

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: MOHAWK INDUSTRIES, INC., Petitioner, v.
NORMAN CARPENTER.
CASE NO: No. 08-678
PLACE: Washington, D.C.
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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-678, Mohawk Industries v. Carpenter.

Mr. Allen.

ORAL ARGUMENT OF RANDALL L. ALLEN

ON BEHALF OF THE PETITIONER

MR. ALLEN: Mr. Chief Justice, and may it please the Court:

For well over a century, this Court has recognized the importance of the attorney-client privilege. In Hunt v. Blackburn in 1888, the Court clearly stated that the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest of justice, that the aid and advice of persons having knowledge and skill in the practice of law provide that advice in a manner that is safely and readily available and, importantly, free from the consequences or apprehension of disclosure. In --

JUSTICE SCALIA: Mr. Allen, except for the fact that you and I are lawyers, do you really think that the -- that confidentiality right is any more important to the proper functioning of society than, let's say, the protection of trade secrets? So that in

1 a case of discovery where the defendant says, if I
2 produce this, I would be giving up a trade secret and
3 it's not necessary for the case, and the judge says no,
4 turn it over -- would there be in your view a right to
5 interlocutory appeal in that case? And if not there,
6 then why here?

7 MR. ALLEN: Justice Scalia, there are --
8 there are several answers to the question. Let me
9 start, first, with the -- the issue of the importance of
10 -- of the attorney-client privilege as a key and central
11 element of the administration of justice that this Court
12 has recognized, not just with Hunt, but in a number of
13 cases since.

14 But the question I think also goes more to
15 prong 3 of Cohen, which is the reviewability
16 standard. In the context of attorney-client privileged
17 information, once that information is disclosed to your
18 adversary, it's disclosed to the last person on earth
19 you might want to see it.

20 JUSTICE SCALIA: The same thing with a trade
21 secret. It's a suit between another company who is a
22 competitor of yours.

23 MR. ALLEN: Well --

24 JUSTICE SCALIA: And the Judge says, turn
25 over your trade secret, the formula for Cocoa-Cola. And

1 you say no -- no interlocutory appeal, right?

2 MR. ALLEN: I think with trade secrets --

3 JUSTICE SCALIA: Or do you say there should
4 be an interlocutory appeal there?

5 MR. ALLEN: Your Honor, we do not argue
6 that -- here, that there should be an interlocutory
7 appeal for trade secrets. I think the practical
8 resolution to the trade secret question is present in
9 most cases of commercial litigation, where the court
10 would provide a protective order limiting access to the
11 trade secret; in other words, limiting access to
12 counsel.

13 JUSTICE SOTOMAYOR: But what if a court
14 doesn't, as Justice Scalia has posited? The court here
15 could do the same thing, depending on the secret being
16 disclosed. It could set up any number of protective
17 mechanisms.

18 The issue is broader than that, which is:
19 Why is the public policy of anti-disclosure any more
20 important in the attorney-client privilege than in the
21 trade secret context?

22 MR. ALLEN: Yes, Justice Sotomayor. But,
23 with regard to the attorney-client privilege, first on
24 the issue of the protective order, the protective order
25 cannot limit the adversary's counsel from seeing the

1 information.

2 As I said earlier, I think that's the last
3 person in the world you would want to see. You could
4 limit access to trade secrets to counsel, who could make
5 no use of the Coca-Cola formula or -- or Colonel
6 Sanders' chicken recipe, but -- but the --

7 JUSTICE SOTOMAYOR: Ah. Are you sure?

8 (Laughter.)

9 MR. ALLEN: But -- but the answer to the --
10 the importance question, I think, has to return to the
11 central and important role that the privilege plays in
12 the administration of justice.

13 JUSTICE SOTOMAYOR: But isn't the role --
14 the central role -- role is to encourage the frank and
15 open communication between client and attorney? That's
16 the purpose of the rule, isn't it?

17 MR. ALLEN: It -- it is the purpose of the
18 rule, at least in part, Your Honor.

19 JUSTICE SOTOMAYOR: All right. If that is
20 the purpose, the very existence of exceptions infringes
21 that purpose. The minute you create an exception, you
22 are placing some sort of limitation to the frank and
23 open discussion that you are permitting, so the damage
24 is already done.

25 The further disclosure doesn't really serve

1 the purpose -- or help the purpose in any meaningful
2 way. The fact that an erroneous decision on
3 attorney-client disclosure is not going to stop people
4 from talking to lawyers if they really need to and they
5 are staying within the rules.

6 MR. ALLEN: Your Honor, I -- I don't think we
7 are here to suggest that it would stop people from
8 talking to their lawyers. I think the point is that the
9 incremental erosion of the rule is going to lessen the
10 value of the privilege. As this Court --

11 JUSTICE SOTOMAYOR: Well -- but that's what
12 I'm trying to figure out, because you are positing that
13 erroneous decisions on disclosures are being made
14 routinely by the lower courts.

15 Assuming, as I do, that there are some
16 erroneous disclosures, but that that's not necessarily
17 the majority, why is there an incremental erosion
18 significant enough to overcome our interests in the
19 finality rule?

20 MR. ALLEN: Your Honor, I don't think we
21 suggest that -- that erroneous orders on privilege are
22 occurring routinely. Certainly, we have suggested they
23 occurred in this case and that they happened in other
24 cases.

25 But I think the more direct answer to your

1 question goes to the Court's holding in Upjohn. One of
2 the things that Upjohn points out is that what is
3 necessary -- and I think the Court makes a similar
4 observation in Swidler & Berlin, that one of the things
5 that's necessary for the privilege to have effect is
6 predictability.

7 If -- if there is no predictability, then
8 you fall back to the apprehension or the worry of
9 disclosure that is observed in Hunt.

10 JUSTICE SCALIA: Okay. Let's talk about
11 predictability. Once you make an exception for waiver,
12 there is already that limitation. It's not absolute.
13 Maybe it can be waived.

14 Secondly, you have to worry about a district
15 court finding it to have been waived, even though it
16 really wasn't. That's another point of doubt.

17 And, thirdly, you have to worry about the
18 Supreme Court affirming a district court that wrongly
19 found it to have been waived, because we give, you know,
20 weight to the fact finding of the -- of the district
21 court.

22 Once you -- once you factor in all of those
23 uncertainties, you are not talking about a -- you know,
24 about a fail-safe privilege at all. There are those
25 doubts, and I'm not sure the doubts are increased

1 enormously by simply saying a district court may make a
2 mistake without -- without your being able to go up to
3 the court of appeals on that mistake.

4 MR. ALLEN: Your Honor, I don't disagree
5 that -- that the rule we search for will not still have
6 problems with the protection of the attorney-client
7 privilege, but I do disagree that it will not
8 significantly improve the quality of the rules that
9 counsel are -- are designed -- or counsel are -- are
10 instructed to follow.

11 JUSTICE GINSBURG: Mr. Allen, you used a
12 term before, and I think you were right in using it --
13 you said, "interlocutory review," but
14 Cohen v. Beneficial is a narrow exception and it -- the
15 theory is it is a final judgment. It's not
16 interlocutory.

17 And, nowadays, the courts have 1292(b).
18 They can certify a question, if they think it's
19 sufficiently important and they need an answer, without
20 pretending that it's a final judgment in the case.

21 So, given 1292(b), shouldn't we be
22 particularly reluctant to extend Cohen v. Beneficial to
23 include a case of a privilege that maybe was wrongfully
24 denied?

