

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1922

TITLE UNITED STATES, Petitioner V. HANA KOECHER

PLACE Washington, D. C.

DATE January 15, 1986

PAGES 1 thru 52



(202) 628-9300
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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

V. : No. 84-1922

HANA KOECHER :

- - - - -x

Washington, D.C.

Wednesday, January 15, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
12:59 o'clock p.m.

APPEARANCES:

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the petitioner.

GERARD E. LYNCH, ESQ., New York, New York; on behalf of
the respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this afternoon in United States against Koecher.

4 Mr. Wright, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT BY CHRISTOPHER J. WRIGHT, ESQ.,
7 ON BEHALF OF THE PETITIONER

8 MR. WRIGHT: Mr. Chief Justice, and may it
9 please the Court, in November of 1984, respondent was
10 called before a grand jury investigating espionage, and
11 asked three questions: whether she had ever met with
12 agents of the Czechoslovak Intelligence Service; whether
13 she had ever delivered classified documents relating to
14 the national security of the United States to those
15 agents; and whether she had ever been paid for the
16 delivery of those documents.

17 She refused to answer, claiming that her
18 answers would be adverse to the interests of her husband,
19 and citing both the marital testimonial privilege and the
20 marital confidential communications privilege.

21 She has since agreed that no confidential
22 communications would be involved in answering the
23 questions. A hearing was held on whether respondent
24 wanted to be ordered to answer the questions. At that
25 hearing, the government argued, relying on cases from the

1 Seventh and Tenth Circuits, that the marital testimonial
2 privilege does not apply in cases involving joint
3 participation in criminal activities.

4 In support of our claim of joint participation,
5 we offered an affidavit of an FBI agent who had
6 interviewed respondent's husband. That affidavit stated
7 that Mr. Koecher said that he and respondent had met with
8 Czech agents on a number of occasions between 1962 and
9 1983.

10 In the early 1960's, they were directed to
11 penetrate U.S. intelligence agencies. They subsequently
12 moved to the United States. Mr. Koecher got a job with
13 the CIA, and he passed virtually any secret material he
14 obtained while employed there.

15 Mrs. Koecher served as his courier delivering
16 documents and receiving payments for the delivery. At
17 the hearing, respondent did not contest our evidence
18 regarding joint participation. Instead, relying on Third
19 Circuit cases, she argued the marital testimonial
20 privilege applies even when there is joint participation
21 in criminal activity.

22 The District Court agreed with the government,
23 ordered respondent to answer the questions, and
24 subsequently ordered her held in civil contempt when she
25 refused to answer. She spent about four months in jail

1 but refused to answer the questions.

2 In December of 1984, a one-count indictment was
3 returned charging Mr. Koecher with espionage. That
4 indictment alleged that he removed a certain four-page
5 document from the CIA in 1975 and had it delivered to
6 Czech agents.

7 At the Second Circuit's direction, the District
8 Court considered whether the dominant or sole purpose of
9 the grand jury in continuing to seek to question
10 respondent was to obtain evidence for use at Mr.
11 Koecher's trial. The District Court concluded that that
12 was not the grand jury's purpose. Rather, it concluded
13 that the indictment would appear to barely scratch the
14 surface, and that it would be reasonable and logical for
15 the grand jury to continue to seek answers to many other
16 questions such as who worked with Mr. Koecher at the CIA,
17 who were the Czech agents to whom Mrs. Koecher delivered
18 documents, and what other documents and information other
19 than the four-page document mentioned in the indictment
20 have been delivered to the agents.

21 The Second Circuit subsequently declined to
22 accept our argument that the marital testimony of
23 privilege does not apply in cases involving joint
24 participation, and reversed the District Court's decision
25 ordering respondent to answer.

1 The issue before this Court, therefore, is
2 whether when spouses jointly participate in criminal
3 activity, a privilege against giving adverse testimony
4 should be recognized. The Trammel decision sets out the
5 two factors to be considered in determining whether the
6 privilege should be recognized in this situation.

7 On the one hand, there is the need for
8 probative evidence. On the other hand, there is the
9 interest in marital harmony. The Trammel decision shows
10 that those interests must be weighed against each other
11 to determine whether the privilege ought to be recognized
12 in certain classes of cases.

13 In cases that do not involve joint
14 participation, we contend that the Trammel decision shows
15 that those interests are nearly at equilibrium. Nineteen
16 states have abolished the privilege altogether,
17 concluding that the need for evidence outweighs the
18 interest in marital harmony in all circumstances.

19 Distinguished commentators such as Wigmore and
20 McCormack have also called for abolition of the
21 privilege. And influential model rules such as the model
22 code of evidence and the uniform rules of evidence have
23 also abolished the privilege while leaving the marital
24 communications privilege intact.

25 The need for evidence is a weighty need. This

1 Court has 13 times cited -- for Hardwick's 1812 statement
2 that the public has a right to every man's evidence. In
3 Branzburg v. Hayes, the Court concluded that the public's
4 right to evidence outweighed the First Amendment interest
5 of newsmen in protecting their confidential sources.

6 The Court stated that the public interest in
7 law enforcement and in ensuring effective grand jury
8 proceedings overrides the consequential but uncertain
9 burden on news gathering that is said to result from
10 insisting that reporters like other citizens answer
11 questions put to them in grand jury proceedings.

12 In United States v. Nixon, similarly, the need
13 for evidence was held to outweigh the President's
14 interest in confidentiality in the communications in his
15 own office. As in Branzburg, the Court noted that the
16 need for production of relevant evidence in a criminal
17 proceeding is specific and central to fair adjudication
18 of a particular case such that without access to specific
19 facts, a criminal prosecution may be totally frustrated,
20 while the need for confidentiality is general and
21 uncertain. The Court added --

22 QUESTION: Mr. Wright, may I interrupt? I
23 wasn't sure I caught something. You mentioned the
24 marital communications privilege has not been challenged
25 in a number of states which have abolished the basic

1 privilege. What is the government's position on the
2 marital communications privilege?

3 MR. WRIGHT: We contend, as I believe five
4 Courts of Appeals have agreed with us, that it does not
5 protect communications made in the furtherance of
6 criminal activity, but other than that, we have not
7 challenged that, but --

8 QUESTION: But in this particular case, if you
9 prevail, you would think you could ask about
10 communications between the husband and wife in this
11 particular inquiry.

12 MR. WRIGHT: We would make that argument. That
13 has not -- that issue has not been raised in this case.

14 QUESTION: Thank you.

15 MR. WRIGHT: The Court noted in U.S. v. Nixon
16 that privileges are not lightly created nor expansively
17 construed, for they are in the derogation of the search
18 for truth. The need for obtaining probative evidence in
19 this case is great. As we pointed out in our reply
20 brief, it is the policy of the government not to compel
21 family members to testify adversely unless the testimony
22 is needed.

