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IN THE SUPREME COURT OF THE UNITED STATES  
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GARY THACKER, ET UX., )  
Petitioners, )  
v. ) No. 17-1201  
TENNESSEE VALLEY AUTHORITY, )  
Respondent. )  
- - - - -

Washington, D.C.  
Monday, January 14, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:  
FRANKLIN TAYLOR ROUSE, ESQ., Huntsville, Alabama;  
on behalf of the Petitioners.  
ANN O'CONNELL ADAMS, Assistant to the Solicitor General, Department of Justice, Washington D.C.;  
on behalf of the Respondent.

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

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 17-1201,  
5 Thacker versus the Tennessee Valley Authority.

6 Mr. Rouse.

7 ORAL ARGUMENT OF FRANKLIN TAYLOR ROUSE

8 ON BEHALF OF THE PETITIONERS

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

11 Congress created the Tennessee Valley  
12 Authority as a corporation that could sue and  
13 be sued. The TVA Act states: Except as  
14 otherwise specifically provided in this Act,  
15 the corporation may sue and be sued in its  
16 corporate name.

17 Nothing in the TVA Act specifically  
18 provides the exception that the TVA now urges,  
19 immunity for what it calls discretionary work.  
20 And for new --

21 JUSTICE SOTOMAYOR: I'm sorry. Are  
22 you denouncing the existence of a core  
23 government activity not being immunized?  
24 Whether to place a dam or not?

25 MR. ROUSE: No, this -- this --

1 there's two totally separate things. Our --

2 JUSTICE SOTOMAYOR: No, they're  
3 basically the same, which is how far does -- if  
4 you recognize some core government functions  
5 performed by the TVA, how far does that  
6 immunity go? Isn't that the question before  
7 us?

8 MR. ROUSE: I -- I think so, but I --  
9 in -- in this circumstance is -- the conduct at  
10 issue is raising a power line out of the water,  
11 replacing an electrical conductor. Whatever  
12 might be said about deciding where to put a dam  
13 or how to -- to manage the flow of the  
14 Tennessee River and to change its course or  
15 anything like that, it's -- this conduct just  
16 does not implicate that.

17 CHIEF JUSTICE ROBERTS: Well, I  
18 suppose it depends at what level of generality  
19 you describe the conduct. Perhaps you're right  
20 if you talk about a particular, you know, cable  
21 at a particular place, but if you decide -- if  
22 you describe the -- what is at issue is  
23 regulating safety along the waterway, then  
24 maybe it starts to sound like -- like more the  
25 exceptions that were talked about in Burr?

1           MR. ROUSE: And that may and would --  
2 and I think those exceptions would certainly  
3 implicate the Federal Tort Claims Act and the  
4 discretionary -- discretionary immunity there.

5           But, under Burr, I think the -- the  
6 question begins with the presumption that --  
7 that Congress has taken this entity, it has  
8 created it; it has not made it a new executive  
9 department, but it has said it can sue and be  
10 sued in its own name. It has cast it aside and  
11 said it can fend for itself. We're allowing it  
12 to do its own work. We'll give it some powers,  
13 but we're going to withhold others.

14           And so there's got to be some  
15 deference to Congress that Congress took these  
16 steps. And to just say, well, it performs some  
17 functions, it's governmental, and you start  
18 making that distinction is the exact error that  
19 we think that the lower courts made here.

20           JUSTICE ALITO: How do you think this  
21 is supposed to work? If we just -- if -- if  
22 the court just applies Burr, how is -- how is  
23 the court supposed to proceed in determining  
24 whether there is immunity? Look at the -- make  
25 a case-by-case determination whether the

1 particular claim in that case falls within the  
2 -- the two categories set out in Burr, so is it  
3 consistent with the statutory and  
4 constitutional scheme, or, more to the point,  
5 does -- is it necessary to have immunity to  
6 avoid grave interference with the performance  
7 of a governmental function?