25 MR. ALLEN: No, Justice Ginsburg. I don't

1 believe that you do. I used the term "interlocutory"
2 only to refer to the fact that the appeal would take
3 place while the case-in-chief proceeds.

4 JUSTICE GINSBURG: And that's what 1292(b)
5 was meant to deal with.

6 MR. ALLEN: I don't think 1292 would --
7 would obtain, in this instance, and I think the -- the
8 judge in the district court made this observation
9 himself, although he did not expound on his reasoning.

10 It would appear that the reasoning would be
11 that this -- that a decision in this case is not likely
12 to materially advance the ultimate determination of the
13 litigation, so, therefore, I think 1292(b) would not be
14 applicable in the ordinary case to a -- to a ruling
15 finding waiver of the attorney-client privilege.

16 JUSTICE BREYER: Why do you think that
17 your -- that this privilege -- or is it -- more
18 important than any other privilege? I mean, Justice
19 Scalia's question and your answer convinced me that you
20 can protect this the same as you can any other trade
21 secret -- any trade secret.

22 Of course, you do disclose it to the
23 opposing party, but that's also true of any breach of
24 any privilege, so husband-wife, priest-penitent,
25 psychiatrist and patient. I take all of those are

1 privileged. Do we allow collateral appeals there?

2 MR. ALLEN: No, Your Honor, you have not.

3 JUSTICE BREYER: Well, if we don't allow
4 collateral appeals with the husband and wife, with the
5 priest and -- and someone in -- you know, confession or
6 something, I don't -- with a priest, or with a
7 psychiatrist who is dealing with a patient, why would we
8 allow collateral appeal here?

9 MR. ALLEN: Your Honor, first of all, I
10 don't think the issue of those other privileges has, to
11 the best of my knowledge, come before this Court.

12 JUSTICE BREYER: But then if we grant your
13 collateral appeal, don't we have to, perhaps, equally
14 grant it in every situation where a judge arguably
15 makes an erroneous ruling on a question of privilege?

16 MR. ALLEN: I don't believe you do, Your
17 Honor, and let me say, first of all, the -- the instance
18 that Your Honor points to, where the information would
19 be disclosed to the other party, it's not the other
20 party in this instance, that --

21 JUSTICE BREYER: It's the lawyer.

22 MR. ALLEN: -- that you are worried about in
23 first instance. It is, in fact, the counsel. And --
24 and, second of all, I think the importance criteria
25 as -- as previously defined in this Court's cases, is a

1 measure of the importance of the interest that will be
2 lost if appeal is not available now.

3 JUSTICE BREYER: So it's -- in your opinion,
4 it's more important to protect the lawyers, who talk to
5 clients, from erroneous rulings, than protect the priest
6 or protect the wife or husband or protect the
7 psychiatrist who is dealing with a patient?

8 Now, that's hard for me to see why. I mean,
9 I think lawyers are very important, but it's a little
10 hard to see why they are more important than these other
11 people.

12 JUSTICE SOTOMAYOR: What is the use --
13 I'm -- I'm sorry to cut you off.

14 But what is the use by the adversary lawyer
15 that you are worried about? That the lawyer is going to
16 use information against your client, correct?

17 MR. ALLEN: Correct, Your Honor.

18 JUSTICE SOTOMAYOR: So there is a remedy.
19 After final judgment, if the information was disclosed
20 erroneously, the court sets aside the judgment, sends it
21 back, and says, you can't use it in the future and so
22 make your case without it.

23 MR. ALLEN: Your Honor, that -- I apologize.

24 JUSTICE SOTOMAYOR: Why isn't that an
25 effective remedy for the harm that you are claiming

1 exists in the disclosure?

2 MR. ALLEN: That is the analysis that the
3 Eleventh Circuit applied, and I think it was incorrect
4 for the following reasons: First of all, it treats the
5 attorney-client privilege as if it is a use privilege,
6 as you describe it in your questioning. It is not a use
7 privilege. It's a right to be free from compelled
8 disclosure. So returning to -- to trial is not going to
9 undisclose the information that's already --

10 JUSTICE SOTOMAYOR: You have a right to
11 choose your lawyer and not to be -- and not to be
12 represented by a -- by a different lawyer, and yet we
13 don't permit that to be interlocutorily appealed.

14 MR. ALLEN: That is --

15 JUSTICE SOTOMAYOR: Why -- why is this any
16 greater in terms of the harm that your client suffers?

17 MR. ALLEN: That is correct, Your Honor, but
18 in the attorney-client privilege cases, this Court did
19 not find that collateral order jurisdiction did not
20 obtain because of the fact that the attorney-client
21 privilege -- or the attorney-client -- excuse me --
22 disqualification cases were not important. The Court's
23 ruling was premised upon the fact that that order was
24 sufficiently reviewable under prong 3 of Cohen. So
25 it's not -- the decisions were not based on Cohen --

1 JUSTICE SOTOMAYOR: I understand what the
2 court below did. I'm just following up on your point
3 about the importance of this privilege and why it's
4 critical that it be subject to interlocutory appeal as
5 opposed to the final judgment rule.

6 MR. ALLEN: Justice Sotomayor, the -- the
7 importance in this instance is -- is measured against
8 the societal importance or the societal need for
9 non-piecemeal application of the final judgment rule.
10 So when you measure the attorney-client privilege and
11 the role that it plays in the administration of justice
12 in ensuring observance with laws against a rule of
13 efficiency, in this instance in our view, the
14 attorney-client privilege weighs heavier in that
15 consideration.

16 JUSTICE GINSBURG: It's not -- it's not a
17 rule of efficiency. It's a firm final judgment rule
18 that we have in the Federal system. And we are talking
19 about a narrow exception. The exception was first
20 declared in *Cohen v. Beneficial*. The question there was
21 security for costs, yes or no? Does that -- that is a
22 pure question of law. It doesn't depend on the variety
23 of factual circumstances. Attorney-client is quite
24 different because it can often be fact-bound. It
25 depends upon this particular case.

1 Cohen v. Beneficial was meant for the kind
2 of question that doesn't get you into the facts.
3 Otherwise, once you get into -- once it's a fact-bound
4 question, you are really eroding the final judgment
5 rule.

6 MR. ALLEN: I understand your question,
7 Justice Ginsburg. I think in this instance, the facts
8 that the Court would need to consider are sufficiently
9 narrow that it should not trouble the final judgment
10 rule and sufficiently collateral --

11 JUSTICE GINSBURG: But you are carving out
12 an area, attorney-client privilege, as opposed to the
13 kind of situation Cohen v. Beneficial dealt with.
14 Here's a rule that a State has. You have to put up
15 security for costs before you go ahead with a class
16 action. The answer to that is either yes or no, that
17 Erie requires it or it doesn't require it. No facts
18 at all. You just have a class action, you need security
19 for costs.

20 Maybe this particular case doesn't involve
21 many facts, but there will be attorney-client privileges
22 cases, waiver cases that surely do. So we can't take
23 that category, attorney-client privilege, and equate it
24 to what was the kind of question at issue in Cohen.

25 MR. ALLEN: I agree, Justice Ginsburg that

1 that was the kind of narrow issue that was at issue
2 in -- in Cohen v. Beneficial Industrial. But this Court
3 has considered much more factually intensive cases in
4 the context of qualified immunity or, maybe as a better
5 example, the context of the double jeopardy claim such
6 as in Abney.

7 JUSTICE GINSBURG: Because those are cases
8 that say your right is not to be tried, your right is
9 not to be exposed to trial at all.