23 In this case, as the District Court noted,
24 respondent may have a great deal of information --

25 QUESTION: Well, is it the government's policy

1 to ask non-family members to testify even though their
2 testimony isn't needed?

3 MR. WRIGHT: No, but in the case of family
4 members it is the government's policy to see whether the
5 evidence can be obtained from other sources.

6 QUESTION: You have got to bend over backwards
7 to avoid calling them if you can avoid it?

8 MR. WRIGHT: Roughly, yes, that is right.

9 As a general matter, the interest in obtaining
10 probative evidence is greater in cases involving joint
11 participation.

12 QUESTION: Of course, it is true, isn't it, Mr.
13 Wright, that the only time you really reach this issue is
14 if you granted immunity, because I suppose the spouse
15 could always plead the Fifth Amendment by hypothesis in
16 the category of cases we are dealing with.

17 MR. WRIGHT: That is true. In the joint
18 participation cases, while respondent has not yet raised
19 the Fifth Amendment, we --

20 QUESTION: Well, but you granted immunity,
21 didn't you?

22 MR. WRIGHT: We would have to if she is a joint
23 participant.

24 QUESTION: So we are really not -- we are
25 mostly talking about the testimony for purposes of

1 investigation before a grand jury, I would suppose is the
2 most important area that you -- well, no, you -- off then
3 with trial testimony, too.

4 MR. WRIGHT: That's right.

5 QUESTION: How much of a showing do you have to
6 make at the grand jury level that the wife is a part and
7 parcel of the work of the husband?

8 MR. WRIGHT: It is our position that we have to
9 come in with some independent evidence --

10 QUESTION: Like what?

11 MR. WRIGHT: In this case, for instance, we
12 have Mr. Koecher's own statements to FBI agents that Mrs.
13 Koecher was a part of the conspiracy, that she served as
14 his courier, that she met with Czech agents in
15 Czechoslovakia, in New York, and in Vienna on a number of
16 occasions over a 20-year period.

17 In this case, we don't believe that there is
18 any serious doubt about our showing of joint
19 participation.

20 QUESTION: Well, there is serious doubt in my
21 mind because she is innocent until proved guilty.

22 MR. WRIGHT: We have not --

23 QUESTION: Right?

24 MR. WRIGHT: We have not shown joint
25 participation --

1 QUESTION: Right?

2 MR. WRIGHT: -- beyond a reasonable doubt. We
3 would certainly concede that.

4 QUESTION: I mean, I am just wondering why,
5 under normal circumstances you can't do it, so all you do
6 is charge her as a co-conspirator, and then automatically
7 they lose the privilege.

8 MR. WRIGHT: Well, we think we have to do more
9 than charge as a co-conspirator. The District Court
10 would have to agree with us that we had come forward with
11 independent evidence showing that there was a probable
12 cause to believe that she was a joint participant.

13 In analogous circumstances involving the
14 marital communications privilege or the lawyer-client
15 privilege, which also do not protect communications made
16 in furtherance of joint criminal activities, courts have
17 faced similar problems, and they have not been
18 insurmountable by any means.

19 It is worth pointing out that the need for
20 probative evidence is greater in cases involving joint
21 participation, and that in connection with that the
22 privilege, if recognized, will as a practical matter
23 often shield third parties as well as spouses. The
24 marital privileges have frequently been asserted, as the
25 cases we cite show, in drug cases, for example, which

1 have often involved large teams of conspirators.

2 Thus, as a practical matter, if the government
3 cannot compel testimony in any circumstances, a number of
4 third parties are likely to benefit as well, as this case
5 shows. We don't know who those third parties are, but
6 specifically, that is, although presumably there are
7 Czech agents who are shielded, we cannot get this
8 testimony.

9 On the other side of the balance from the need
10 for probative evidence is the interest in preserving
11 marital harmony. As an initial matter, it is worth
12 noting that this interest, like the interest asserted in
13 Branzburg and in U.S. v. Nixon, are uncertain. It may
14 have no effect at all, abolition of the testimonial
15 privilege, at least in some cases.

16 Contrary to respondent's repeated suggestions,
17 there is simply nothing about compelled testimony that
18 automatically leads to dissolution of marriage. Indeed,
19 respondent's argument is somewhat contradictory. On one
20 hand, she has repeatedly stated that she is so devoted to
21 her husband and he to him that she will never testify
22 against him. At the same time, however, she implies that
23 their marriage will disintegrate automatically if she
24 answers our questions. We suspect that she exaggerates
25 on both counts.

1 Moreover, as this Court suggested in Hawkins,
2 we think that there is less danger of an adverse effect
3 on marital harmony when testimony is compelled than there
4 is when the testimony is voluntarily given by a spouse in
5 return, for example, for a promise of leniency.

6 The Court of Appeals here did not appear to
7 understand that there is a utilitarian aspect as well as
8 a non-utilitarian aspect to the interest in marital
9 harmony. It concluded that a marriage between criminals
10 can be devoted and essentially ended its inquiry at
11 that.

12 It thus overlooked the public interest in
13 marital harmony even though this Court stressed that
14 public interest in Trammel, and even though commentators
15 have always assumed that privileges exist to serve
16 utilitarian purposes.

17 QUESTION: Mr. Wright, perhaps this is a
18 similar thought to the one Justice Marshall expressed,
19 but at the time the trial is taking place, when you seek
20 to get the testimony, do you assume that they are
21 criminals or that they are innocent?

22 MR. WRIGHT: Our position is that we have to
23 come forward and make a prima facie showing of joint
24 participation.

25 QUESTION: Are they still entitled to the

1 presumption of innocence?

2 MR. WRIGHT: I presume until we make that
3 showing they certainly are.

4 QUESTION: But it is a probable cause showing
5 under your standard as I understand it?

6 MR. WRIGHT: As I have read the cases, the
7 probable cause prima facie showing required in the
8 lawyer-client privilege cases, for example, have --

9 QUESTION: So you make a probable cause showing
10 before the grand jury, but the presumption of innocence
11 survives that showing normally.

12 MR. WRIGHT: Certainly.

13 QUESTION: But here you are suggesting it
14 doesn't, I guess.

15 MR. WRIGHT: Wouldn't you be satisfied with
16 just showing enough to be accused, not convicted?

17 QUESTION: Yes, that is our position. We don't
18 think we have to show it beyond a reasonable doubt. We
19 believe we have to come forward with some independent
20 evidence. Certainly the presumption of innocence would
21 be retained.

22 All the reports that have addressed this issue,
23 including the Third Circuit, which went the other way,
24 have recognized the utilitarian interest served by this
25 privilege and other privileges. The Third Circuit in its

1 Malfitano decision suggested that marriage is a social
2 bond that not only ties individuals together but also can
3 tie them into certain social norms and behavioral
4 patterns.

