

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MOHAWK INDUSTRIES, INC., :

4 Petitioner :

5 v. : No. 08-678

6 NORMAN CARPENTER. :

7 - - - - - x

8 Washington, D.C.

9 Monday, October 5, 2009

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:05 a.m.

14 APPEARANCES:

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16 Petitioner.

17 JUDITH RESNIK, ESQ., New Haven, Conn.; on behalf of
18 the Respondent.

19 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf of
21 the United States, as amicus curiae, supporting the
22 Respondent.

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

2 (11:05 a.m.)

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

6 Mr. Allen.

7 ORAL ARGUMENT OF RANDALL L. ALLEN

8 ON BEHALF OF THE PETITIONER

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

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

21 JUSTICE SCALIA: Mr. Allen, except for the
22 fact that you and I are lawyers, do you really think
23 that the -- that confidentiality right is any more
24 important to the proper functioning of society than,
25 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 three 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 is 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 is 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 the 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 MR. ALLEN: But -- but the answer to the --
9 the importance question, I think, has to return to the
10 central and important role that the privilege plays in
11 the administration of justice.

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

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

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

24 The further disclosure doesn't really serve
25 the purpose -- or help the purpose in any meaningful

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

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

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

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

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

24 But I think the more direct answer to your
25 question goes to the Court's holding in Upjohn. One of

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

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

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

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

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

21 Once you -- once you factor in all of those
22 uncertainties, you are not talking about a -- you know,
23 about a fail-safe privilege at all. There are those
24 doubts, and I'm not sure the doubts are increased
25 enormously, by simply saying a district court may make a

1 mistake without -- without your being able to go up to
2 the court of appeals on that mistake.

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

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

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

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

24 MR. ALLEN: No, Justice Ginsburg. I don't
25 believe that you do. I used the term "interlocutory"

1 only to refer to the fact that the appeal would take
2 place while the case-in-chief proceeds.

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

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

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

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

21 Of course, you do disclose it to the
22 opposing party, but that is also true of any breach of
23 any privilege, so husband-wife, priest-penitent,
24 psychiatrist and patient. I take all of those are
25 privileged. Do we allow collateral appeals there?

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

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

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

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

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

20 JUSTICE BREYER: It's the lawyer.

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

1 lost if appeal is not available now.

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

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

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

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

16 MR. ALLEN: Correct, Your Honor.

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

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

23 JUSTICE SOTOMAYOR: Why isn't that an
24 effective remedy for the harm that you are claiming
25 exists in the disclosure?

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

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

13 MR. ALLEN: That's --

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

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

25 JUSTICE SOTOMAYOR: I understand what the

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

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

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

25 Cohen v. Beneficial was meant for the kind

1 of question that doesn't get you into the facts.
2 Otherwise, once you get into -- once it's a fact-bound
3 question, you are really eroding the final judgment
4 rule.

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

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

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

24 MR. ALLEN: I agree, Justice Ginsburg that
25 that was the kind of narrow issue that was at issue

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

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

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

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

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

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

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

1 JUSTICE STEVENS: Why not?

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

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

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

22 So -- so, while I think it is instructive to
23 compare the privilege to other privileges that the Court
24 may in the future confront, I think the proper analysis
25 is to balance that, that rigorous application of the

1 final judgment rule, to the attorney-client privilege.

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

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

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

1 up on appeal. So, we have some experience to tell us
2 what will actually happen.

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

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

1 wanting us to limit this rule only to the waiver cases?

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

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

7 MR. ALLEN: Your Honor --

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

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

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

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

24 I -- I don't think that compels the
25 conclusion that any case addressing privilege must

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

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

23 In Flanagan it took up the question of
24 whether or not collateral order jurisdiction obtained in
25 disqualification cases and criminal cases, and in

1 Richardson-Merrell in civil cases. So the Court has
2 traditionally taken, if you will, the facts of the case
3 presented to them and limited its rulings to the facts
4 of those cases. We suggest that approach in this case.

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

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

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

25 JUSTICE GINSBURG: There is another. You

1 are stressing the importance of the attorney-client
2 relationship, the work of the attorney. Do you extend
3 your position to work product? It's not privileged.

4 MR. ALLEN: No, Your Honor --

5 JUSTICE GINSBURG: But it's certainly --
6 it's certainly protected against disclosure.

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

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

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Ms. Resnik.