10 MR. ALLEN: That is correct, Your Honor. My
11 only point is that the appellate courts are perfectly
12 capable and able to consider the facts that are at issue
13 in those cases, and it does not unduly burden the
14 appellate process in the context of those type of cases.

15 JUSTICE STEVENS: May I ask two yes or no
16 questions? One, did you, in fact, ask for a 1292(b)
17 right to appeal, make an interlocutory appeal?

18 MR. ALLEN: No, Your Honor, we did not.

19 JUSTICE STEVENS: And the second question
20 is, would your rule apply if the decision had gone the
21 other way? If they had denied access to the documents,
22 would the other -- would the person seeking discovery
23 have the same right to appeal that you've asked for here?

24 MR. ALLEN: No, Your Honor, the -- the party
25 losing the claim would not have the same right to

1 appeal.

2 JUSTICE STEVENS: Why not?

3 MR. ALLEN: I think access to information in
4 the course of discovery does not trigger the same
5 important interest that orders compelling discovery of
6 attorney-client would trigger. So I don't think that
7 they would in any way satisfy that test. And I think,
8 in fact, the question presented as designed even by
9 Respondent does not capture orders that deny the
10 disclosure of attorney-client privilege information.

11 CHIEF JUSTICE ROBERTS: Some time ago
12 Justice Breyer asked the question of why is this
13 different than the other privileges, and I would like
14 your answer to that.

15 MR. ALLEN: Justice Breyer, I think that the
16 answer to that question is -- has to focus on the role
17 that the privilege plays in the administration of
18 justice,
19 and it's why I went -- in response to Justice Sotomayor's
20 question, why I went to the balancing between the
21 interest of the attorney-client privilege versus the
22 interest of a more rigorous application of the final
23 judgment rule.

24 So -- so, while I think it's instructive to
25 compare the privilege to other privileges that the Court

1 may in the future confront, I think the proper analysis
2 is to balance that -- that rigorous application of the
3 final judgment rule to the attorney-client privilege.

4 And I think in that instance it resolves more quickly.

5 JUSTICE GINSBURG: Mr. Allen, one of the
6 purposes, one of the -- the underpinnings of
7 Cohen v. Beneficial is that this kind of question is not
8 going to come up very often, but attorney-client
9 privilege, once you say that that's open to --
10 everything stops while you go to the court of appeals to
11 get that. And if you -- and if we hold the way you want
12 us to, then a lawyer will be obligated every time she
13 thinks that she has a valid claim to the privilege or
14 that it hasn't been waived, she would be obligated to
15 take an appeal which you are urging would be an appeal
16 of right.

17 MR. ALLEN: Justice Ginsburg, I don't
18 believe that the attorney would be obligated to take the
19 appeal. And I believe that the -- that the facts that
20 we've laid out in our brief with regard to what has
21 actually occurred -- we wonder how many appeals might
22 take place. We know how many appeals might take place,
23 because we have the experience in the Third and the
24 Ninth and the D.C. Circuits that tell us that in the
25 11 years since Ford was decided by Judge Becker in the

1 Third Circuit -- the opinion by Judge Becker in the Third
2 Circuit -- that there have been only 11 such cases
3 brought up on appeal. So, we have some experience to
4 tell us what will actually happen.

5 But I don't believe it requires that the
6 attorney as a matter of obligation take that appeal.
7 The Court, I believe, dealt with this same issue in the
8 Behrens v. Pelletier case, which is a qualified immunity
9 case, where the Court wondered whether or not there were
10 going to be an increase -- a significant increase in
11 the -- the appeals that arose out of -- out of the
12 Court's holding. And the Court observed that the only
13 conclusion that could be reached -- and I believe the
14 Court quoted in that opinion the opinion of Judge
15 Easterbrook in the Abel case in the Seventh Circuit --
16 that the only conclusion that could be drawn is that
17 there was forbearance by the lawyers in taking appeals
18 that they otherwise had the opportunity to take. I
19 think there is no reason to conclude that there would be
20 a difference in the analysis in -- in the case here.

21 JUSTICE SOTOMAYOR: Are you -- just so I'm
22 clear about your position, are you arguing that all
23 issues related to attorney-client, whether they are
24 waiver, crime or fraud, scope of the privilege,
25 et cetera, that all issues are immediately appealable

1 because the public interest is the same in all cases
2 related to the attorney-client privilege, or are you
3 wanting us to limit this rule only to the waiver cases?

4 MR. ALLEN: Correct, Your Honor. We have
5 asked that the Court address, in this instance, the
6 question presented having to do with only waiver cases.

7 JUSTICE SOTOMAYOR: So -- but your position
8 logically would apply to everything, wouldn't it?

9 MR. ALLEN: Your Honor --

10 JUSTICE SOTOMAYOR: Otherwise, how do we
11 distinguish or make a difference, in your analysis?

12 MR. ALLEN: I think it's certainly -- it
13 certainly should be assumed that if this Court rules in
14 our favor, it must conclude that the attorney-client
15 privilege is important. If it concludes that the --

16 JUSTICE SOTOMAYOR: No, no one is doubting
17 its importance. The issue is whether that importance
18 outweighs the finality rule. That's a very different
19 thing for you.

20 MR. ALLEN: I -- I agree. But -- but in
21 order to get to -- to the position we advocate, the
22 Court must pass that threshold and establish importance.
23 If the Court reaches that conclusion, it is certainly
24 likely that the importance test in other existence-of-
25 privilege cases, for example, would obtain.

1 I -- I don't think that compels the
2 conclusion that any case addressing privilege must
3 therefore be permitted collateral order jurisdiction.
4 For example, I believe you recited the crime-fraud
5 exception in your question. Certainly crime-fraud
6 exception might present a difficulty with prong 2 of
7 the Cohen analysis, which has to do with the
8 separability of the issue on appeal for merits. So it
9 may well be that in crime-fraud cases there is not
10 sufficient separability of the issue from the merits and
11 therefore collateral order jurisdiction would not
12 obtain.

13 As I mentioned earlier, I think we are in
14 agreement that orders that deny the disclosure of
15 information would not be immediately appealable. So
16 there are -- there are a number of instances that this
17 Court might find in what I'll call "general privilege"
18 cases that might not obtain, and it's the course that
19 the Court has taken in other sort of general areas of
20 law. For example, in the attorney disqualification
21 cases, the Court started off in Firestone finding that
22 orders denying disqualification did not satisfy
23 collateral order jurisdiction, and it limited its
24 holdings to -- to that instance.

25 In Flanagan, it took up the question of

1 whether or not collateral order jurisdiction obtained in
2 disqualification cases and criminal cases, and in
3 Richardson-Merrell in civil cases. So the Court has
4 traditionally taken, if you will, the facts of the case
5 presented to them and limited its rulings to the facts
6 of those cases. We suggest that approach in this case.

7 JUSTICE GINSBURG: Is there any sensible
8 line between an invocation of the privilege denied, and
9 a holding that the privilege has been waived? I know in
10 your reply brief you -- you draw some kind of a
11 distinction between waiver of the privilege and the
12 existence of the privilege, but I didn't follow it.

13 MR. ALLEN: Other than the examples that I
14 --- that I just gave, Your Honor, I don't think there's
15 a principled difference between the finding of
16 importance, and that's -- that's clearly a threshold
17 issue. As the Court said in Will, it's the -- the --
18 what the issues ultimately boil down to.