5 Thus, it said, marriage may serve as a
6 restraining influence on couples against future
7 antisocial acts, and may help their integration back into
8 society.

9 This interest, the public interest in marital
10 harmony is seriously diminished.

11 QUESTION: Was the Third Circuit case one in
12 which the spouse asserted the -- the witness spouse
13 asserted the privilege, or the non-testifying spouse?
14 The Third Circuit.

15 MR. WRIGHT: It was a post-Trammel decision, so
16 the witness must have asserted the privilege.

17 QUESTION: I see.

18 QUESTION: Mr. Wright, it sounds like most of
19 your arguments really go to a suggestion that the
20 privilege be altogether eliminated, not just an exception
21 created.

22 MR. WRIGHT: Well, no, we are asking for an
23 exception. We believe that it is important to understand
24 that the interests are nearer to equilibrium without the
25 addition of joint participation in crimes. And we think

1 we have shown that.

2 From that point, it seems to us that it is
3 quite clear that the added weight on the side of the need
4 for probative evidence added because a joint participant
5 spouse is likely to have more evidence as well as the
6 lesser interest on the other side of the balance.

7 QUESTION: Well, it occurs to me it might make
8 more sense just to abandon it altogether than to try to
9 save something out of it.

10 MR. WRIGHT: Well, certainly 19 states have
11 concluded that that is logical, and most of the
12 commentators, the distinguished commentators who thought
13 about this and authors of the model rules have all
14 reached those conclusions --

15 QUESTION: But the distinguished commentators
16 on which you rely are not speaking out in favor of the
17 creation of just an exception from the rule, are they?

18 MR. WRIGHT: No, they have primarily said that
19 the marital testimonial privilege ought to be abolished
20 altogether and only confidential communications privilege
21 retained.

22 QUESTION: Have the undistinguished
23 commentators taken any position?

24 (General laughter.)

25 MR. WRIGHT: Well, I am sure that my colleague

1 will tell you about the undistinguished commentators --

2 (General laughter.)

3 MR. WRIGHT: -- many of whom have suggested
4 radically broadening the privilege to include friends and
5 lovers and various other people.

6 QUESTION: Mr. Wright, you wouldn't object to
7 the abolition of the privilege altogether, would you?

8 MR. WRIGHT: We have not asked for it. I do
9 not understand that we would object to it, no. Returning
10 to the --

11 QUESTION: Your position in this case is that
12 the privilege falls if they are accomplices in the
13 criminal activity. Isn't that it?

14 MR. WRIGHT: Exactly. Exactly. We believe
15 that that addition clearly shows that the privilege ought
16 not be recognized in these circumstances because, in
17 part, we see little social utilitarian interest in a case
18 involving joint participation in a crime.

19 There is another reason why the interest in
20 preserving marital harmony is diminished in cases
21 involving drug participation that I haven't mentioned.
22 It is that recognition of the privilege in this case
23 actually encourages the recruitment of spouses as
24 co-conspirators.

25 It is true that after this Court's Trammel

1 decision, a spouse cannot be sure that his co-conspirator
2 spouse won't decide to testify against him. But there is
3 still a significant advantage in recruiting a spouse as a
4 co-conspirator if the privilege is recognized, as this
5 case illustrates.

6 Thus, viewed prospectively, it is the privilege
7 that is likely to harm the institution of marriage by
8 encouraging criminals to recruit their spouses as
9 co-conspirators if the exception we propose is not
10 recognized.

11 QUESTION: Or to recruit spouses.

12 MR. WRIGHT: I am sorry? I meant to say
13 recruit spouses as co-conspirators, if that is not what I
14 said.

15 QUESTION: Or convert co-conspirators into
16 spouses.

17 MR. WRIGHT: Again, summarizing our argument,
18 the position we have made is that the interests to be
19 weighed are very close without our exception, and we
20 think that there is added weight on the side of the need
21 for probative evidence because co-conspirator spouses are
22 likely to have more evidence. We think there is less
23 weight on the side of protecting marital harmony because
24 it is not clear that compelled testimony will have an
25 effect, because there is little or no societal interest

1 in preserving marriages between criminals, and because
2 recognizing privilege in these circumstances encourages a
3 recruitment of spouses as co-conspirators.

4 I would like to briefly discuss two arguments
5 respondent makes that do not add to our argument. One
6 argument that respondent repeatedly makes is an argument
7 that decent people have a natural repugnance to watching
8 one spouse testify against another.

9 As an initial matter, it is worth noting that
10 Wigmore, who coined the phrase "natural repugnance,"
11 dismissed this argument summarily, and that this Court in
12 comprehensively reviewing the privilege in Trammel did
13 not mention it.

14 Nevertheless, we do not think that there is
15 nothing to this argument. Instead, we think it is merely
16 a restatement of the personal interest, the
17 non-utilitarian interest in marital harmony that weighs
18 on the other side of the balance, the side favoring that
19 condition.

20 But we think it is nothing more than that, and
21 we do not think it is a particularly weighty factor.
22 Some people, at least, have a natural repugnance to
23 evidentiary rules that allow guilty defendants to go free
24 because of the introduction of evidence against them that
25 proves their guilt has been prohibited.

1 And in cases of joint participation in criminal
2 activity, any sympathy we might otherwise feel for the
3 spouse, the witness spouse who faces a difficult decision
4 between testifying, between perjuring herself, and
5 between being held in contempt, is lessened considerably
6 by the fact that she has brought this upon herself by
7 agreeing to participate in the crime.

8 The other argument is respondent's repeated
9 suggestion that the marital privilege somehow has a
10 constitutional basis. There is simply nothing in the
11 Constitution nor in this Court's decisions that suggests
12 that the privilege is constitutionally based and, of
13 course, constitutionalizing the privilege would interfere
14 with the common law process that many states have used to
15 abolish the privilege altogether.

16 Furthermore, to the extent that respondent
17 appears to believe that the constitutional basis for this
18 privilege is the right to privacy, we think she has her
19 marital privileges confused. If either of the privileges
20 involves the right to privacy, it is the confidential
21 communications privilege, not the testimonial privilege.

22 That no privacy interest is implicated in these
23 cases -- in this case, rather, can be determined clearly
24 by reading the three questions that respondent has
25 refused to answer. It is also worth noting that an

1 exception like the joint participant exception that we
2 favor has been recognized for all other privileges, as I
3 mentioned previously.

4 The reason for that, we submit, is that the
5 social utility in recognizing a privilege is severely
6 lessened when the privilege is used to shield joint
7 criminal activity.

8 In summary, in this case, we are asking the
9 Court to hold that the marital testimonial privilege,
10 like other privileges, does not shield joint criminal
11 activity. We think that the Court's decision in Trammel
12 shows that the factors to be weighed are nearly at
13 equilibrium in the absence of joint criminal activity.