21 ORAL ARGUMENT OF JUDITH RESNIK

22 ON BEHALF OF THE RESPONDENT

23 MS. RESNIK: Thank you. Mr. Chief Justice,
24 may it please the Court:

25 Before 1997, no circuit held that there was

1 appeal as of right for privilege or waiver, and most of
2 the circuits continue that approach. That is the right
3 approach because attorney-client privilege cases do not
4 fit the parameters of the Cohen appealability and there
5 are alternative responses that are available on the
6 remedial side. In terms of the Cohen factors, the
7 factor of importance which has just been discussed here,
8 this Court has over the 60 years of some 30 opinions
9 refined the importance test and moved it away from the
10 questions of place, shape of litigation, dynamics of
11 litigation, to a very narrow set of cases in which a
12 government is typically a party or a government
13 official, and there is a very significant either
14 constitutional or statutory question principally of
15 immunity from suit.

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

19 MS. RESNIK: I think the --

20 CHIEF JUSTICE ROBERTS: Government lawyers
21 get the privilege, private lawyers don't?

22 MS. RESNIK: As I understand the
23 government's position here, it's that ordinary lawyers
24 don't get the privilege in ordinary litigation. The
25 government is here to speak to the question of State

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

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

16 CHIEF JUSTICE ROBERTS: But we are talking
17 about the central privilege to the maintenance of the
18 adversary system which we've determined to be central to
19 maintaining the rule of law. This is not like the other
20 privileges, priest-penitent, other evidentiary
21 privileges, because it is the privilege that allows
22 lawyers to protect the interests in those other cases.
23 And it just seems to me that -- that to allow a single
24 ruling by a district court judge to undermine the
25 privilege is going to affect people.

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

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

17 JUSTICE SOTOMAYOR: That is in the Third
18 Circuit.

19 MS. RESNIK: Well, the Third, the Ninth and
20 the D.C. together are the three that have opened up the
21 door, and they have found -- the experience of those
22 appellate judges has not found that it is easy to make
23 the distinction among these, and as a consequence there
24 is appeal as of right to this entire cluster of cases.

25 JUSTICE GINSBURG: Mr. Allen has told us

1 that there are very few cases, in fact 11 cases in I
2 don't know how many years, in the Third Circuit.

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

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

16 As best we can tell, somewhere between 10
17 and 30 times a month in Westlaw reports one can find a
18 conclusion either upholding or denying disclosure.
19 Moreover it's sequential --

20 CHIEF JUSTICE ROBERTS: Well, it matters
21 which they do, right? If they are denying disclosure
22 the statistics don't mean much.

23 MS. RESNIK: We found about half the cases,
24 and the law professors amici and judges amici found
25 about 104, in which in which disclosure was required, in

1 the six-month period. So there is a significant number
2 at the trial level that exists in terms of the pipeline.
3 If we go just to the case that is before you, the
4 Federal district judge reserved question on a second
5 attorney-client privilege question because issuing a
6 protective order on the deposition, there is a related
7 case here and he precluded the lawyers from
8 participating in it.

9 JUSTICE ALITO: I was on the Third Circuit
10 for eight years under this regime. And it didn't seem
11 to me that the sky was falling. In fact I can't
12 remember any cases, any appeals involving this issue,
13 and we had lots of cases of a variety of kinds. So
14 maybe there's -- I don't want to be a witness in this,
15 but you know, convince me that the sky really will fall
16 if we were to adopt this.

17 MS. RESNIK: I am not going to convince you
18 that the sky is going to fall, but I am going to suggest
19 that the Cohen rule does not apply to these cases not
20 only because the sky isn't going to fall. The empirical
21 question is there will be more cases for sure and there
22 will be more people with comparable privileges knocking
23 at the appellate doors, and they'll be sorting, so that
24 goes to the county. Do we count the cases that knocked
25 and you said no to as well as the cases you said yes to.

1 The other case is that the Cohen rule
2 requires a particular kind of importance and a
3 particular kind of severability. In this case, the
4 trial judge said, in fairness, there has been a waiver
5 because you've injected new issues in the case. In
6 order to get to the in fairness waiver injection, you
7 have to know the facts of the case and weigh the waiver
8 against the other facts in the case.

9 JUSTICE ALITO: So the Eleventh Circuit was
10 wrong on that issue? Didn't they hold that this was --
11 this was separate from the merits?