8 MR. ROUSE: So under -- I think under  
9 the test that at least the second prong --

10 JUSTICE ALITO: Okay.

11 MR. ROUSE: -- certainly looks at the  
12 specific conduct at issue, and it says, what  
13 proof do you have that immunity here is needed?  
14 It must -- it must be clearly shown that it is  
15 necessary to prevent some grave interference  
16 with the performance of a governmental  
17 function.

18 Not just it may be tougher, it may be  
19 harder, or you may have to pay normal tort  
20 damages, but what grave interference is present  
21 here? Whereas --

22 JUSTICE ALITO: You think this is --  
23 this is to be done a case-by-case basis or  
24 categorical basis?

25 MR. ROUSE: I think that under the

1 second prong, a -- a case-by-case basis is  
2 going to be the more usual result, but, under  
3 the first prong, you're looking at, is this the  
4 type of suit that is consistent or inconsistent  
5 with the statutory or constitutional scheme?

6 In this circumstance, there's no real  
7 argument that this case is inconsistent with  
8 the statutory scheme. There's no doubt that  
9 liability here will somehow mean the TVA can't  
10 do its other functions or anything like that.  
11 It's not --

12 JUSTICE BREYER: I guess there is some  
13 -- I guess there is some argument on the other  
14 side, and I take it that a main argument that  
15 registered in my mind was where Justice  
16 Sotomayor started out. And you reply to that  
17 and say let's do it on a case-by-case basis.

18 Well, subsequent to Burr, Congress  
19 enacted the Federal Tort Claims Act. Under --  
20 it contains a discretionary exemption. And  
21 there's a well-worked-out body of  
22 jurisprudence.

23 And so what you're asking us to do is  
24 to have each court decide each thing that the  
25 TVA and probably 100 other government agencies



1 with a sue-and-be-sued clause does and decide  
2 case by case, which is what you said, whether  
3 it does or does not fall within the  
4 discretionary exemption.

5 That seems to me a very complex,  
6 difficult decision that could end up with  
7 probably a hundred cases before this Court  
8 deciding what this different thing, serving the  
9 same purpose, does.

10 Now that, I think, is at least one  
11 argument that I'd like to hear your response  
12 to.

13 MR. ROUSE: The Burr test, we believe,  
14 is actually much easier to look at for the  
15 judiciary than the Federal Tort Claims Act  
16 test. The Federal Tort Claims Act test looks  
17 at the conduct at issue, whether -- it looks at  
18 statutes and internal policies, and then it  
19 asks the court to say, is this the type of  
20 conduct that is susceptible to policy analysis?  
21 Is this what --

22 JUSTICE BREYER: Uh-huh.

23 MR. ROUSE: -- that Congress was  
24 trying to protect under the FTCA?

25 JUSTICE BREYER: And I take it if we

1 apply Burr, we have to go case by case and  
2 decide whether, for other reasons, it was  
3 plainly the purpose of Congress to use  
4 sue-and-be-sued clause in a narrow sense. And  
5 we have to decide just what you said, case by  
6 case.

7 So my question is not whether case by  
8 case, but do you do that without reference to  
9 the well-worked-out body of discretionary  
10 exception law under the FTCA? That's the  
11 point.

12 MR. ROUSE: Yes.

13 JUSTICE BREYER: I mean, you'll --  
14 you're saying don't use the FTCA; use Burr.  
15 And I want to know, is that a big difference?  
16 And if that is a big difference, is it case by  
17 case? And that's where my question came from.

18 MR. ROUSE: It is a big difference,  
19 totally separate. And the Burr test is much  
20 easier for the judiciary in its traditional  
21 role of -- of looking at things that -- what  
22 has Congress enacted?

23 Under the first -- under the first  
24 prong of Burr, you're just looking at whether  
25 the type of suit -- don't have to look anything

1 further than the complaint. What is the  
2 challenged conduct?

3 JUSTICE BREYER: And Burr -- look,  
4 I'll say -- try it once more. We started with  
5 Justice Sotomayor. They build dams. Well,  
6 somebody's hurt during the building of a dam.  
7 There are farmers, their land is flooded by the  
8 dam, their crops might be destroyed. There are  
9 many kinds of crops. There are many ways of  
10 building dams. There are many arguments for  
11 and against deciding whether there's a dam.  
12 Okay?