19 So with regard to that issue I -- I agree,
20 but with regard to crime-fraud exception or instances
21 when no disclosure is ordered, another example that I
22 think the Respondent points to in their brief is
23 instances of inadvertent disclosure. Instances of
24 inadvertent disclosure would not trigger the -- the
25 prejudice element necessary because the -- if you will,

1 the cat is in fact already out of the bag at that point.

2 JUSTICE GINSBURG: There's another. You're --
3 you're stressing the importance of the attorney-client
4 relationship, the work of the attorney. Do you extend
5 your position to work product? It's not privileged.

6 MR. ALLEN: No, Your Honor --

7 JUSTICE GINSBURG: But it's certainly --
8 it's certainly protected against disclosure.

9 MR. ALLEN: We do not extend the -- the rule
10 that we advocate to work product in the -- in the broad
11 sense. Certainly there are exceptions within Rule 26 to
12 when work product can in fact under the right
13 circumstances be disclosed. So we are not embracing the
14 -- the work product as a general rule. Certainly the
15 mental impressions of client -- of counsel, which is the
16 important exclusion of the work product doctrine in Rule
17 26, we would embrace as a -- as an appropriate
18 limitation on the rule that we are advocating.

19 Mr. Chief Justice, if there are no further
20 questions, may I reserve the remainder of my time?

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. Resnik.

23 ORAL ARGUMENT OF JUDITH RESNIK

24 ON BEHALF OF THE RESPONDENT

25 MS. RESNIK: Thank you. Mr. Chief Justice,

1 may it please the Court:

2 Before 1997, no circuit held that there was
3 appeal as of right for privilege or waiver, and most of
4 the circuits continue that approach. That's the right
5 approach because attorney-client privilege cases do not
6 fit the parameters of the Cohen appealability and there
7 are alternative responses that are available on the
8 remedial side.

9 In terms of the Cohen factors, the
10 factor of importance which has just been discussed here,
11 this Court has over the 60 years of some 30 opinions
12 refined the importance test and moved it away from the
13 questions of place, shape of litigation, dynamics of
14 litigation, to a very narrow set of cases in which a
15 government is typically a party, or a government
16 official, and there is a very significant either
17 constitutional or statutory question principally of
18 immunity from suit.

19 CHIEF JUSTICE ROBERTS: We will get to that,
20 I think, when the government lawyer gets up. But does
21 that distinction make sense to you?

22 MS. RESNIK: I think the --

23 CHIEF JUSTICE ROBERTS: Government lawyers
24 get the privilege; private lawyers don't?

25 MS. RESNIK: As I understand the

1 government's position here, it's that ordinary government
2 lawyers don't get the privilege in ordinary litigation.
3 The government is here to speak to the question of State
4 secrets and particular kinds of particular official
5 privileges, but not to the regular case. And I think
6 it's important that we understand from the presence of
7 them that this is a rule that is appropriate for lawyers
8 on all sides of the fence, because the immediate
9 availability of appeal as of right stops in the tracks.
10 The case was decided at the district court in October of
11 2007 and, holding aside these proceedings, it was August
12 of 2008 when the Eleventh Circuit rejected the mandamus
13 and the appeal.

14 So the wisdom of the final judgment rule is
15 precisely because the costs and delay, particularly in
16 the area of discovery and evidentiary privileges, is so
17 significant given that there are so many of these. And
18 one of the important --

19 CHIEF JUSTICE ROBERTS: But we are talking
20 about the central privilege to the maintenance of the
21 adversary system which we've determined to be central to
22 maintaining the rule of law. This is not like the other
23 privileges, priest-penitent, other evidentiary
24 privileges, because it is the privilege that allows
25 lawyers to protect the interests in those other cases.

1 And it just seems to me that -- that to allow a single
2 ruling by a district court judge to undermine the
3 privilege is going to affect people.

4 What -- I mean, the statement of the lawyer
5 could be, look, you are going to lose this case, and you
6 are saying the district court can require the disclosure
7 of that without allowing at least a quick trip to the
8 court of appeals to check it out.

9 MS. RESNIK: Well, there are remedies --
10 there are two directions for an answer. One is that in
11 all the courts of appeal of the three circuits that have
12 this rule, work product as well as attorney-client
13 privilege is available on appeal in the Third Circuit.
14 Trade secrets is available, although the Third Circuit
15 has now raised questions given *Will v. Hallock* and
16 *Cunningham* about whether or not this remains a viable
17 position, but trade secrets is available, psychotherapist
18 is appealable, spouse is appealable, and non-testifying
19 expert as well. Which is the --

20 JUSTICE SOTOMAYOR: That's in the Third
21 Circuit.

22 MS. RESNIK: Well, the Third, the Ninth, and
23 the D.C. together are the three that have opened up the
24 door, and they have found -- the experience of those
25 appellate judges has not found that it is easy to make

1 the distinctions among these, and as a consequence there
2 is appeal as of right for this entire cluster of cases.
3 In contrast --

4 JUSTICE GINSBURG: Mr. Allen has told us
5 that there are very few cases, in fact, 11 cases in I
6 don't know how many years, in the Third Circuit.

7 MS. RESNIK: Well, that, I take to be -- the
8 cheerful news is that by and large everyone is getting
9 it right at the trial level. But we are looking at the
10 question -- first of all, one question would be how to
11 count the cases of whether there are these other appeals
12 as well.

13 But more importantly, both the law professor
14 and judge amici in our brief asked to look at the
15 pipeline, and there are two levels of the pipeline, or
16 three. One is that in the district courts we try to
17 look at the numbers of instances when trial judges write
18 opinions, magistrate and district judges, which is only
19 the tip of that iceberg.

20 As best we could tell, somewhere between 10
21 and 30 times a month in Westlaw reports one can find a
22 conclusion either upholding or denying disclosure.
23 Moreover, it's sequential --

24 CHIEF JUSTICE ROBERTS: Well, it matters
25 which they do, right? If they are -- if they are denying

1 disclosure, the statistics don't mean much.

2 MS. RESNIK: We found about half the cases,
3 and the law professors amici and judges amici found
4 about 104 in which in which disclosure was required, in
5 a 6-month period. So there is a significant number
6 at the trial level that exist in terms of the pipeline.
7 If we go just to the case that is before you, the
8 Federal district judge reserved question on a second
9 attorney-client privilege question because issuing a
10 protective order on the depositions -- there is a related
11 case here, and he precluded the lawyers from
12 participating in it.

13 JUSTICE ALITO: I was on the Third Circuit
14 for 8 years under this regime. And it didn't seem
15 to me that the sky was falling. In fact, I can't
16 remember any cases, any appeals involving this issue,
17 and we had lots of cases of a variety of kinds. Now,
18 maybe there's -- I don't want to be a witness in this,
19 but --

20 (Laughter.)

21 JUSTICE ALITO: -- you know, convince me that
22 the sky really will fall if we were to adopt this.

23 MS. RESNIK: I am not going to convince you
24 that the sky is going to fall, but I am going to suggest
25 that it is -- that the Cohen rule does not apply to these

1 cases, not only because the sky isn't going to fall. The
2 empirical question is there will be more cases for sure
3 and there will be more people with comparable privileges
4 knocking at the appellate doors, and they'll be sorting,
5 so that goes to the counting: Do we count the cases that
6 knocked and you said no to as well as the cases you said
7 yes to?