12 MS. RESNIK: In our view, every one of
13 the -- this case fails the test on all four -- three to
14 four of the Cohen prongs, which is separability and
15 conclusiveness or -- or distinct ideas, potentially,
16 importance, and remediability. And therefore, the
17 embeddedness here is typical of cases, CrimeStar was an
18 example already mentioned, in which the factual
19 predicates are here. In terms of coming back to the
20 piecemeals, in this case the trial judge reserved the
21 question. The lawyers below have asked for a
22 pre-ruling. The questions to be asked at the deposition
23 will not waive attorney-client privilege. The trial
24 judge said, I don't know the answer to that, it hasn't
25 been fully breached and we don't know what you are going

1 to ask. Therefore, in this very case, if the rule were
2 that you could appeal as a right, you could be back in
3 this case twice to the Eleventh Circuit during the
4 pendency of the case.

5 JUSTICE SOTOMAYOR: Ms. Resnick, can you go
6 back and articulate what you see as the rule that we
7 have on what is important enough? Because that is what
8 really is at question. So how would you articulate a
9 rule that would apply both to the cases in which we have
10 granted interlocutory appeal and to those that you are
11 advocating we don't. Because it's not just freedom from
12 suits like qualified immunity or double jeopardy. We
13 have granted interlocutory appeal in other cases,
14 including in the Cohen case.

15 MS. RESNIK: Well, Cohen involved the major
16 question of the application of the Erie principle in
17 1949 involving a state -- the right of security for
18 expenses. And I would take Cohen and the Vale case and
19 the drugging case of Sell as instances in which, is the
20 litigant, during the pendency of the case, going to be
21 economically secure or free, or drugged or not drugged,
22 as distinct qualities which are all framed in either
23 State law or Constitutional premises. If we look over
24 the course of the 60 years, the category is not neat.
25 But the turning point is in 1978 with the Coopers

1 opinion which says death knell, which says strategic
2 interactions, the shape of class actions, is not
3 available for appeal as a right.

4 In 1994, one might have thought of the
5 digital case that a contract not to continue by -- just
6 settle would have been within the set, but the Court
7 said, no, that kind of private contractual interest is
8 not sufficient.

9 And in 2006, in the Will case, the court
10 narrowed it again by saying the res judicata sequence is
11 insufficient. So in the last decade the Cohen cases
12 have come down to basically qualified immunity or
13 Constitutionally-freighted -- structural or almost
14 abstract, not interpersonal dynamics of the litigation,
15 including contractual relationships or evidentiary
16 privileges.

17 JUSTICE GINSBURG: But are you suggesting
18 that -- that Cohen itself wouldn't come out the same way
19 today if the question of security for costs, whether
20 State or Federal, hadn't been settled?

21 MS. RESNIK: Well, Cohen predates this --
22 the Congress's creation of 1292(b), which you mentioned
23 earlier, Justice Ginsburg. And so what it is looking at
24 is, when Cohen was initially decided it opened a window,
25 but in the relationship between Court and Congress, the

1 judicial conference went to the Congress and said, We
2 need a broader window, and Congress adopted verbatim in
3 1958 the 1292(b) criteria which, clearly, Cohen would
4 have been eligible for or potentially eligible for, and
5 there are attorney-client privilege cases that do go off
6 under 1292(b).

7 CHIEF JUSTICE ROBERTS: But it is a bit of a
8 hurdle, isn't it, since you do have to satisfy the
9 materially advanced -- the litigation and those other
10 criteria?

11 MS. RESNIK: There are a few selective
12 waiver cases. There are a few of these that come up,
13 but you are completely right that it is a hurdle but we
14 have alternatives here as well. As the example of the
15 -- once the Federal Court Study Committee suggested we
16 needed more appeal rights after the Coopers case,
17 Congress responded by authorizing the Court through its
18 rulemaking to provide interlocutory orders as final, and
19 23(f) is the next example, which also provides the
20 mechanism.

21 The basic point is that there are other
22 routes. The remedial prong of Cohen is amply responded
23 to here, because first, internal to the case, there
24 could be protective orders and limited disclosure.
25 Second, you can take the issue and stipulate it against

1 you. Third, you could actually, if you ever did go to
2 trial, not testify. That's the Jackie B. Redman
3 scenario. Fourth, you have the after-a-fact appeal.
4 Fifth, mandamus is available, and there are circuit
5 courts.

6 JUSTICE GINSBURG: But that is only in
7 egregious cases.

8 MS. RESNIK: In the extraordinary case there
9 is mandamus. There is also certification, and all of
10 these are routes that are filtered. Cohen opens the
11 door completely.