14 When we, when the the government comes forward
15 with independent evidence showing that there was joint
16 participation in crime, it seems to us that the need for
17 probative evidence is greater, the societal interest in
18 preserving marital harmony is lessened, so that the
19 balance clearly tips against recognition of the privilege
20 in these circumstances.

21 QUESTION: May I ask, on your Trammel case, you
22 have not mentioned what Judge Friendly said about it.
23 Judge Friendly went into the Trammel case and found it
24 didn't apply, didn't he?

25 MR. WRIGHT: The Trammel case does not

1 expressly apply. That case involved voluntary
2 testimony.

3 QUESTION: But he had no trouble with saying
4 that it didn't apply in this case?

5 MR. WRIGHT: No. I might mention in that
6 regard that --

7 QUESTION: Well, I was waiting to hear you.

8 MR. WRIGHT: -- that in the Trammel case, the
9 Tenth Circuit based its decision on the joint participant
10 exception. We argued in our brief in Trammel that the
11 Court should affirm on the basis that the Court did
12 affirm on the voluntary testimony exception, which is a
13 broader argument, one that applies in more cases.

14 The Court did not mention the joint participant
15 exception. We don't think that any inference, certainly
16 no negative inference can be drawn from the fact that the
17 Court actually went farther than it probably needed to in
18 some areas and to some extent in that case.

19 I would like to reserve the remainder of my
20 time.

21 CHIEF JUSTICE BURGER: Very well.

22 Mr. Lynch.

23 ORAL ARGUMENT OF GERARD E. LYNCH, ESQ.,

24 ON BEHALF OF THE RESPONDENT

25 MR. LYNCH: Thank you, Mr. Chief Justice, and

1 may it please the Court, the government today is asking
2 this Court to do something that it has never done before,
3 to put a woman in prison for refusing to testify in a
4 criminal matter against her husband of 22 years, and
5 despite Mr. Wright's emphasis on the particular questions
6 that were asked in this case, there is no question but
7 that any testimony given by Mrs. Koecher in this
8 investigation could well have led to potential
9 incrimination of her husband. There is no question but
10 that the grand jury was continuing to investigate Mr.
11 Koecher as well -- that is the finding of fact below --
12 with a view to possibly bringing further charges against
13 him.

14 The government's demand today is truly
15 extraordinary. For more than 400 years the courts of
16 both Great Britain and the United States have held that
17 out of respect for the sacred unity of marriage the
18 common law does not permit a person to be compelled to
19 testify against his or her spouse.

20 QUESTION: But there have been a lot of changes
21 in recent years, have there not?

22 MR. LYNCH: There have been changes in the
23 marital privilege in recent years. I would submit that
24 one of the -- there are two that are particularly
25 significant. One is the change this Court made in the

1 Trammel decision a few years ago. In Trammel, this Court
2 essentially removed the principal basis on which the
3 marital privilege had been criticized before.

4 That is, before the Trammel decision the rule
5 had been that the defendant spouse had the right to block
6 his or her spouse from testifying, so that the privilege
7 resided in the defendant, usually the husband, who would
8 then prevent a willing wife from testifying against him.
9 That was the essential basis on which the marital
10 privilege had been criticized, and that has gone --

11 QUESTION: How long had that part of the
12 privilege been extant?

13 MR. LYNCH: That part of the privilege goes all
14 the way back as well, Justice White. That is correct.

15 QUESTION: And yet we changed it.

16 MR. LYNCH: You changed it. It took 400 to --

17 QUESTION: The tradition of the common law
18 process.

19 MR. LYNCH: And I don't think we need to make
20 another --

21 QUESTION: When did the present code of
22 evidence, when was it passed by Congress?

23 MR. LYNCH: In, I guess the rules of evidence
24 were promulgated in about 1972 by this Court, and then by
25 Congress a few years later.

1 QUESTION: Two. And Congress didn't take a lot
2 of the privilege provisions in the code, did they?

3 MR. LYNCH: That's right. This Court --

4 QUESTION: It left it to the Court.

5 MR. LYNCH: Oh, there is no question about it,
6 Your Honor. We agree with that absolutely. This Court
7 had recommended to Congress --

8 QUESTION: So in terms of the kind of decision,
9 you are not objecting to our considering this matter?

10 MR. LYNCH: Oh, no not at all. Not at all,
11 Justice White.

12 QUESTION: You just think we ought to consider
13 it your way.

14 MR. LYNCH: Absolutely, although I do think
15 that as the Chief Justice said in his opinion for the
16 Court in Trammel, that this Court should be very cautious
17 before changing rules of privilege that go back as far as
18 this one does, and particularly where those rules of
19 privilege trench on matters respecting the family.

20 QUESTION: Well, we took one step at it in
21 Trammel.

22 MR. LYNCH: Absolutely, Justice White, and I
23 think that --

24 QUESTION: That is caution.

25 MR. LYNCH: Excuse me?

1 QUESTION: That is caution in itself.

2 MR. LYNCH: That certainly is caution, but what
3 the Court did in Trammel, as I said a moment ago, was to
4 really undermine the basis for the principal criticism of
5 the marital privilege. The argument that Mr. Wright
6 made, for example, about recruiting spouses as
7 co-conspirators had particular force at a time when if
8 the spouse became a co-conspirator the spouse could never
9 testify whether or not she was ultimately willing to
10 because the defendant could block it.

11 But that is gone in Trammel. That was the
12 big --

13 QUESTION: Mr. Lynch, how many states have
14 abolished the privilege altogether?

15 MR. LYNCH: Nineteen. Thirty-one states
16 retained it. Interestingly enough, not one of those 31
17 states by legislation, common law, or any other process
18 has ever adopted the exception for which the government
19 contends in this case.

20 QUESTION: Well, that is why it might make more
21 sense to abolish it altogether than to create an
22 exception.

23 MR. LYNCH: Well, insofar as the government's
24 position in this case makes no sense whatever, it seems
25 to me that abolishing the privilege might be more

1 sensible than that, but abolishing the privilege is a
2 step that this Court has refused to take, not 400 years
3 ago, but in Hawkins in 1958, in Trammel, and in its
4 recommendations to Congress with respect to the Federal
5 Rules of Evidence.

6 QUESTION: Was there any occasion to abolish it
7 completely in Trammel?

8 MR. LYNCH: Well, in Trammel, Mr. Chief
9 Justice, as --

10 QUESTION: The question wasn't presented to us
11 on the broad basis.

12 MR. LYNCH: Well, the government didn't argue
13 for the abolition of the privilege there, just as the
14 government does not argue for the abolition of the
15 privilege here. It is exactly the same posture in that
16 respect. The government did urge a broader ground than
17 this one in that case.

18 QUESTION: But in those cases, did the Court
19 not -- the Court's opinion not point out that the root of
20 this whole idea went back to the time when the woman was
21 nothing, the woman was merged into the man when they were
22 married?