13 What do you want us to do? Look to  
14 the FTCA or something different? That's the  
15 question that I think you were beginning with.  
16 And it seemed -- I wanted to follow up because  
17 that seems the central issue in the case to me.

18 MR. ROUSE: We should look at Burr.  
19 And under Burr, the presumption begins with the  
20 fact that Congress has launched this entity,  
21 that it has --

22 JUSTICE SOTOMAYOR: Counsel, let --  
23 let me phrase it slightly differently. Is your  
24 argument based on the sue-to-be -- permission  
25 to sue and be sued clause, or is it welded in

1 -- in part in the fact that the TVA was  
2 excluded from the FTCA?

3 I think, once you start with that it  
4 was excluded, then we have to figure out what  
5 applies, right?

6 MR. ROUSE: Correct.

7 JUSTICE SOTOMAYOR: And why we should  
8 keep the FTCA in when Congress told us not to.  
9 Correct?

10 MR. ROUSE: Well -- correct. The  
11 Federal Tort Claims Act just does not apply.  
12 The TVA is exempted.

13 JUSTICE SOTOMAYOR: There's three  
14 entities that were excluded from the FTCA.

15 MR. ROUSE: Correct.

16 JUSTICE SOTOMAYOR: So how much does  
17 your argument rely on the sue-to-be-sued clause  
18 or -- or the exclusion of the TVA?

19 MR. ROUSE: Well, it's a little of  
20 both and it's this Court's precedent. In -- in  
21 Meyer in 1994 --

22 JUSTICE SOTOMAYOR: All right. So, if  
23 it's -- if it's this Court's precedent, then  
24 give us a reason addressing Justice Breyer's  
25 point, which is the Burr analysis, since, by

1 definition, it has to involve a case-by-case  
2 analysis.

3 I think, but I'm not sure, were you  
4 saying that so does the discretionary --

5 MR. ROUSE: Correct. The lawsuit is  
6 there. The complaint is there. And so under  
7 --

8 JUSTICE SOTOMAYOR: So both of them  
9 require a case-by-case analysis?

10 MR. ROUSE: They're both going to  
11 require a case-by-case basis.

12 JUSTICE SOTOMAYOR: I think what  
13 Justice Breyer is saying --

14 JUSTICE KAGAN: Well, that's true --  
15 please.

16 JUSTICE SOTOMAYOR: I'm sorry, that  
17 the discretionary policy exemption is less  
18 complex than the Burr rule.

19 MR. ROUSE: I believe that at least  
20 where the judiciary is concerned it's -- it --  
21 it's -- it might be more complex in some ways  
22 but less complex in other ways. It might be  
23 more complex in that it requires you to take a  
24 much deeper look into the facts of the case  
25 than Burr.

1 Burr is just looking at is this the  
2 type of suit that was not contemplated by the  
3 statute. And so then you look at the statute.  
4 You don't have to do anything other than the  
5 complaint.

6 JUSTICE SOTOMAYOR: That's on step 1.  
7 But step 2?

8 MR. ROUSE: That's on step 1. On step  
9 2, yeah, there -- there needs to be a showing.  
10 And the idea is that Congress has launched this  
11 entity out. It has made it sueable. And so  
12 now it has the proof to show -- it has the  
13 burden to submit proof to show that immunity is  
14 needed here.

15 And we don't have that here.

16 JUSTICE KAGAN: Right. But that makes  
17 it sound, Mr. Rouse, and I think this is what  
18 everybody is getting to, is that you're saying  
19 in most cases we have the discretionary  
20 function exception. And here, with respect to  
21 the TVA or other entities like the TVA, we're  
22 essentially going to have a discretionary  
23 function exception light.

24 We're going to have something where we  
25 look to the same concerns, the same animating

1 purposes, but we just have a higher bar. Is  
2 that what we're doing, or is it a different  
3 inquiry in kind?