12 JUSTICE ALITO: Are you -- are you arguing
13 that the collateral order door is closed now? That --
14 that nobody else is going to get through that door?

15 MS. RESNIK: I can't forecast future cases,
16 except to say that this Court has repeatedly in the last
17 decade narrowed the door substantially. And I take it
18 it has come in relationship to the door opening through
19 the other mechanisms, Congressional carve-ups like the
20 Classified Informations Procedure Act, the Congressional
21 carve-up in Catha, and each of those isn't a wide-open
22 door, but either discretionary or timeframed or limited.
23 And of course, that goes to the problem that an
24 interlocutory appeal really is interlocutory and stops
25 everything, whereas the 23(f) rule says after the court

1 order, there's nothing stayed at the district court
2 level.

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

5 MS. RESNIK: The -- as a rule of filing a
6 notice of appeal with a court of appeal at the -- a
7 statutory rule provision puts the -- stays the district
8 court activity. That's why 23(f) moderates that rule,
9 as I understand it.

10 Further, I wanted to come back to the
11 question here in terms of importance. Rule 501 and 502
12 of the Federal Rules of Evidence, Number 502 has just
13 been reworked. 501 remains that in some of these the
14 existence of the privilege will arise -- will be a
15 question of state law. I know of no one of the Erie
16 cases in which the interlocutory appellate question
17 turns on the question of state law as a predicate, and
18 the D.C. Circuit rule is that it's when there's an
19 adverse privilege ruling that you get appeal as a right.
20 It's -- that's the D.C. circuit's rule for -- and
21 indeed, it had several of these, not very many, but a
22 few of these cases.

23 So then 502 has just come with the workings
24 of the judicial conference and the Congress together,
25 and the lawyers, to shape a rule that is very protective

1 of inadvertent waiver, protective about its sequential
2 impacts as well, and articulating and Federalizing that
3 area of law, as well as providing under 502(a) for -- if
4 you waive in the course of a Federal proceeding, 502
5 organizes the way a district court should think about
6 it.

7 If there were appeal as a right of waiver
8 right now, after this case, then all those 502 cases
9 could come directly, whereas instead a few might get
10 here or not by 1292(b). And again, if it looked like
11 there needed to be a wholesale reworking because of the
12 vulnerability of the system, then the Court and
13 committee working with the lawyers can draft together
14 some revision. But the --

15 CHIEF JUSTICE ROBERTS: The usual way that
16 the district court, after denying the recognition of the
17 privilege, insists that people proceed is, they want the
18 lawyer to go to jail. They say, You've got contempt,
19 you can appeal contempt. The district judges, as you've
20 mentioned, they want these things to move on and they
21 tend not to think that their rulings are in error, and
22 the lawyers are frequently confronted with an extremely
23 difficult choice, of violating what they think is their
24 ethical obligation or going to jail.

25 MS. RESNIK: Well, it is the case that Judge

1 Wilkinson recently reiterated Judge Friendly's
2 suggestion that -- or commentary that contempt is a
3 provision that is available. And it is a route. But
4 we've found --

5 JUSTICE GINSBURG: And how -- how is it --
6 unless the judge cooperates, it has to be criminal
7 contempt. It wouldn't be civil contempt. The judge
8 says, I'm not going to hold you, and --

9 MS. RESNIK: What -- we have found that many
10 courts of appeals have responded, precisely because of
11 either the draconian nature of criminal contempt or the
12 possibility that it won't issue, by looking at some of
13 these cases, in the extraordinary instance, through
14 mandamus and there are at least a dozen mandamus --

15 JUSTICE GINSBURG: But mandamus is supposed
16 -- not supposed to be a run about the final judgment
17 rule, and if -- and if Cohen v. Beneficial is available,
18 then mandamus would not lie, right?

19 MS. RESNIK: That is directly -- that is
20 exactly correct, yes. It is that the appeal of these
21 unappealing groups is because the final judgment rule
22 says even if there is an error and even if it's a very
23 important error, absent this very narrow category of
24 cases that are final through our gloss on Cohen, the
25 basic plan is you wait till the end.

1 In this instance, this district judge, in
2 the related case, certified under 1292(b), the RICO
3 question that came back -- came up to this Court, it
4 also had a 23(f) appeal in this case.

5 So this is actually a textbook case, if you
6 will, of watching both the pros and cons of
7 interlocutory appellate review, and, in this instance,
8 what we see is that the district court, here, said this
9 is too run-of-the-mill for 1292(b).