8 The other piece is that the Cohen rule
9 requires a particular kind of importance and a
10 particular kind of severability. In this case, the
11 trial judge said, in fairness, there has been a waiver
12 because you've injected new issues in the case. In
13 order to get to the in fairness waiver injection, you
14 have to know the facts of this case and weigh the waiver
15 against the other facts in the case.

16 JUSTICE ALITO: So the Eleventh Circuit was
17 wrong on that issue? Didn't they hold that this was --
18 this was separate from the merits?

19 MS. RESNIK: In our -- yes, in view, every
20 one of the -- this case fails the test on all four of the
21 -- three to four of the Cohen prongs, which is
22 separability and conclusiveness or -- or distinct ideas,
23 potentially, importance, and remediability. And,
24 therefore, the embeddedness here is typical of cases --
25 crime-fraud was an example already mentioned -- in which

1 the factual predicates are here. In terms of coming back
2 to the piecemeal, in this case the trial judge reserved
3 the question. The lawyers below have asked for a
4 pre-ruling. The questions to be asked at the deposition
5 will not waive attorney-client privilege. The trial
6 judge said, I don't know the answer to that, it hasn't
7 been fully briefed, and we don't know what you are going
8 to ask. Therefore, in this very case, if the rule were
9 that you could appeal as of right, you could be back in
10 this case twice to the Eleventh Circuit during the
11 pendency of the case.

12 JUSTICE SOTOMAYOR: Ms. Resnik, could you go
13 back and articulate what you see as the rule that we
14 have on what is important enough? Because that's what
15 really is at question. So how would you articulate a
16 rule that would apply both to the cases in which we have
17 granted interlocutory appeal and to those that you are
18 advocating we don't? Because it's not just freedom from
19 suits like qualified immunity or double jeopardy. We
20 have granted interlocutory appeal in other areas,
21 including in the Cohen case.

22 MS. RESNIK: Well, Cohen involved a major
23 question of the application of the Erie principle in
24 1949 involving a State -- the right of security for
25 expenses. And I would take Cohen and the bail case and

1 the drugging case of Sell as instances in which, is the
2 litigant, during the pendency of the case, going to be
3 economically secure or free, or drugged or not drugged,
4 as distinct qualities which are all framed in either
5 State law or constitutional premises. If we look over
6 the course of the 60 years, the category is not neat.
7 But there are turning points in 1978 with the Coopers
8 opinion which says death knell, which says strategic
9 interactions, the shape of class actions, is not
10 available for appeal as of right.

11 In 1994, one might have thought in the
12 Digital case that a contract not to continue by -- to
13 settle would have been within the set, but the Court
14 said no, that kind of private contractual interest is
15 not sufficient.

16 And in 2006, in the Will case, the Court
17 narrowed it again by saying the res judicata sequence is
18 insufficient. So in the last decade the Cohen cases
19 have come down to basically qualified immunity or
20 constitutionally freighted -- structural and almost
21 abstract, not interpersonal dynamics of the litigation,
22 including contractual relationships or evidentiary
23 privileges. Now, you --

24 CHIEF JUSTICE ROBERTS: But those are all --

25 JUSTICE GINSBURG: Now, you're not suggesting

1 that -- that Cohen itself wouldn't come out the same way
2 today if -- if the question of security for costs,
3 whether State or Federal, hadn't been settled?

4 MS. RESNIK: Well, Cohen predates the --
5 the Congress's creation of 1292(b), which you mentioned
6 earlier, Justice Ginsburg. And so what it is looking at
7 is, when Cohen was initially decided it opened a window,
8 but in the relationship between Court and Congress, the
9 Judicial Conference went to the Congress and said, we
10 need a broader window, and Congress adopted verbatim in
11 1958 the 1292(b) criteria which, clearly, Cohen would
12 have been eligible for, or potentially eligible for, and
13 there are attorney-client privilege cases that do go up
14 under 1292(b).

15 CHIEF JUSTICE ROBERTS: But it is a bit of a
16 hurdle, isn't it, since you do have to satisfy the
17 materially advanced -- the litigation and those other
18 criteria?

19 MS. RESNIK: There are a few selective
20 waiver cases. There are a few of these that come up,
21 but you are completely right that it is a hurdle, but we
22 have alternatives here as well. As the example of the
23 -- once the Federal Court Study Committee suggested we
24 needed more appeal as of right, this -- after the Coopers
25 case, Congress responded by authorizing the Court through

1 its rulemaking to provide interlocutory orders as final,
2 and 23(f) is the next example, which also provides a
3 mechanism.

4 The basic point is that there are other
5 routes. The remedial prong of Cohen is amply responded
6 to here, because first, internal to the case, there
7 could be protective orders and limited disclosure.
8 Second, you can take the issue as stipulated against
9 you. Third, you could actually, if you ever did go to
10 trial, not testify. That's the Jaffee v. Redmond
11 scenario. Fourth, you have the after-a-fact appeal.
12 Fifth, mandamus is available, and there are circuit
13 courts --

14 JUSTICE GINSBURG: But that's only in
15 egregious cases.

16 MS. RESNIK: In the extraordinary case there
17 is mandamus. There's also certification, and all of
18 these are routes that are filtered. Cohen opens the
19 door completely. And our --

20 JUSTICE ALITO: But you -- are you arguing
21 that the collateral order door is closed now? That --
22 that nobody else is going to get through that door?

23 MS. RESNIK: I can't forecast future cases,
24 except to say that this Court has repeatedly in the last
25 decade narrowed the door substantially. And, I take it,

1 it has come in relationship to the door opening through
2 the other mechanisms, congressional carve-outs like the
3 Classified Informations Procedure Act, the congressional
4 carve-out in CAFA, and each of those isn't a wide-open
5 door, but either discretionary or time-framed or limited.
6 And, of course, that goes to the problem that an
7 interlocutory appeal really is interlocutory and stops
8 everything, whereas the 23(f) rule says, absent a court
9 order, there's nothing stayed at the district court
10 level.

11 JUSTICE ALITO: An interlocutory appeal
12 doesn't have to stop everything, does it?

13 MS. RESNIK: The -- as a rule of filing a
14 notice of appeal with a court of appeals, absent a
15 statutory rule provision, puts the -- stays the district
16 court activity. That's why 23(f) moderates that rule,
17 as I understand it.

18 Further, I wanted to come back to the
19 question here in terms of importance. Rule 501 and 502
20 of the Federal Rules of Evidence -- 502 has just
21 been reworked. 501 remains that, in some of the
22 instances, the existence of the privilege will arise --
23 will be a question of State law. I know of no one of the
24 Erie cases in which the interlocutory appellate question
25 turns on the question of State law as a predicate, and

1 the D.C. Circuit rule is that it's when there's an
2 adverse privilege ruling that you get appeal as of right.
3 It's -- that's the D.C. Circuit's rule for it, and
4 indeed, it has had several of these -- not very many, but
5 a few of these cases.

6 So then 502 has just come with the workings
7 of the Judicial Conference and the Congress together,
8 and the lawyers, to shape a rule that is very protective
9 of inadvertent waiver, protective about its sequential
10 impacts as well, and articulating and Federalizing that
11 area of law, as well as providing under 502(a) for -- if
12 you waive in the course of a Federal proceeding, 502
13 organizes the way a district court should think about
14 it.