4 MR. ROUSE: It is a different inquiry  
5 in kind.

6 JUSTICE KAGAN: Well, that's what I'm  
7 not getting, because if you, again, focus, as  
8 Justice Sotomayor said, on the question of  
9 intrusion, impediment of -- of government  
10 operations, it seems like the same inquiry,  
11 just a higher standard --

12 MR. ROUSE: So --

13 JUSTICE KAGAN: -- a higher bar.

14 MR. ROUSE: -- the Federal Tort Claims  
15 Act was by Congress. Congress has never --  
16 this Court, at least under the Federal Tort  
17 Claims Act, has never said, as a matter of  
18 separation of powers, the discretionary  
19 function exception in the Federal Tort Claims  
20 Act exists in all areas of law. It's never  
21 said that.

22 It actually -- the Court used very  
23 specific language in saying, in Varig Airlines,  
24 which my friends at the TVA try to draw so many  
25 distinctions -- or so many lessons from, the

1 Court in there said Congress -- Congress wished  
2 to prevent judicial second-guessing.

3 And by fashioning an exception,  
4 Congress took steps to handicap -- to protect  
5 the handicap of efficient government  
6 operations.

7 JUSTICE ALITO: Here's what bothers me  
8 about this case, and I'll ask the same  
9 question, if I have a chance, to the Assistant  
10 to the Solicitor General.

11 The -- the TVA does some things that  
12 are purely governmental and it does some things  
13 that are pretty much purely commercial. It's a  
14 hybrid entity.

15 As to the -- as to its commercial  
16 activities, it's hard to see why a -- a  
17 business should be exempt from tort liability  
18 for every discretionary business decision that  
19 the business makes.

20 But, as to its governmental  
21 activities, it's kind of hard to see why the  
22 regime should be different from the regime  
23 under the Federal Tort Claims Act.

24 Now, under Burr, the Court is supposed  
25 to ask, you say, whether it interferes with a



1 governmental function, but I'm not quite sure  
2 what is the governmental function when you're  
3 talking about a hybrid entity like that. Does  
4 it mean something that only the government can  
5 do?

6 MR. ROUSE: No. I mean, the case  
7 we're talking about here involves something  
8 contractors could do. It's inherent work a day  
9 labor. But, under -- under Burr, the -- the  
10 governmental function, I believe, it is -- it  
11 is -- it takes into higher account -- it just  
12 doesn't concern that. It concerns that the TVA  
13 serves much larger purposes in that it can do  
14 things and things can be protected under Burr,  
15 such as, you know, its -- its economic and its  
16 regulatory or policy decisions.

17 All of those things can be protected  
18 under Burr.

19 JUSTICE KAGAN: You see, I think, Mr.  
20 Rouse, what Justice Alito may be offering you  
21 is a way out of the difficulty of some of these  
22 questions, is that, with respect to some of the  
23 TVA's functions, we shouldn't be applying  
24 something that's sort of like the discretionary  
25 function exception but not really like the

1 discretionary function exception.

2           Rather, we should be applying nothing.  
3 With respect to the commercial functions of the  
4 TVA, the TVA ought to be treated just like any  
5 other corporate entity.

6           MR. ROUSE: We absolutely think that's  
7 the case here. This is -- this -- the TVA is  
8 not mandated to do any of the work that was  
9 involved here. This is a choice that it makes.

10           And it is a choice that it makes, and  
11 it accomplishes that goal without any funding  
12 or appropriations from Congress. Its -- all of  
13 its activities are completely self-funded.

14           And it just doesn't concern -- the  
15 federal government is just not concerned with  
16 it at this point.

17           JUSTICE ALITO: Part --

18           MR. ROUSE: Maybe --

19           JUSTICE ALITO: Go ahead.

20           MR. ROUSE: Maybe in -- in  
21 historical -- in the Depression Era times, in  
22 the Tennessee Valley, during that point in  
23 time, but now it is doing all of the stuff on  
24 its own, without help, without anything like  
25 that, and it's making profit, profit that it's

1 not turning back over to the U.S. Treasury.

2 It's operating just as a private corporation.

3 And so we absolutely think that --

4 JUSTICE SOTOMAYOR: Sorry. There are  
5 some functions it does that are governmental.

6 We're trying to get to the dividing line. And  
7 Justice Alito said, if it's commercial, it  
8 should not be subject to any exemption.