10 However, if you want, cooperating with the
11 lawyers, I will -- I will put everything in abeyance, if
12 you want to seek mandamus. And so the district judge
13 was attentive to the lawyers' concerns, moreover because
14 the district judge has put a protective order on related
15 materials.

16 We have an example of a district judge, who
17 is very aware of the parameters of the litigation, and
18 that goes to remedies. We don't know --

19 CHIEF JUSTICE ROBERTS: Well, a protective
20 order isn't going to work -- a protective order isn't
21 going to work at all. You're not going to -- I mean,
22 the lawyers on the other side get the privileged
23 material, so they don't care -- I mean, in terms of the
24 viability and protection of the privilege, it doesn't
25 matter if the clients get it.

1 MS. RESNIK: In -- the -- underlying the
2 privilege is the workings of the system for both private
3 ordering and for the justice system. The rare instances
4 in which a trial judge affirmatively makes a finding of
5 waiver through conduct, in this instance or in some
6 other way, are going to not undermine the privilege in
7 its initial formation, and the final judgment rule has
8 said, repeatedly, We could get it wrong on class action
9 certification. We could get it wrong on attorney
10 disqualification.

11 Nevertheless, the costs of the final
12 judgment rule are so substantial --

13 CHIEF JUSTICE ROBERTS: Well, but the -- you
14 know, the -- the American Bar Association has said the
15 exact opposite. It will say that the opening up of the
16 privilege and the disclosure, however rare the case is,
17 will, in fact, undermine the -- the value of the
18 privilege.

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

22 CHIEF JUSTICE ROBERTS: Oh, sure, the other
23 people are, too, but we -- I, at least, look at a brief
24 of the American Bar Association and view that as a
25 representation of how the people affected here, the

1 lawyers, view the value of the privilege and what will
2 happen to it.

3 MS. RESNIK: And I believe that the judges
4 and lawyers and law professors, who have written to you
5 on the other side, are committed to understanding that
6 the privilege is important instrumentally. The trial --

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

12 MS. RESNIK: There are many provisions short
13 of going to jail, and, furthermore, I want to come back
14 to the -- to the rule, the limited --

15 JUSTICE SOTOMAYOR: But it's only going to
16 jail that gives you criminal intent.

17 MS. RESNIK: Yes. It is.

18 JUSTICE SOTOMAYOR: That's immediately
19 appealable.

20 MS. RESNIK: And the -- the underlying
21 insight of Cohen, is that there are many instances when
22 dramatic events occur in the dynamics of trial, but the
23 Congress has concluded that the final judgment rule
24 requires waiting till you get to the end.

25 And in the instances -- contempt, as

1 standing here as an alternative around that rule, as is
2 mandamus, as is 1292(b), are small windows, not for the
3 regular course of events.

4 The empiric suggests that, by and large,
5 people are getting it right, but there will a lot of
6 requests for review and the strategic dimension, which
7 is what the attorney-client privilege and the class
8 action holdings in Cohen are about, will invite more of
9 the strategic play, so that, in the plea from the judges
10 who also participated in the amicus --

11 JUSTICE STEVENS: Is the attorney-client
12 claim sometimes raised, along with a host of other
13 discovery issues, as a bargaining chip?

14 MS. RESNIK: These are packages that -- yes,
15 the attorney-client privilege -- and this is granular
16 work by district and magistrate judges of -- of hundreds
17 of thousands of pieces of paper.

18 It could go, piecemeal, to the court of
19 appeals more than one time and it can also come up, even
20 at trial, interrupting a trial. So we could watch the
21 sequence of a frequent, repetitious return back and
22 forth to the court of appeals on this kind of privilege
23 and, potentially, on other kinds of privileges.

24 Thank you very much.

25 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1 Mr. Kneedler?

2 ORAL ARGUMENT OF EDWIN S. KNEEDLER

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 MR. KNEEDLER: Mr. Chief Justice, and may it
7 please the Court. In the last 15 years, this Court, in
8 applying the principles of Cohen, has repeatedly
9 stressed that a necessary requirement is that the order
10 involved and the issues implicated be important and,
11 particularly, that the issues be so important as to
12 outweigh the values served by the important and usual
13 rule of a final judgment requirement.