15 If there were appeal as of right of waiver
16 right now, after this case, then all those 502 cases
17 could come directly, whereas instead a few might get
18 here or not by 1292(b). And, again, if it looked like
19 there needed to be a wholesale reworking because of the
20 vulnerability of the system, then the -- the Court and
21 committees working with the lawyers can draft together
22 some revision. But the --

23 CHIEF JUSTICE ROBERTS: The usual way that
24 the district court, after denying the recognition of the
25 privilege, insists that people proceed is they want the

1 lawyer to go to jail. They say, you've got contempt,
2 you can appeal contempt. District judges, as you've
3 mentioned, they want these things to move on, and they
4 tend not to think that their rulings are in error, and
5 the lawyers are frequently confronted with an extremely
6 difficult choice of violating what they think is their
7 ethical obligation or going to jail.

8 MS. RESNIK: Well, it is the case that Judge
9 Wilkinson recently reiterated Judge Friendly's
10 suggestion that -- or commentary that contempt is a
11 provision that is available. And it is a route. But
12 we've found --

13 JUSTICE GINSBURG: And how -- how is it --
14 unless the judge cooperates, it has to be criminal
15 contempt.

16 MS. RESNIK: Yes, so --

17 JUSTICE GINSBURG: It wouldn't be civil
18 contempt. The judge says, I'm not going to hold you, and -
19 -

20 MS. RESNIK: What we're -- we have found that
21 many courts of appeals have responded, precisely because
22 of either the draconian nature of criminal contempt or
23 the possibility that it won't issue, by looking at some
24 of these cases, in the extraordinary instance, through
25 mandamus -- and there are at least a dozen mandamus

1 decisions --

2 JUSTICE GINSBURG: But mandamus is supposed
3 -- not supposed to be an end run about the final judgment
4 rule, and if -- and if Cohen v. Beneficial is available,
5 then mandamus would not lie, right?

6 MS. RESNIK: That is directly -- that is
7 exactly correct, yes. It is that the appeal of these
8 unappealing routes is because the final judgment rule
9 says, even if there is an error and even if it's a very
10 important error, absent this very narrow category of
11 cases that are final through our gloss on Cohen, the
12 basic plan is you wait till the end.

13 In this instance, this district judge, in
14 the related case, certified under 1292(b), the RICO
15 question that came back -- came up to this Court. It
16 also had a 23(f) appeal in this case. So this is
17 actually a textbook case, if you will, of watching both
18 the pros and cons of interlocutory appellate review, and,
19 in this instance, what we see is that the district court
20 here said this is too run-of-the-mill for 1292(b).

21 However, if you want, cooperating with the
22 lawyers, I will -- I will put everything in abeyance, if
23 you want to seek mandamus. And so the district judge
24 was attentive to the lawyers' concerns. Moreover,
25 because the district judge has put a protective order on

1 related materials, we have an example of a district
2 judge, who is very aware of the parameters of the
3 litigation, and that goes to remedies. We don't know --

4 CHIEF JUSTICE ROBERTS: Well, a protective
5 order isn't going to work -- a protective order isn't
6 going to work at all. You're not going to -- I mean,
7 the lawyers on the other side get the privileged
8 material, so they don't care -- I mean, in terms of the
9 viability and protection of the privilege, it doesn't
10 matter if the clients get it.

11 MS. RESNIK: In -- the -- underlying the
12 privilege is the workings of the system for both private
13 ordering and for the justice system. The rare instances
14 in which a trial judge affirmatively makes a finding of
15 waiver through conduct, in this instance, or in some
16 other ways, are going to not undermine the privilege in
17 its initial formation, and the final judgment rule has
18 said, repeatedly, we could get it wrong on class action
19 certification, we could get it wrong on attorney
20 disqualification; nevertheless, the costs of the final
21 judgment rule are so substantial --

22 CHIEF JUSTICE ROBERTS: Well, but the -- you
23 know, the -- the American Bar Association has said the
24 exact opposite. It will say that the opening up of the
25 privilege and the disclosure, however rare the cases,

1 will, in fact, undermine the -- the value of the
2 privilege.

3 MS. RESNIK: I appreciate -- and before you
4 and amici, on both sides, are people deeply committed to
5 the administration of justice.

6 CHIEF JUSTICE ROBERTS: Oh, sure, the other
7 people are, too, but we -- I, at least, look at a brief
8 from the American Bar Association and view that as a
9 representation of how the people affected here, the
10 lawyers, view the value of the privilege and what will
11 happen to it.

12 MS. RESNIK: And I believe that the judges
13 and lawyers and law professors who have written to you
14 on the other side are committed to understanding that
15 the privilege is important instrumentally. The trial --

16 CHIEF JUSTICE ROBERTS: Oh, but the law
17 professors -- the law professors aren't the ones who deal
18 with this question on a day-to-day basis and have to
19 worry about going to jail if they want to protect their
20 client's -- what they view as their ethical obligations.

21 MS. RESNIK: There are many provisions short
22 of going to jail, and, furthermore, I want to come back
23 to the -- to the rule, the limited scope --

24 JUSTICE SOTOMAYOR: But it's only going to
25 jail that gives you criminal contempt.

1 MS. RESNIK: Yes, it is.

2 JUSTICE SOTOMAYOR: That's immediately
3 appealable.

4 MS. RESNIK: And the -- the underlying
5 insight of Cohen is that there are many instances when
6 dramatic events occur in the dynamics of trial, but the
7 Congress has concluded that the final judgment rule
8 requires waiting till you get to the end.

9 And in the instances -- contempt, as
10 standing here as an alternative around that rule, as is
11 mandamus, as is 1292(b), as small windows, not for the
12 regular course of events.

13 The empirics suggests that, by and large,
14 people are getting it right, but there will be a lot of
15 requests for review, and the strategic dimension, which
16 is what the attorney-client privilege and the class
17 action holdings in Cohen are about, will invite more of
18 the strategic play, so that, in the plea from the judges
19 who also participated in the amicus --

20 JUSTICE KENNEDY: Is the attorney-client
21 claim sometimes raised, along with a host of other
22 discovery issues, as a bargaining chip?

23 MS. RESNIK: These are packages that -- yes,
24 the attorney-client privilege -- and this is granular
25 work by district and magistrate judges of -- of hundreds

1 of thousands of pieces of paper.

2 It could go, piecemeal, to the court of
3 appeals more than one time, and it can also come up, even
4 at trial, interrupting a trial. So we could watch the
5 sequence of a frequent, repetitious return back and
6 forth to the court of appeals on this kind of privilege
7 and, potentially, on other kinds of privileges.

8 Thank you very much.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Kneedler.

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER

12 ON BEHALF OF THE UNITED STATES,

13 AS AMICUS CURIAE,

14 SUPPORTING THE RESPONDENT

15 MR. KNEEDLER: Mr. Chief Justice, and may it
16 please the Court:

17 In the last 15 years, this Court, in
18 applying the principles of Cohen, has repeatedly
19 stressed that a necessary requirement is that the order
20 involved and the issues implicated be important and,
21 particularly, that the issues be so important as to
22 outweigh the values served by the important and usual
23 rule of a final judgment requirement.

24 In our view, the denial of an assertion of
25 attorney-client privilege in an individual case does not

1 rise to that level and, to the contrary --

2 CHIEF JUSTICE ROBERTS: Well, except when
3 the government is the one raising it.

4 MR. KNEEDLER: No. We do not -- we -- to be
5 clear, we are not asserting that an -- that an assertion
6 of attorney-client privilege by the government is -- is
7 immediately appealable.

8 CHIEF JUSTICE ROBERTS: Yes, but, in the
9 government context, what would be in the private
10 context an attorney-client privilege is redressed as a
11 different type of governmental privilege.