9 If it's governmental, are you agreeing  
10 that it does receive immunity?

11 MR. ROUSE: Only if the TVA shows that  
12 it clearly meets one of the Burr prongs.

13 JUSTICE SOTOMAYOR: All right. So  
14 let's assume it does, where to build a dam. Is  
15 that governmental enough for you?

16 MR. ROUSE: I don't know under those  
17 circumstances, but I will point the Court to an  
18 example that the Court has actually considered,  
19 and this is a pre-Burr case. It's Tennessee  
20 Electric Power Company versus TVA, and 306 U.S.  
21 118. And in that case, the challenged conduct  
22 was the TVA. Somebody sought a -- a private  
23 power company sought an injunction against the  
24 TVA so that it could not produce or sell power  
25 at all.

1 JUSTICE SOTOMAYOR: Well, it seems to  
2 me that that's really a close question, isn't  
3 it?

4 MR. ROUSE: I -- I -- I think that  
5 under those cases, because the Court in that  
6 case --

7 JUSTICE SOTOMAYOR: Let's assume we --  
8 on common ground. There are some functions  
9 that are governmental. You're unwilling to  
10 specify which at the moment.

11 But do you -- do you agree that there  
12 are some functions that may be governmental?

13 MR. ROUSE: There are some functions  
14 that may be governmental and Burr accounts  
15 for --

16 JUSTICE SOTOMAYOR: So that's fine.  
17 The question before us is what to do about the  
18 middle stuff, or are you saying this is just  
19 commercial? And if you're saying it's just  
20 commercial, explain the Chief Justice's  
21 description of why it might not be just  
22 commercial, and how do we draw that line?

23 MR. ROUSE: It's not whether something  
24 is commercial or not commercial. I think the  
25 commercial activity certainly imply more --

1 less immunity -- or apply less immunity. But  
2 there's got to be some sort of deference that  
3 Congress has -- what Congress has done, and  
4 that Congress has completely stripped this  
5 entity of the immunity under this Court's law.  
6 This Court has said that these waivers are  
7 broad, that they must be liberally construed,  
8 that any exceptions must be narrowly construed.

9 JUSTICE ALITO: You said --

10 CHIEF JUSTICE ROBERTS: Well, we've  
11 held -- we've held that the immunity has not  
12 been completely stripped, right? We've  
13 recognized that there are circumstances under  
14 which the TVA, as well as these other entities  
15 that are carved out of the FTCA, nonetheless  
16 have immunity.

17 MR. ROUSE: Yes, Mr. Chief Justice,  
18 absolutely, that there are circumstances. But,  
19 here, in this case, we don't believe, one, that  
20 that implicates the kind of immunities under  
21 Burr that this Court talked about.

22 CHIEF JUSTICE ROBERTS: Well, maybe we  
23 need some examples of ones you think are  
24 covered. I mean, one of the things the TVA  
25 does is regulate flood control in the area.

1 So, at a particular moment, it has a choice  
2 whether to let more water through, which may  
3 damage lower downstream farms, or keep more  
4 water back, which might damage upstream farms.

5 Now, if you're downstream and you're  
6 injured, can you bring a negligence action  
7 against the TVA for that decision, and show --  
8 for example, show they -- they did the  
9 calculations wrong because of pure negligence?  
10 Can you bring that action against the FT --  
11 against the TVA?

12 MR. ROUSE: I think so. I think that  
13 under that action you can, because, one, you're  
14 not talking about the -- there's no statutory  
15 scheme issue.

16 CHIEF JUSTICE ROBERTS: So flood  
17 control is something that you can sue the TVA  
18 on?

19 MR. ROUSE: There are certain  
20 circumstances where, absolutely, I think so.

21 CHIEF JUSTICE ROBERTS: Well, what are  
22 -- give me an example of something you can't  
23 sue them on.

24 MR. ROUSE: I think that if I'm a  
25 private landowner and I've got land on the --

1 right on the banks of the Tennessee River, and  
2 the TVA wants to exercise some of the power  
3 that Congress has given it in being able to use  
4 eminent domain, take land to put up power  
5 lines, then I can't turn around and sue the TVA  
6 and say no, you can't do that.