14 In our view, the denial of an assertion of
15 attorney-client privilege in an individual case does not
16 rise to that level and to the --

17 CHIEF JUSTICE ROBERTS: Well, except when
18 the government is the one raising it.

19 MR. KNEEDLER: No. We do not -- we -- to be
20 clear, we are not asserting that an -- that an assertion
21 of attorney-client privilege by the government is -- is
22 immediately --

23 CHIEF JUSTICE ROBERTS: Yes, but, in the
24 government context, what would be in the private
25 context, an attorney-client privilege, is redressed as a

1 different type of governmental privilege.

2 When you give advice to a government agency,
3 you don't call that the attorney-client privilege. You
4 call it a governmental privilege, a deliberative
5 privilege, all these other things.

6 In the private sector, when you are an
7 attorney and you give advice to a client, you can't say,
8 This has got something. It's the attorney-client
9 privilege.

10 MR. KNEEDLER: Let me also stress, we are
11 not arguing that a denial of the assertion of the
12 deliberative process privilege is immediately
13 appealable.

14 Our -- the -- the submission that we make in
15 the latter part of our brief, and that we urge the Court
16 not to foreclose here, is the Presidential
17 communications privilege, which applies to
18 communications involving the President or his top
19 advisors.

20 And we also say that the State secrets
21 privilege raises similar concerns. Both of those serve
22 functions of constitutional significance. We do not
23 make the same claim about -- about the general
24 government privilege for deliberative process.

25 CHIEF JUSTICE ROBERTS: So you are saying

1 that you -- government lawyers cannot seek an
2 interlocutory appeal of any privilege claimed, other
3 than Presidential communications and State secrets?

4 MR. KNEEDLER: I don't want to rule out the
5 possibility that there could be a statutory privilege of
6 some -- of some particular sort --

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

9 MR. KNEEDLER: That -- that would be -- that
10 would be available in an appropriate case. There are
11 the -- there are the limitations. We trust that a court
12 would -- would grant that, but these -- these are
13 interests of the highest order.

14 CHIEF JUSTICE ROBERTS: I'm sorry. There
15 are problems with 1292(b). Are you telling me, when
16 your office writes a letter to the Department of
17 Interior and says, Look, we are not going to appeal --
18 we will appeal your case, but we think you have got a
19 really bad case, you are likely to lose; and you
20 assert -- the only privilege you can assert is the
21 attorney-client privilege, and, if a district judge
22 says, that's not covered, for one reason or another,
23 you -- you don't get an interlocutory appeal?

24 MR. KNEEDLER: No. Not -- we don't get an
25 interlocutory appeal under -- under 1291. No. We are

1 not arguing for that -- for that position. And, for the
2 two particular privileges that -- that we have
3 identified in our -- in our brief, it is possible that
4 1292(b) certification would be granted by the -- by the
5 Court, but it is also possible that it would not.

6 And I -- I would like to -- I would like to
7 identify -- and I think Justice Sotomayor asked about --
8 about a test for importance, and the Court, in its
9 recent decision in Will, tried to summarize what -- what
10 it has been driving at over the last 15 years on this
11 importance prong and whether the importance outweighs
12 the -- the final judgment values.

13 And what the Court said there is that there
14 has -- that the denial of an immediate appeal has to
15 undermine -- let me -- let me quote -- "has to undermine
16 some particular value of high order."

17 And then the Court identified the things
18 that have fallen into that category. It mentioned
19 separation of powers. The Court mentioned disruption of
20 government operations through the denial of qualified
21 immunity, and I would add the denial of statutory
22 immunity under the Westfall Act to that.

23 CHIEF JUSTICE ROBERTS: You don't think that
24 the attorney-client privileges rises to the level of who
25 gets to -- who has to put up security for costs that was

1 an issue in Cohen?

2 MR. KNEEDLER: We -- I think the -- I do
3 not. And I think the problem is that the denial of
4 attorney-client privilege is tied up with discovery of
5 the sort that happens every day in Federal Court. It's
6 bound up with -- with discovery plans, that --
7 objections on relevance, materiality, various -- various
8 privileges.

9 One of the important values served by the
10 final judgment rule is that the conduct of -- of
11 district court proceedings like that is committed to the
12 judgment and discretion of the district court, and if a
13 disappointed litigant could automatically run to the
14 court of appeals that undermines the ability of the
15 district court judge to manage the day-to-day --

16 CHIEF JUSTICE ROBERTS: We are not talking
17 about -- I guess what, perhaps, the case comes down to
18 is, if you think the attorney-client privilege is like
19 every other evidentiary privilege that you have just
20 listed, relevance, materiality, all those sorts of
21 things, or if you think the attorney-client privilege is
22 different, even more important than who has to post
23 security for costs, because it is central to the rule of
24 law, because it is central to how the adversary system
25 functions.