23 MR. LYNCH: Yes, I think that is an important
24 point, Mr. Chief Justice. At one time, the woman's
25 position in marriage was, as you say, as a nullity, and

1 the privilege does indeed have its roots in that time,
2 but the essential insight that the privilege represents,
3 indeed, the essential insight that lies behind the
4 erroneous conception that the wife was a nullity is one
5 that was valid then and is valid now, as this Court said
6 in Hawkins.

7 QUESTION: How much do you rest on the
8 proposition that for the one spouse to testify against
9 the other would undermine the marriage relationship?

10 MR. LYNCH: Well, that is what this Court said
11 in Hawkins. I think that that is an accurate perception.

12 QUESTION: If the Court orders the spouse to
13 testify, doesn't that eliminate that fact?

14 MR. LYNCH: I don't think it does at all, Mr.
15 Chief Justice.

16 QUESTION: Then the spouse is given the choice
17 of pleasing her husband or going to prison.

18 MR. LYNCH: The spouse certainly has an excuse,
19 as it were, in the moral court in which she would have to
20 argue with her husband. But I would suggest that that
21 excuse wouldn't carry much weight in that kind of court.
22 That is to say, the way I would prefer to state the
23 insight that this Court expressed in Hawkins is not so
24 much that compelled testimony would destroy the marriage
25 as that compelled testimony is inconsistent with the very

1 basis of marriage, the very nature of marriage.

2 What the Court would be compelling a spouse to
3 do if the marital privilege were abolished is to betray a
4 husband.

5 QUESTION: But on the other hand, doesn't this
6 give the man or the woman an advantage over all other
7 criminals, that if you take your husband or your wife in
8 and commit the crime, then you have got a preferred
9 witness status?

10 MR. LYNCH: No, I don't think so, Mr. Chief
11 Justice.

12 QUESTION: You don't think that encourages
13 joint crimes by husband and wife?

14 MR. LYNCH: I don't think that is, with all
15 respect, a particularly realistic way to look at
16 marriage. The assumption that spouses tend to recruit
17 each other to be in each other's crimes because that
18 would be a good person to have in the crime because they
19 have a privilege, that is not, it seems to me, the way it
20 works.

21 If there is any tendency for spouses to recruit
22 each other to be in crimes, it stems from two basic
23 facts. The spouse is the person closest to the person
24 contemplating the crime. And secondly, if there is any
25 assumption that the spouse isn't going to testify, it

1 doesn't come from the law. It comes from the same
2 assumption that I suppose co-conspirators often indulge,
3 that people that they trust will not betray them.

4 I think that is particularly -- a particularly
5 strong force where those people are married, and I don't
6 think it is one that the law can really do much to
7 change. I think if we look realistically at the
8 government's suggestion that important evidence is being
9 lost because of the marital privilege in joint
10 participant or any other circumstances, it will not bear
11 scrutiny.

12 The government has pointed to not a single case
13 from the Seventh or Tenth Circuit in which any evidence
14 was ever obtained by compelling a spouse to testify
15 before a grand jury or anywhere else.

16 QUESTION: Mr. Lynch, I wonder if your use of
17 the word "betray" a couple of minutes ago isn't a rather
18 inappropriate term. If the law does say that the spouse
19 can be compelled to testify, I can see how a husband
20 could be, you know, deeply disturbed or a wife deeply
21 disturbed, the spouse is testifying against them, perhaps
22 disagrees with the spouse's account, which could be a
23 source of -- but to say that the spouse is betrayed, I
24 just don't think that is a very apt use of that word.

25 MR. LYNCH: Well, I am sorry, Justice

1 Rehnquist, if you think that I overstressed that point,
2 but I do think that the essence of marriage, as this
3 Court said in Griswold against Connecticut, is bilateral
4 loyalty. What I would suggest to the Court is that if
5 there is any analogous privilege, and the government
6 places great stress on various other privileges, it is
7 not the attorney-client, it is not even the marital
8 confidential communications privilege, it is the Fifth
9 Amendment privilege.

10 There is no other privilege that exists in our
11 law, which is like the marital testimonial privilege in
12 giving a witness the blanket right to refuse to testify
13 against some other person.

14 An attorney doesn't have a privilege not to
15 testify against his client. The attorney has the
16 privilege not to testify -- in fact, more accurately, the
17 client has the privilege to prevent. But the privilege
18 is not to testify about the particular narrow kind of
19 communication. That is what the marital confidential
20 communications privilege is like, too.

21 That is very different from this situation. In
22 those situations, it makes sense to say that if a
23 particular kind of communication, one, for example, in
24 furtherance of crime, is not within the nature of the
25 kinds of communications we are encouraging by the

1 privilege, then the privilege shouldn't apply.

2 The privilege we have got here is a blanket
3 sort of privilege, and as I say, the only analogy to it
4 is the Fifth Amendment privilege. It is the only situation
5 where a person can say within the law that my loyalty to
6 another person is sufficient to justify my never
7 testifying against them.

8 QUESTION: Well, the Fifth Amendment analogy is
9 my loyalty to another person, I myself?

10 MR. LYNCH: That's right. In the marital
11 situation, and this goes back to the Chief Justice's
12 comment a moment ago about the roots of the marital
13 privilege, the roots of the marital privilege lay in the
14 metaphor, perhaps, that husband and wife are one.

15 Now, as the Chief Justice pointed out, that
16 metaphor has certainly been maliciously applied in some
17 circumstances to undermine the separate position of a
18 woman, for example, separate right to property, and
19 things of that sort. But the basic insight underlying
20 that metaphor, that husband and wife, for one, is not
21 something that is oppressive to women. It is not
22 something that died in the 14th century. It is something
23 that I think is with us today. The nature of the marital
24 relationship is that it is the relationship society
25 recognizes in which people are closely bound to each

1 other.

2 What the government is asking for --

3 QUESTION: Why shouldn't you have one on parent
4 and child? We can make a mother testify against her
5 son.

6 MR. LYNCH: Yes, the short --

7 QUESTION: That is kind of close, isn't it?

8 MR. LYNCH: The short answer to that --

9 QUESTION: Isn't it?

10 MR. LYNCH: -- Justice Marshall --

11 QUESTION: The relationship is longer than the
12 marital relationship.

13 MR. LYNCH: It is longer and different in a
14 number of other respects. But I am afraid the short
15 answer to that is simply that our tradition has never
16 recognized that particular privilege. Our tradition has
17 always recognized --

18 QUESTION: That is what Trammel said.

19 MR. LYNCH: That is right. I am certainly not
20 here to argue one way or the other as to whether the
21 privilege should be extended to other situations. That
22 is not implicated in this case at all. But in the
23 situation where the common law has always recognized the
24 privilege, even the government is not here asking that
25 this Court abolish the privilege.