12 When you give advice to a government agency,
13 you don't call that the attorney-client privilege. You
14 call it a governmental privilege, a deliberative
15 privilege, all these other things.

16 In the private sector, when you are an
17 attorney and you give advice to a client, you can't say,
18 this has got something. It's the attorney-client
19 privilege.

20 MR. KNEEDLER: Let me also stress, we are
21 not arguing that a denial of the assertion of the
22 deliberative process privilege is immediately
23 appealable.

24 Our -- the -- the submission that we make in
25 the latter part of our brief, and that we urge the Court

1 not to foreclose here, is the presidential
2 communications privilege, which applies to
3 communications involving the President or his top
4 advisors. And we also say that the State secrets
5 privilege raises similar concerns. Both of those serve
6 functions of constitutional significance. We do not
7 make the same claim about -- about the general
8 government privilege for deliberative process.

9 CHIEF JUSTICE ROBERTS: So you are saying
10 that you -- government lawyers cannot seek an
11 interlocutory appeal of any privilege claimed, other
12 than presidential communications and State secrets?

13 MR. KNEEDLER: I don't want to rule out the
14 possibility that there could be a statutory privilege of
15 some -- of some particular sort. There was --

16 JUSTICE GINSBURG: Well, you could -- you
17 could seek an interlocutory appeal under 1292(b).

18 MR. KNEEDLER: That -- that would be -- that
19 would be available in an appropriate case. There are
20 the -- there are the limitations. We trust that a court
21 would -- would grant that, but these -- these are
22 interests of the highest order.

23 CHIEF JUSTICE ROBERTS: I'm sorry. There
24 are problems with 1292(b). Are you telling me, when
25 your office writes a letter to the Department of

1 Interior and says, look, we are not going to appeal --
2 we will appeal your case, but we think you have got a
3 really bad case, you are likely to lose; and you
4 assert -- the only privilege you can assert is the
5 attorney-client privilege, and, if a district judge
6 says, that's not covered, for one reason or another,
7 you -- you don't get an interlocutory appeal?

8 MR. KNEEDLER: No. Not -- we don't get an
9 interlocutory appeal under -- under 1291. No. We are
10 not arguing for that -- for that position. And, for the
11 two particular privileges that -- that we have
12 identified in our -- in our brief, it is possible that
13 1292(b) certification would be granted by the -- by the
14 court, but it is also possible that it would not.

15 And I -- I would like to -- I would like to
16 identify -- and I think Justice Sotomayor asked about --
17 about a test for importance, and the Court, in its
18 recent decision in Will, tried to summarize what -- what
19 it has been driving at over the last 15 years on this
20 importance prong and whether the importance outweighs
21 the -- the final judgment values. And what the Court
22 said there is that there has -- that the denial of an
23 immediate appeal has to undermine -- let me -- let me
24 quote -- "has to undermine some particular value of high
25 order."

1 And then the Court identified the things
2 that have fallen into that category. It mentioned
3 separation of powers. The Court mentioned disruption of
4 government operations through the denial of qualified
5 immunity. And I would add the denial of statutory
6 immunity under the Westfall Act to that.

7 CHIEF JUSTICE ROBERTS: You don't think that
8 the attorney-client privileges rises to the level of who
9 gets to -- who has to put up security for costs that was
10 at issue in Cohen?

11 MR. KNEEDLER: We -- I think the -- I do
12 not. And I think the problem is that the denial of
13 attorney-client privilege is tied up with discovery of
14 the sort that happens every day in Federal court. It's
15 bound up with -- with discovery plans, that --
16 objections on relevance, materiality, various -- various
17 privileges.

18 One of the important values served by the
19 final judgment rule is that the conduct of -- of
20 district court proceedings like that is committed to the
21 judgment and discretion of the district court, and if a
22 disappointed litigant could automatically run to the
23 court of appeals, that undermines the ability of the
24 district court judge to manage the day-to-day
25 discovery --

1 CHIEF JUSTICE ROBERTS: But we're not talking
2 about -- I guess what, perhaps, the case comes down to
3 is, if you think the attorney-client privilege is like
4 every other evidentiary privilege that you have just
5 listed, relevance, materiality, all those sorts of
6 things, or if you think the attorney-client privilege is
7 different, even more important than who has to post
8 security for costs, because it's central to the rule of
9 law, because it's central to how the adversary system
10 functions.

11 MR. KNEEDLER: I think the more precise
12 question, Mr. Chief Justice, is whether the -- the
13 question is whether the denial of an attorney-client
14 privilege threatens to -- so substantially undermine the
15 values of the privilege to warrant an immediate appeal,
16 and I think, as has been pointed out by several of the
17 Justices here, there are -- there are exceptions to the
18 privilege, which -- which will -- might undermine the
19 confidence people might have in it. There are
20 uncertainties at trial. These are often fact-based
21 determinations that would be subject to clearly
22 erroneous review on appeal. The very sorts of reasons
23 why issues like this are committed to the district
24 court's discretion and reviewed on final judgment when
25 you can find out whether the error actually made a

1 difference in a particular case.

2 CHIEF JUSTICE ROBERTS: But the review -- I
3 follow your answer, but the review on final judgment is
4 meaningless. I mean, the cat is out of the bag.

5 MR. KNEEDLER: Well, it's not entirely
6 meaningless. It can -- if the evidence was used in the
7 trial and had -- had a substantial impact, you can have a
8 reversal of the judgment, and -- and the -- the injury
9 can be mitigated by saying that the -- that the evidence
10 cannot be -- cannot be used in the retrial. That is
11 not --

12 CHIEF JUSTICE ROBERTS: The injury to the
13 party, but not the injury to the attorney-client
14 privilege.

15 MR. KNEEDLER: Well, again, the -- the
16 question is -- the attorney-client privilege is not for
17 confidence in its own right but to encourage frank
18 communications in order to promote litigation in the
19 function of lawyers. And the question is whether the
20 denial of a privilege in a particular case will so
21 undermine that privilege as a general matter to warrant
22 an immediate appeal. And we think the answer is clearly
23 no. And also the loss of the privilege to the
24 individual litigant we think is not a sufficient basis,
25 because the other cases that I mentioned and that the

1 Court identified in Will are situations where the injury
2 transcends the particular case.

3 JUSTICE ALITO: Do you think it's --

4 JUSTICE GINSBURG: Mr. Kneedler, I think I
5 have this right, but correct me if I am wrong. I
6 thought in Cohen v. Beneficial, it wasn't just a
7 question that we would like to get this legal question
8 settled, but, in fact, for many plaintiffs if security
9 for costs was something that the plaintiff had to put up,
10 up front, that would be the end of the lawsuit. It
11 would be the practical end of the lawsuit. Unlike -- in an
12 attorney-client privilege, the suit goes on.

13 So Cohen v. Beneficial wasn't simply that
14 this was an important question unsettled under Erie; it
15 was the practical reality that plaintiffs who had to put
16 up security costs would be out of court --

17 MR. KNEEDLER: That's -- that's a very
18 important -- that's a very important point. And I think
19 that --

20 JUSTICE ALITO: Well, Mr. Kneedler, is -- is
21 that true, that the case goes on? Isn't it true that of
22 the civil cases that get through discovery, only a tiny
23 percentage ever come to an appealable final judgment?
24 The vast, vast majority these days are settled, are
25 they not?