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

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

20 MR. KNEEDLER: Well, it's not entirely
21 meaningless. It can -- if the evidence was used in the
22 trial and had -- had a substantial impact you can have a
23 reversal of the judgment, and -- and the -- the injury
24 can be mitigated by saying that the -- that the evidence
25 cannot be -- cannot be used in the retrial. That is

1 not --

2 CHIEF JUSTICE ROBERTS: The injury to the
3 party, but not the injury to the attorney-client
4 privilege.

5 MR. KNEEDLER: Well, again, the -- the
6 question is -- the attorney/client privilege is not for
7 competence in its own right but to encourage frank
8 communications in order to promote litigation in the
9 function of lawyers. And the question is whether the
10 denial of a privilege in a particular case will so
11 undermine that privilege as a general matter to warrant
12 an immediate appeal. And we think the answer is clearly
13 no. And also the loss of the privilege to the
14 individual litigant we think is not a sufficient basis,
15 because the other cases that I mentioned, and that the
16 Court identified in Will are situations where the injury
17 transcends the particular case.

18 JUSTICE GINSBURG: Mr. Kneedler, I think I
19 have this right, but correct me if I am wrong. I
20 thought in Cohen v. Beneficial, it wasn't just a
21 question that we would like to get this legal question
22 settled, but, in fact, for many plaintiffs if security
23 for costs was something that the Plaintiff has to put up
24 up front, that would be the end of the lawsuit. It
25 would be the practical end of the lawsuit. Unlike in an

1 attorney-client privilege, the suit goes on.

2 So Cohen v. Beneficial wasn't simply that
3 this was an important question unsettled under Erie, it
4 is the practical reality that plaintiffs who had to put
5 up security costs would be out of --

6 MR. KNEEDLER: That's -- that's a very
7 important -- that's a very important point. And I think
8 that --

9 JUSTICE ALITO: Well, Mr. Kneedler, is true
10 that true, that the case goes on? Isn't it true that of
11 the civil cases that get through discovery, only a tiny
12 percentage ever come to an appealable final judgment?
13 The vast, vast majority of these things are settled, are
14 they not?

15 MR. KNEEDLER: They are. And I -- I -- I
16 think that supports the point for not having immediate
17 appealable --

18 JUSTICE ALITO: Right, because there never
19 could be an appeal.

20 MR. KNEEDLER: Well, but the --

21 JUSTICE ALITO: It means that the
22 erroneous -- if there was an erroneous ruling, it's
23 built into the -- it's irretrievably built into -- well
24 not irretrievably, but powerfully built into the
25 bargaining --

1 MR. KNEEDLER: But that's the nature of
2 trial proceedings and discovery. Judges may make
3 erroneous rulings. And this Court, again, acknowledged
4 in Will that the purpose of the final judgment rule is
5 no to protect -- prevent particular injustices that
6 might happen in a particular case. Again, to go back to
7 what the Court has stressed, there has to be a -- a -- a
8 value, and the Court said constitutional or statutory or
9 something with a large public pedigree where the --
10 where the injury will -- will not be -- where the
11 weighing of the costs and benefits comes out quite
12 differently.

13 JUSTICE ALITO: If the privilege were in a
14 statute, that would make a difference?

15 MR. KNEEDLER: I don't think so if there was
16 a statute that just codified the -- the privileges like
17 this. What I -- what I -- what I was suggesting is
18 there might be a statute that would identify a
19 particular governmental interest as in the D.C.
20 Circuit's decision in the -- in the --

21 CHIEF JUSTICE ROBERTS: Putting aside the
22 question of whether the attorney-client privilege has a
23 good pedigree in public law, my experience has been that
24 litigants on one side frequently request and demand in
25 discovery material that they know is covered by the

1 attorney-client privilege, one, precisely because that's
2 where the good stuff is; and two, because it gives them
3 leverage, because they know that the other side is going
4 to have to go through this impossible process and can't
5 get an immediate appeal.

6 Why isn't that a concern that we should
7 have?

8 MR. KNEEDLER: I think and that's a --
9 district judges are -- are -- who manage these cases
10 every day can see through that, and -- and -- and can be
11 trusted to, by and large, make correct results. It may
12 be that there will be an occasional erroneous
13 determination. But, again, as for privileges generally,
14 that's -- that's so.