1 That issue hasn't been briefed and isn't raised
2 by the government. What they are asking for is something
3 that is the law nowhere. They are not asking for this
4 Court to follow those 19 states that have put the marital
5 privilege aside. They are asking this Court to do
6 something that no legislature has ever done.

7 QUESTION: But there are analogies in the way
8 the attorney-client privilege is treated to what the
9 government is asking for here.

10 MR. LYNCH: There are analogies there, but as I
11 was suggesting before, Justice Rehnquist, those are not
12 true analogies, because the nature of those privileges is
13 different. The reason for the exception is different,
14 and the way in which the exception works is different.

15 After all, in all of those cases, in addition
16 to the fact that they are much narrower privileges to
17 start with and they have a different set of rationales,
18 all of those privileges are ones that can be asserted as
19 the marital privilege used to be able to be asserted by
20 the defendant. That is, if the client is on trial and
21 the attorney is going to testify about a confidential
22 communication, the client can prevent that from
23 happening.

24 That does create a situation, it seems to me,
25 in which it could be said that the client could exploit

1 the lawyer, could use the lawyer for a criminal purpose,
2 wittingly or unwittingly, by the way. The lifting of the
3 privilege doesn't depend on the attorney's involvement or
4 mental state. It turns on what the client was trying to
5 do.

6 If the exception to the privilege were not
7 available there, the client could use the attorney to
8 commit a crime, could make communications in furtherance
9 of a crime, and then prevent that from ever coming out.
10 That is not the case here. Here, if the wife is willing
11 to testify, the defendant spouse cannot prevent her ever
12 from testifying. That is the benefit that this Court
13 obtained for law enforcement in Trammel, and that seems
14 to me distinguishes, among other things, the differences
15 between --

16 QUESTION: A lot of your argument sounds as
17 though you are objecting to the government's argument
18 because it doesn't go far enough.

19 MR. LYNCH: I hope I am not sounding that way,
20 Justice White.

21 QUESTION: It sounds that way. You object that
22 nobody else has ever taken this step by step approach to
23 closing in on the privilege.

24 MR. LYNCH: Well, I think no one else has ever
25 taken this approach because this approach just doesn't

1 make sense. It isn't the case that you can adequately
2 distinguish the joint participant case from any other
3 case of marital privilege.

4 Perhaps it is a good idea to turn directly to
5 that situation.

6 QUESTION: Before you go on to a new point, let
7 me see if I can get your picture clear in mind. The
8 husband and wife engaged in a joint criminal activity,
9 and it doesn't make any difference whether it is
10 importing cocaine or robbing a bank or whatever, I
11 assume.

12 MR. LYNCH: Or income tax evasion.

13 QUESTION: Now the wife is called before the
14 grand jury. And the husband doesn't want her to testify,
15 of course. She is instructed by the court presiding over
16 the grand jury that she must answer or go to prison.
17 Now, you suggest it impairs the marriage relationship if
18 the husband is willing to let her go to prison rather
19 than answer the questions?

20 MR. LYNCH: I am suggesting that it is -- it
21 presents a conflict, first of all, within the conscience
22 of the spouse that puts the marital relationship under
23 tremendous strain, and secondly, that if the wife does
24 testify, essentially what the court has done in that
25 situation and and what the law has done in that situation

1 is to turn the spouses directly against each other. The
2 spouse becomes a witness for the prosecution against the
3 spouse, and that seems to be --

4 QUESTION: Well, I hear what you are saying.
5 You say they put the spouses against each other. When
6 did that begin? When they called her to the grand jury
7 or when the criminal acts began?

8 MR. LYNCH: Well, Mr. Chief Justice, I don't
9 see that the spouses were pitted against each other at
10 any earlier point than the point at which one of them --

11 QUESTION: Well, ordinarily, if two people go
12 into a criminal -- two or three people go into a criminal
13 enterprise, there is the risk that they may be pitted
14 against one another, and it often happens that one will
15 testify against the other in exchange for some lesser
16 sentence.

17 MR. LYNCH: And as this Court recognized in
18 Trammel, the very reason why Mrs. Trammel in that case
19 could be permitted to testify despite the prior history
20 of there being a privilege that would prevent her
21 testifying, the very reason was that her decision to take
22 that option, her decision to become a witness for the
23 prosecution had undermined the marriage. There was no
24 longer, this Court said in Trammel, obviously, this Court
25 said, there was no longer --

1 QUESTION: Wait a minute. You have the
2 sequence wrong. The sequence was that if she was willing
3 before she was under any compulsion of any kind from that
4 opinion, if she was willing, then probably there wasn't
5 much left of that marriage.

6 Now, let's take that same proposition. The
7 husband is saying to the wife, don't testify, but then
8 she answers, they are going to make me testify or go to
9 prison, and he says, all right, go to prison. How much
10 is left of that marriage?

11 QUESTION: No, Mr. Chief Justice. I think in
12 some sense that is exactly my point, but in another way I
13 think it misconceives the situation. Let me try to
14 explain.

15 QUESTION: Well, just answer the specific
16 question. Do you think he has got a right to let her go
17 to prison?

18 MR. LYNCH: I don't think it is his right. I
19 think that is the point. I think it is her decision what
20 to do. I don't think we have a situation here.
21 Certainly there is nothing in the record here, and there
22 is nothing in my understanding of modern relationships
23 between husband and wife that says that the husband calls
24 the shot as to whether or not the wife testifies. It is
25 the wife's decision.

1 QUESTION: He is calling -- in a sense, you are
2 letting his willingness to have her go to prison --

3 MR. LYNCH: Well, he doesn't have much say in
4 the matter. She will go to prison based on her decision
5 and the court's decision, not based on anything that he
6 has to do about it.

7 QUESTION: Mr. Lynch --

8 QUESTION: We are speaking now of what kind of
9 a marriage relationship is left between these two people
10 if he says, in effect, not openly, as under Trammel,
11 where the breach was there, all right, you go to jail.

12 MR. LYNCH: We may have some misunderstanding,
13 but I guess I think that is my point. My point is, there
14 is nothing left of the marriage after the court puts the
15 wife in the position where she has to choose between
16 whether to go to jail and uphold her loyalty to her
17 husband or whether to testify against him.

18 QUESTION: The husband is not -- has a right to
19 say that even if you are being compelled to do this, I am
20 through with you?

21 MR. LYNCH: I don't -- well, I suppose, yes, he
22 clearly does have that right, because --

23 QUESTION: Well, that is what he is doing.

24 MR. LYNCH: But I don't think --

25 QUESTION: Mr. Lynch, isn't it your point that

1 if you prevail he won't have this power?

