclusionary rule. See *United States v. Leon*, 104 S. Ct. 3405 (1984); see also *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976).

¹²³526 F.2d 1362 (8th Cir. 1975).

¹²⁴*Id.* at 1363.

¹²⁵*Id.* at 1367.

¹²⁶*Id.* at 1366 (citations omitted); see also Note, *United States v. Allery*, 7 CUMB. L. REV. 177 (1976).

¹²⁷526 F.2d at 1366.

¹²⁸See *supra* text accompanying notes 82-93, 102-15.

participation by spouses in criminal activity is not necessarily indicative of a marriage undeserving of protection. These courts, however, ignore the countervailing interests. The Seventh and Tenth Circuits, on the other hand, look beyond the question of whether the purpose of the privilege would be served and attempt to balance the conflicting interests.¹²⁹ In *United States v. Clark*, however, the Seventh Circuit viewed the joint participation exception as a rigid evidentiary principle and applied the exception without even considering whether the purpose of the privilege would be served in that particular case.¹³⁰

In an effort to remedy possible unjust assertions of the marital testimonial privilege, the federal courts should adopt a systematic balancing test. Such a test could serve to protect the marital relationship yet allow the privilege to be circumvented in those cases where the public's interest mandates the admission of compelled spousal testimony. Such a process would necessarily involve an evaluation of the privilege in light of the specific facts on a case-by-case basis. Courts and commentators have expressly acknowledged the need to balance competing considerations in determining whether a privilege should be allowed in a particular case.¹³¹

The probable effect of adverse spousal testimony on a particular marriage, as well as the damage that exclusion of the testimony would do to the factfinding process, will vary substantially from case to case. Although it would be difficult to establish criteria of general application that will strike the best balance in all cases, it would be essential that a case-by-case evaluation of the privilege initially involve a judicial assessment of whether the particular marriage deserves protection. Should the court find the marriage unworthy of protection, assertion of the privilege should be denied. When a particular marriage is deemed worthy of protection, however, the court should carefully weigh society's interest in protecting the marriage against several factors. These factors include the nature and magnitude of the crime involved, whether the testimony is expected to be material, and whether the information sought to be introduced could be obtained from a less intrusive source. Completion of the balancing process would then require the court to consider the extent of the potential harm to the marriage itself.

¹²⁹*United States v. Trammel*, 583 F.2d 1166; *United States v. Van Drunen*, 501 F.2d 1393; see also *supra* text accompanying notes 50-73.

¹³⁰712 F.2d 299; see also *supra* text accompanying notes 93-101.

¹³¹*E.g.*, *Ryan v. Commissioner of Internal Revenue*, 568 F.2d 531, 543 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *United States v. Cameron*, 556 F.2d 752, 756 (5th Cir. 1977); Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1391 (1973) ("[R]ather than abolish the testimonial privilege, I would merely leave it to the court's discretion to disallow it in exceptional circumstances where testimony is absolutely necessary in the interests of justice.").

Procedurally, a witness spouse, prior to trial or a grand jury hearing, should have an opportunity to assert the privilege by filing a request with the court. The government would then be required to present a summary of the nature of the knowledge the witness spouse is believed to have of the crime and the testimony expected to be elicited. The court would then make a preliminary decision as to whether an extensive hearing on the issue is required.

The approach is not free from imperfections. Critics argue that such an approach requires inquiry into collateral issues and that successful assertion of the privilege would be unpredictable, thereby leading to a further lack of uniformity in the federal courts.¹³² With the privilege in its *present* form, however, partners to a marriage cannot now be certain that assertion of the privilege will be successful. A court's decision to grant or deny assertion of the privilege should be a determination of which interest is more important to society in specific situations. Such a determination does not guarantee that other societal interests will not suffer as a result. But because this balancing process considers both the marriage and the countervailing interests in obtaining material testimony, the effects of the harm will be minimized. Despite the inherent difficulties in conducting a balancing of interests on a case-by-case basis, the balancing approach would minimize the injustice that emanates from the rigid application of evidentiary rules and exceptions.

V. CONCLUSION

Whether there exists any real justification for the marital testimonial privilege remains the subject of debate. That the social policy of preserving marital harmony has no relation in fact to the privilege and is "merely a sentiment" will continue to be asserted by some and denied by others. Nevertheless, the Supreme Court has indicated that the privilege is not apt to disappear soon as an evidentiary concept. It is, however, subject to further modification.

The joint participation exception was created upon the premise that a marriage comprised of partners who engage in criminal activity is unworthy of the protection that the privilege affords. When the exception is applied without consideration of the actual need for the evidence, it undermines the policy supporting the privilege. Conversely, when the privilege itself is applied without consideration of countervailing interests, it undermines the public's interest in securing the truth.

Reconciling the opposing positions requires only that the courts adopt a systematic balancing test to weigh the conflicting interests on a case-by-case basis. Such a test is congruent with Congress' intent in enacting

¹³²See Note, *The Husband-Wife Testimonial Privilege in the Federal Courts*, 59 B.U.L. REV. 894, 914, 917 (1979).

Federal Rule of Evidence 501.¹³³ Only through such a balancing approach can the contours of the marital testimonial privilege be shaped to strike the best balance between the competing interests of preserving marital harmony and securing material testimony in criminal proceedings.

JAMES CALVIN MCKINLEY

¹³³With regard to the application of common law privileges under Federal Rule of Evidence 501, the Report of the Senate Committee on the Judiciary stated:

[I]n approving [Rule 501], the action of Congress should not be understood as disapproving any recognition of a . . . husband-wife or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. REP. NO. 1277, 93rd Cong., 2nd Sess. 13 (1974).