15 I did want to make one final point about --
16 about irreparable injury. For the sorts of privileges
17 that we have identified in -- in our brief, the -- the
18 presidential communications privilege and whatnot,
19 that -- that harm is immediate and broad on behalf of
20 the nation as a whole. That is a different question
21 from the harm to a particular litigant when a privilege
22 is denied in a particular case and it doesn't undermine
23 the broader purposes of the privilege.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Kneedler.

1 Mr. Allen, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF RANDALL L. ALLEN

3 ON BEHALF THE PETITIONER

4 MR. ALLEN: I would like to address the
5 question that Justice Alito raised with regard to
6 whether or not an appeal of a collateral issue dealing
7 with waiver or privilege would stay the litigation. The
8 answer is it does not. The case remains with the
9 district court, the district court is empowered to
10 manage the case. Only the question addressing the issue
11 would go up with collateral order jurisdiction. Indeed,
12 in this case, the court did not stay the litigation
13 below. So, the court maintains that ability to manage
14 its own docket. To be sure --

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

17 MR. ALLEN: He has not gone ahead with the
18 trial.

19 JUSTICE STEVENS: It never would, would it?

20 MR. ALLEN: He is certainly empowered to do
21 so.

22 JUSTICE STEVENS: Well, just go ahead with
23 trial while a material issue is still pending, I can't
24 imagine that.

25 MR. ALLEN: Your Honor, the scenario that

1 you raise would put the attorney or the client,
2 depending on who is in the box, if you will, to some
3 hard choices. But there are two ways that the case
4 stays: Either the district court has to order that the
5 case stays or on appeal the court of appeals has to
6 order that the case stays. The parties and their
7 counsel cannot stay the case.

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

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

13 MR. ALLEN: I am unaware that it has -- it
14 has ever happened, Your Honor, and I hope it doesn't.
15 But the -- but point is that the district court
16 maintains that power and authority to run -- to run its
17 courtroom.

18 The United States cites Will for the
19 proposition that -- that the collateral order doctrine
20 is designed to impact some particular value of high
21 order, and it recites from Will a number of those
22 particular values of high order, including qualified
23 immunity. As this Court recognized in -- in Harlow,
24 a -- a doctrine of common law origin, much like the
25 attorney-client privilege, the -- the doctrine in

1 Harlow, qualified immunity is designed to impact and
2 affect the efficient operation of government.

3 The design of the attorney-client privilege
4 is intended to have the same impact on the efficient and
5 effective operation of the administration of justice.

6 If I could go back, Justice Breyer, to the
7 question that you raised with regard to other privilege.
8 I would suggest that a holding in this case in our favor
9 would have no impact on the Court's later determination
10 of privileges of husband, wife, spousal privileges, or
11 of priest and penitent type privileges. I would suggest
12 that the better course would be to examine a case that
13 develops the importance or the impact of those
14 privileges, but certainly with regard, for example, to
15 spousal immunity or spousal privilege, the way that the
16 States recognize them -- I believe that all 50 States
17 recognize spousal privilege -- is varied.

18 JUSTICE BREYER: So -- so, I think any
19 system of -- that denies you the interlocutory appeal,
20 will, in fact, work some injustice. I have no doubt
21 about that. Any system that allows too many
22 interlocutory appeals wrecks the judicial system through
23 delay.

24 Now, I think on that kind of question which
25 is here, maybe there is some information that you come

1 across with the ABA, for example, that has 300,000 --
2 maybe 600 -- you know, hundreds of thousands of members.
3 There might be instances in the circuits where appeal
4 was denied, where the lawyers would say, my goodness,
5 appeal was denied, I want to tell you the hardship that
6 that worked.

7 Has anyone gone around and tried to find if
8 there are such instances, as there must be, how serious
9 it was? How harmful, how often do we have any empirical
10 information on that question?

11 MR. ALLEN: Your Honor, I do not have any
12 empirical information to answer that question. But to
13 go to the -- to the -- to the underlying premise of
14 whether or not those other cases might generate some
15 flood gate, if you will, I think we have -- we have
16 answered to be clear with Respondent's description of
17 our counting. I don't think it is a statistical
18 analysis. We simply counted the actual appeals, 11.

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

25 MR. ALLEN: I don't believe it does, Your

1 Honor, I don't believe that should count against us.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

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

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