2 MR. LYNCH: That is exactly right, Justice
3 Stevens. That is to say, what puts everyone in that
4 position, the very position that I think the Chief
5 Justice finds distressing here in this relationship
6 between the parties is that the wife is compelled to
7 testify. If she is not compelled to testify, we never
8 reach the point of having exactly that kind of marital
9 conflict.

10 QUESTION: But how serious a conflict is that?
11 As long as we are speculating, how many wives are going
12 to go to jail rather than testify against their husbands,
13 go to jail for an indefinite period of time, or at least
14 the life of the grand jury?

15 MR. LYNCH: Well, every spouse who has ever
16 been compelled under this exception, which, granted, is a
17 small number, has taken that option. That is what Mrs.
18 Koecher did. She went to jail. This is not a case where
19 there has been a stay, and this is a theoretical issue.
20 Mrs. Koecher went to jail and spent four months there
21 before being released on bail after the Court of Appeals
22 decision.

23 QUESTION: Well, is there any reason to believe
24 that she is a typical example?

25 MR. LYNCH: Well, the government tells us there

1 are no typical examples, because despite the enormous
2 benefits they expect to accrue to law enforcement, they
3 tell us that in the 12 years since this idea was first
4 thought up in Van Drunin by the Seventh Circuit, we
5 haven't had an adequate basis to decide what the
6 empirical effect of it is because it is too short a time
7 and it doesn't come up very often.

8 The two times that it has come up are in the
9 case of United States against Clark in the Seventh
10 Circuit and in this case, and in both of those cases the
11 spouse went to jail rather than to testify.

12 QUESTION: How long did the spouse spend in
13 jail in the Clark case?

14 MR. LYNCH: I don't know for certain. However,
15 it probably was the full 18 months that is permitted,
16 because of the situation there. Clark was a petty
17 embezzler of some kind, and he had engaged in a scheme
18 with his wife. Clark, unlike Mrs. Koecher, was convicted
19 by a jury beyond a reasonable doubt of having
20 participated in the crime. His wife was also under
21 indictment.

22 The government then sought to compel him to
23 testify, saying he is a joint participant and he has been
24 proven to be so. He was already under sentence, and as
25 you know, a contempt citation interrupts the running of

1 the sentence, so presumably his contempt sentence ran for
2 as long as it was, and then he continued with the
3 sentence he was serving.

4 QUESTION: Well, Mr. Lynch, presumably we have
5 a substantial body of experience in the 19 states which
6 have eliminated the privilege altogether. What does that
7 experience show?

8 MR. LYNCH: I am not sure what that experience
9 shows. I don't know how many cases there are in which it
10 is used. One of the other things the government says is
11 that the United States, and I presume this is true for
12 state prosecutors as well, is chary about using his
13 power. I don't know how many cases there are, and I
14 don't know what has happened --

15 QUESTION: How many of the 19 did it by
16 legislation, and how many by a court decision?

17 MR. LYNCH: I don't know the answer to that,
18 Justice White. I believe that most of them have done it
19 by legislation. Let me --

20 QUESTION: There must have been some
21 investigation, some hearings and some decisions about the
22 impact on law enforcement.

23 MR. LYNCH: Curiously, Justice White, I think
24 probably not, although I can't answer that definitely
25 not.

1 QUESTION: They just decided this is a -- we
2 don't have anything else to do, let's just look around
3 and pass these laws?

4 MR. LYNCH: Not at all. There are trends and
5 eddies in these matters. The government says the
6 distinguished commentators go their way. I think by that
7 they mean the old commentators. The government doesn't
8 cite any authority --

9 QUESTION: Law professors. Law professors go
10 around drumming up --

11 MR. LYNCH: Indeed, that is something like what
12 happened here. Wigmore in his treatise said the marital
13 privilege doesn't make much sense, and that was taken as
14 the scholarly view.

15 QUESTION: How long ago did he first say that?

16 MR. LYNCH: About 1903, I think, was when he
17 made that. What the government doesn't point out is that
18 in our brief we present the Court with a comprehensive
19 survey of academic writing on this subject since about
20 1960. Not a single academic commentary since the Trammel
21 decision and since this Court's decisions on family
22 privacy has either adopted the government's position. I
23 would have thought you could find an academic who says
24 anything, but nobody supports the government's position
25 in this case. Or who supports Wigmore and continues to

1 argue that the marital privilege should be adopted.

2 Now, the government's response to that is to
3 pluck two stray statements from two of those articles, of
4 which there are about a dozen, and say, well, those are,
5 you know, these academics say weird things. But the
6 point is --

7 QUESTION: They may be true.

8 MR. LYNCH: I have no doubt about it, although,
9 as I say, none of them says anything as weird as what the
10 government says in this case. What the government says
11 in this case has never been adopted by the highest court
12 of any jurisdiction, as a matter of common law
13 interpretation. It has never been adopted by any
14 legislature.

15 QUESTION: His position couldn't have been
16 adopted without a statute, because you have to have an
17 immunity statute or you have the Fifth Amendment
18 privilege.

19 MR. LYNCH: Well, that is true, although as I
20 understand it I don't --

21 QUESTION: That is why I don't suppose you have
22 any experience in the 19 states, because they all have
23 the Fifth Amendment privilege.

24 MR. LYNCH: Yes. I don't know, though, Justice
25 Stevens, of many states that don't have at least some

1 kind of immunity available in some situations, so I don't
2 think that that is what is preventing it.

3 QUESTION: The position you advocate -- I will
4 put it in the form of a question. Does not your position
5 say to a man who is criminally inclined and he is going
6 to start importing heroin and cocaine from Colombia that
7 -- he has got to have some help, and so isn't it safer on
8 your theory, then, to have your wife be your helper
9 instead of some other criminal type?

10 MR. LYNCH: If it is, Mr. Chief Justice, it is
11 only because -- by reason of nature, not by reason of
12 anything the law does. I would think that it is --

13 QUESTION: By reason of the law you are
14 advocating, it is certainly a great inducement to take
15 your wife, because she can never turn state's evidence.

16 MR. LYNCH: No, that is not true after
17 Trammel. She can turn state's evidence.

18 QUESTION: On that kind of a relationship at
19 the starting point. I am not talking about the
20 relationship that has broken down, as in Trammel. You
21 are suggesting that the relationship will break down
22 because she testifies.

23 MR. LYNCH: Well, or alternatively, as in
24 Trammel, that --

25 QUESTION: Even if she is compelled to

1 testify.

2 MR. LYNCH: Yes, but it seems to me that always
3 the safest person to recruit to be your co-conspirator is
4 someone who will be devoted to your interests, who loves
5 you, who won't turn you in.

6 That is true whether there is a privilege or
7 not, and I would think it would be a rather foolish
8 person who would put his trust not in the fact that he
9 thinks his wife will never betray him, but in the fact
10 that he thinks his wife will never betray him and get
11 away with it.

