IN THE SUPREME COURT OF THE UNITED STATES

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MOHAWK INDUSTRIES, INC., :

Petitioner :

v. : No. 08-678

NORMAN CARPENTER. :

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Washington, D.C.

Monday, October 5, 2009

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

APPEARANCES:

RANDALL L. ALLEN, ESQ., Atlanta, Ga.; on behalf of the Petitioner.

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

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

C O N T E N T S

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 states 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.

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

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

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

But the question I think also goes more to prong three of Cohen, which is the reviewability standard. In the context of attorney-client privileged information, once that information is disclosed to your adversary, it is disclosed to the last person on earth you might want to see it.

JUSTICE SCALIA: The same thing with a trade secret. It is a suit between another company who is a competitor of yours --

MR. ALLEN: Well --

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

you say no. No interlocutory appeal, right?

MR. ALLEN: I think with trade secrets --

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

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

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

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

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

information.

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

JUSTICE SOTOMAYOR: Ah. Are you sure?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ALLEN: No, Your Honor, you have not.
JUSTICE BREYER: Well, if we don't allow collateral appeals with the husband and wife, with the priest and -- and someone in -- you know, confession or something, I don't -- with a priest, or with a psychiatrist who is dealing with a patient, why would we allow collateral appeal here?
MR. ALLEN: Your Honor, first of all, I don't think the issue of those other privileges has, to the best of my knowledge, come before this Court.
JUSTICE BREYER: But then if we grant your collateral appeal, don't we have to, perhaps, equally grant it in every situation, where a judge arguably makes an erroneous ruling on a question of privilege?
MR. ALLEN: I don't believe you do, Your Honor, and let me say, first of all, the -- the instance that Your Honor points to, where the information would be disclosed to the other party, it's not the other party in this instance, that --
JUSTICE BREYER: It's the lawyer.
MR. ALLEN: -- that you are worried about in first instance. It is, in fact, the counsel. And -- and, second of all, I think the importance criteria as -- as previously defined in this Court's cases, is a measure of the importance of the interest that will be

lost if appeal is not available now.

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

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

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

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

MR. ALLEN: Correct, Your Honor.

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

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

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

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

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

MR. ALLEN: That's --

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

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

JUSTICE SOTOMAYOR: I understand what the

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

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

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

Cohen v. Beneficial was meant for the kind

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Why not?

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

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

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

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

final judgment rule, to the attorney-client privilege. And I think in that instance it resolves more quickly.

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

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

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

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

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

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

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

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

MR. ALLEN: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: There is another. You

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

MR. ALLEN: No, Your Honor --

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Resnik.

ORAL ARGUMENT OF JUDITH RESNIK

ON BEHALF OF THE RESPONDENT

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

Before 1997, no circuit held that there was

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

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

MS. RESNIK: I think the --

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: That is in the Third Circuit.

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

JUSTICE GINSBURG: Mr. Allen has told us

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: But that is only in egregious cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We have an example of a district judge, who is very aware of the parameters of the litigation, and that goes to remedies. We dont' know --

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

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

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

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

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

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

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

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

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

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

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

MS. RESNIK: Yes. It is.

JUSTICE SOTOMAYOR: That's immediately appealable.

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

And in the instances -- contempt, as

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

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

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

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

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

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Kneedler?

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING THE RESPONDENT

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

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

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

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

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

different type of governmental privilege.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: So you are saying

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

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

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

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

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

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

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

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

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

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

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

an issue in Cohen?

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

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

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

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

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

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

not --

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

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

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

attorney-client privilege, the suit goes on.

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

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

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

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

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

MR. KNEEDLER: Well, but the --

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.

Mr. Allen, you have four minutes remaining.

REBUTTAL ARGUMENT OF RANDALL L. ALLEN

ON BEHALF THE PETITIONER

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

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

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

JUSTICE STEVENS: It never would, would it?

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

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

MR. ALLEN: Your Honor, the scenario that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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