1 MR. KNEEDLER: They are. And I -- I think
2 that supports the point for not having immediate
3 appealable --

4 JUSTICE ALITO: Right, it means that there
5 never can be an appeal.

6 MR. KNEEDLER: Well, but the --

7 JUSTICE ALITO: It means that the
8 erroneous -- if there was an erroneous ruling, it's
9 built into the -- it's irretrievably built into -- well,
10 not irretrievably, but powerfully built into the
11 bargaining --

12 MR. KNEEDLER: But that's the nature of
13 trial proceedings and discovery. Judges may make
14 erroneous rulings. And this Court, again, acknowledged
15 in Will that the purpose of the final judgment rule is
16 not to protect -- prevent particular injustices that
17 might happen in a particular case. Again, to go back to
18 what the Court has stressed, there has to be a -- a
19 value, and the Court said constitutional or statutory or
20 something with a large public pedigree where the --
21 where the injury will -- will not be -- where the
22 weighing of the costs and benefits comes out quite
23 differently. And I --

24 JUSTICE ALITO: If the attorney-client
25 privilege were in a statute, that would make a

1 difference?

2 MR. KNEEDLER: I don't think so if there was
3 a statute that just codified the -- the privileges like
4 this. What I -- what I was suggesting is
5 there might be a statute that would identify a
6 particular governmental interest as in the D.C.
7 Circuit's decision in the -- in the Inowan case.

8 CHIEF JUSTICE ROBERTS: Putting aside the
9 question of whether the attorney-client privilege has a
10 good pedigree in public law, my experience has been that
11 litigants on one side frequently request and demand in
12 discovery material they know is covered by the
13 attorney-client privilege, one, precisely because that's
14 where the good stuff is; and two, because it gives them
15 leverage, because they know that the other side is going
16 to have to go through this impossible process and can't
17 get an immediate appeal.

18 Why isn't that a concern that we should
19 have?

20 MR. KNEEDLER: I think and that's a --
21 district judges are -- are -- who manage these cases
22 every day can see through that, and -- and -- and can be
23 trusted to, by and large, make correct results. It may
24 be that there will be an occasional erroneous
25 determination. But, again, as for privileges generally,

1 that's -- that's so.

2 I did want to make one final point about --
3 about irreparable injury. For the sorts of privileges
4 that we have identified in -- in our brief, the -- the
5 presidential communications privilege and whatnot,
6 that -- that harm is immediate and broad on behalf of
7 the nation as a whole. That is a different question
8 from the harm to a particular litigant when a privilege
9 is denied in a particular case and it doesn't undermine
10 the broader purposes of the privilege.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Kneedler.

13 Mr. Allen, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF RANDALL L. ALLEN
15 ON BEHALF THE PETITIONER

16 MR. ALLEN: I would like to address the
17 question that Justice Alito raised with regard to
18 whether or not an appeal of a collateral issue dealing
19 with waiver or privilege would stay the litigation. The
20 answer is it does not. The case remains with the
21 district court, the district court is empowered to
22 manage the case. Only the question addressing the issue
23 would go up with collateral order jurisdiction. Indeed,
24 in this case, the court did not stay the litigation
25 below. So, the court maintains that ability to manage

1 its own docket. To be sure --

2 JUSTICE STEVENS: It certainly doesn't go
3 ahead with the trial, does it?

4 MR. ALLEN: He has not gone ahead with the
5 trial.

6 JUSTICE STEVENS: It never would, would it?

7 MR. ALLEN: He is certainly empowered to do
8 so.

9 JUSTICE STEVENS: Well, to go ahead with a
10 trial while a material issue is still pending? I can't
11 imagine that.

12 MR. ALLEN: Your Honor, the scenario that
13 you raise would put the attorney or the client,
14 depending on who is in the box, if you will, to some
15 hard choices. But there are two ways that the case
16 stays: Either the district court has to order that the
17 case stays or on appeal the court of appeals has to
18 order that the case stays. The parties and their
19 counsel cannot stay the case.

20 So, I agree with you that it could be a
21 difficult situation for the parties.

22 JUSTICE STEVENS: I can't imagine a judge
23 going to trial in a case when an important issue like
24 this is pending on appeal. Has that ever happened?

25 MR. ALLEN: I am unaware that it has -- it

1 has ever happened, Your Honor, and I hope it doesn't.
2 But the -- but point is that the district court
3 maintains that power and authority to run -- to run its
4 courtroom.

5 The United States cites Will for the
6 proposition that -- that the collateral order doctrine
7 is designed to impact some particular value of high
8 order, and it recites from Will a number of those
9 particular values of high order, including qualified
10 immunity. As this Court recognized in -- in Harlow,
11 a -- a doctrine of common law origin, much like the
12 attorney-client privilege, the -- the doctrine in
13 Harlow, qualified immunity, is designed to impact and
14 affect the efficient operation of government.

15 The design of the attorney-client privilege
16 is intended to have the same impact on the efficient and
17 effective operation of the administration of justice.

18 If I could go back, Justice Breyer, to the
19 question that you raised with regard to other privilege,
20 I would suggest that a holding in this case in our favor
21 would have no impact on the Court's later determination
22 of privileges of husband, wife, spousal privileges, or
23 of priest and penitent type privileges. I would suggest
24 that the better course would be to examine a case that
25 develops the importance or the impact of those

1 privileges, but certainly with regard, for example, to
2 spousal immunity or spousal privilege, the way that the
3 States recognize them -- I believe that all 50 States
4 recognize spousal privilege -- is varied.

5 JUSTICE BREYER: So -- so, I think any
6 system of -- that denies you the interlocutory appeal
7 will, in fact, work some injustice. I have no doubt
8 about that. Any system that allows too many
9 interlocutory appeals wrecks the judicial system through
10 delay.

11 Now, I'd think on that kind of question which
12 is here, maybe there is some information that you come
13 across with the ABA, for example, which has 300,000
14 members -- maybe 600 -- you know, hundreds of thousands
15 of members. There might be instances in the circuits
16 where appeal was denied, where the lawyers would say, my
17 goodness, appeal was denied, I want to tell you the
18 hardship that that worked.

19 Has anyone gone around and tried to find if
20 there are such instances, as there must be, how serious
21 it was? How harmful, how often? Do we have any
22 empirical information on that question?

23 MR. ALLEN: Your Honor, I do not have any
24 empirical information to answer that question. But to
25 go to the -- to the underlying premise of whether or not

1 those other cases might generate some flood gate, if you
2 will, I think we've -- we've answered, and to be clear,
3 to Respondent's description of our counting. I don't
4 think it is a statistical analysis. We simply counted
5 the actual appeals, 11.

6 JUSTICE BREYER: Is it wrong for me to
7 expect that if this would work, a lot of instances of
8 serious hardship not allowing the appeal, some lawyers
9 in their meetings would be upset and they would raise a
10 few examples? So doesn't the fact that you have been
11 unable to find any tend to count against you?

12 MR. ALLEN: I don't believe it does, Your
13 Honor. I don't believe that should count against us.
14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 The case is submitted.

17 (Whereupon, at 12:06 p.m., the case in the
18 above-entitled matter was submitted.)

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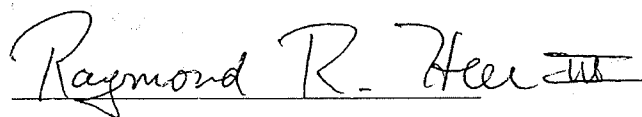
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; MOHAWK INDUSTRIES, INC., Petitioner, v. NORMAN CARPENTER.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, written over a horizontal line.

REPORTER