12 After all, because of the immunity situation,
13 what you have to understand is that the contempt sanction
14 is not the principal weapon that the government could
15 bring to bear on a true joint participant. If a spouse
16 is truly a joint participant, and the government has any
17 hope of proving it beyond a reasonable doubt, they can do
18 to that spouse precisely what they do to every other
19 co-conspirator. They can threaten her with prosecution,
20 which they would have every right to bring if she is
21 guilty of a crime, and offer that they will forego that
22 option if she persists in her refusal to cooperate.

23 QUESTION: So you want the government to break
24 up the marriage, not the parties.

25 MR. LYNCH: There are two important differences

1 between that situation and this one. One is that the
2 spouse remains free to make her own choice in that
3 situation. There is no legal compulsion on her to
4 testify. The second is that what the government is
5 threatening in that circumstance is something it has
6 every right to do, that is, to bring a criminal
7 prosecution that is warranted, to go before a jury and to
8 prove guilt beyond a reasonable doubt.

9 That is the difference between the Trammel
10 circumstance and this one.

11 QUESTION: Maybe the government will adopt your
12 guidance in this case if you prevail.

13 MR. LYNCH: I imagine they might try, although
14 certainly if one looks to the evidence they have produced
15 so far, it is clear what is going on in this case. It is
16 clear that the government does not have evidence which
17 they could present to a grand jury to get an indictment
18 and then go before a jury and convict Mrs. Koecher beyond
19 a reasonable doubt.

20 The only evidence that they have ever offered
21 in this case with respect to joint participation are
22 hearsay statements presented by an agent, ostensibly made
23 by her husband, culled from about ten days of
24 interrogation. Her husband is obviously not available as
25 a witness against her. They have not offered him

1 immunity to testify against her.

2 There is no independent evidence that they
3 could bring in to convict her. Failing an ability to
4 punish her for what they think she did, the government
5 prefers to offer her immunity, bring her before a grand
6 jury, and then punish her not for the espionage they
7 claim was committed, but for loyalty to her husband for
8 refusing to testify.

9 What I have been urging here is not a radical
10 innovation. It is not, as in Branzburg against Hayes,
11 the creation by this Court of a new constitutionally
12 based privilege. What I am asking is that this Court
13 follow the common law as it has always existed.

14 I am asking the Court to deny the government's
15 effort in this case, to create an exception that is a
16 total innovation, to create that exception not based on
17 reason, and certainly not based on any experience,
18 because they tell us that they have no experience to
19 offer this Court suggesting that the operation of this
20 exception in the two circuits where it has operated has
21 produced any benefits for law enforcement.

22 They speculate in Mr. Wright's argument that
23 the marital privilege shields third parties. Mr. Wright
24 says, well, what about narcotics conspiracies? If we
25 have the privilege operating in this situation, we will

1 never be able to prosecute, but that is nonsense. The
2 government prosecutes these narcotics conspiracies every
3 day. It prosecutes large ones.

4 QUESTION: Would you claim the privilege if I
5 asked you, do you oppose getting rid of it altogether?

6 MR. LYNCH: I absolutely oppose getting rid of
7 it altogether. That is not what the government has asked
8 in this case. That issue, I think, is not properly
9 before the Court, but I think it follows from everything
10 I have said here and everything we have said in our
11 brief, that we believe it would be a dreadful mistake for
12 the Court to go beyond what the government asks and take
13 on essentially an outdated view of the marital privilege.

14 Thank you.

15 CHIEF JUSTICE BURGER: Mr. Wright, do you have
16 anything further?

17 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQ.,

18 ON BEHALF OF THE PETITIONER - REBUTTAL

19 MR. WRIGHT: Yes, I do.

20 I would like to add that we believe that joint
21 participation in crime is a corruption of the marriage,
22 and in that respect it is analogous to other
23 relationships where crime and fraud and joint participant
24 exceptions are also recognized. It is a corruption of
25 the attorney-client relationship, the reason society

1 recognized a privilege there for the client to go in
2 seeking advice to help in a criminal matter.

3 CHIEF JUSTICE BURGER: May I ask, Mr. Wright,
4 under your view, if you prevail -- say you have a case in
5 which the spouses were joint participants for about a
6 year or two years, say. Would you inquire of the spouse
7 for the period before she joined the conspiracy?

8 MR. WRIGHT: Of course, we don't believe that
9 that is presented here because we believe that she joined
10 the conspiracy in 1953 or 1952, whenever she first
11 attended meetings with the Czechoslovak agents.

12 QUESTION: Say you wanted to ask her about what
13 happened in 1960. Could you do that?

14 MR. WRIGHT: Well, I don't think we do -- I
15 think that probably we could. That is not presented
16 here, I don't think.

17 QUESTION: I am just wondering what the scope
18 of the exception you are asking for is, whether it is
19 just, once the privilege is waived, it is waived as to
20 everything, or only for the period of joint
21 participation? Maybe you haven't thought it through.

22 MR. WRIGHT: We have thought it through to the
23 extent that we certainly believe it relates to everything
24 of the matter that is under investigation. For example,
25 in espionage in this case, we are not contending that if

1 they were --

2 QUESTION: What if the husband were engaged in
3 espionage at a time and all she knew was when he was home
4 and when he was traveling or something, and you wanted to
5 ask her about his whereabouts? Could she claim the
6 privilege during the period prior to her actually helping
7 him out?

8 MR. WRIGHT: We think not. We think that once
9 we have shown joint participation, that ought to be
10 enough.

11 Respondent had brought up the Fifth Amendment
12 privilege. It was pointed out that, of course,
13 parent-child relationships, there has never been such a
14 privilege. We think that to the extent respondent
15 attempts to rely on Fifth Amendment privilege, it merely
16 shows the medieval roots of this privilege, the fact that
17 it is here in this form results from the outdated view
18 that the husband and wife are one.

19 Respondent also mentioned that the only
20 evidence we offered to show joint participation here were
21 the affidavits from the FBI agents based on Mr. Koecher's
22 evidence. As I have stated, we believe that that is
23 quite compelling evidence.

24 I would like to point out that we were never
25 put to our proof that we had other evidence at the

1 November 29th, 1984, hearing. Respondent simply did not
2 argue that there wasn't proof of joint participation.

3 Finally, respondent began and ended his
4 presentation by noting that this is an old privilege and
5 by quoting the Trammel decision where the Court said that
6 it is reluctant to change things or takes a gradual view
7 of these matters.

8 I would like to point out that the Court in
9 Trammel also pointed out that when all that can be said
10 for a privilege is that it is an old privilege, that
11 precedent alone is not enough.

12 If there are no further questions, thank you.

13 CHIEF JUSTICE BURGER: Very well. Thank you,
14 gentlemen. The case is submitted.

15 (Whereupon, at 1:59 o'clock p.m., the case in
16 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1922 - UNITED STATES, Petitioner V. HANA KOECHER

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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