7 That is one of those things where, no,  
8 Congress has --

9 CHIEF JUSTICE ROBERTS: Well, but you  
10 can't sue -- you can't sue somebody with  
11 eminent domain power anytime. I mean, if  
12 they're giving you -- if you -- if they have  
13 eminent domain power, they're paying you for  
14 it, so you can't sue them to -- to stop it.

15 MR. ROUSE: Or a -- or, I guess, a --  
16 a negligence action saying no, you should have  
17 put the -- the lines -- you're going to take my  
18 land, you should have taken my neighbor's land  
19 and put the lines that way. I don't know that  
20 that is something that the statutory scheme  
21 here necessarily contemplates.

22 But I do think that Congress -- and if  
23 you look at the legislative history, Congress  
24 -- Congress absolutely contemplated tort  
25 liability with --

1 JUSTICE KAVANAUGH: Part of the  
2 problem is figuring out what Burr means, to my  
3 problem at least. And you said there's a big  
4 difference between Burr and the  
5 discretionary-function exception.

6 How would you articulate that big  
7 difference?

8 MR. ROUSE: We think that Burr  
9 accounts for much more. The  
10 discretionary-function exception only looks at  
11 the conduct at issue, the executive conduct at  
12 issue. Burr accounts for the other branch of  
13 government, Congress, that it has created an  
14 entity.

15 JUSTICE KAVANAUGH: Well, that doesn't  
16 tell me what the exception means, though. That  
17 just describes the situation.

18 MR. ROUSE: So the exceptions would be  
19 an inconsistency with the statutory scheme,  
20 some -- some lawsuit that is just not  
21 contemplated by the text. It's not allowed.  
22 And, here, we don't have that. There's no  
23 argument or even assertion that the court --

24 JUSTICE KAVANAUGH: What about -- what  
25 about the second -- I'm sorry to interrupt, the



1 second prong, though, grave interference? How  
2 do you think about that?

3 MR. ROUSE: I think that there --  
4 normal tort liability in this case does not  
5 implicate the type of governmental conduct that  
6 Burr's second prong is written to protect.

7 JUSTICE KAVANAUGH: And are you --  
8 just so I understand your argument here, are  
9 you asking us to simply hold that the right  
10 test is Burr, instead of discretionary  
11 function, and then to remand for application of  
12 Burr in the first instance by the court of  
13 appeals?

14 MR. ROUSE: At -- at a minimum. I  
15 think at a maximum -- that we can live with  
16 that --

17 JUSTICE KAVANAUGH: What's the  
18 maximum? Yeah.

19 MR. ROUSE: The maximum is that we can  
20 look at this as a 12(b)(1) dismissal, we can  
21 take the facts as stated in the complaint, in  
22 the affidavit, as true, and say no, this is  
23 just not the type of conduct that is  
24 inconsistent with the constitutional scheme,  
25 because that's really the only element that is

1 at issue here.

2 There was no findings of fact on the  
3 grave interference test. The court -- lower  
4 courts didn't consider it. There's -- there  
5 was no showing under Burr.

6 The whole issue here is the TVA is  
7 trying to couch the constitutional scheme in a  
8 separation of powers in that this court would  
9 be violating separation of powers if it were to  
10 exercise jurisdiction and even hear the case.

11 That's the only issue. But this Court  
12 has never looked at separation of powers that  
13 way. It --

14 JUSTICE KAGAN: But I think people are  
15 actually a little bit more interested in the  
16 second prong of -- of Burr, which is the  
17 interference with government operations. So,  
18 if you were to answer Justice Kavanaugh's  
19 question and say this is not the conduct that  
20 should be immune from suit because, how would  
21 you finish the sentence in thinking about the  
22 second prong of Burr?

23 MR. ROUSE: Because there's no grave  
24 interference. The TVA can raise rates on me, a  
25 citizen who lives 30 minutes away from where

1 this happened. I -- it can raise rates on me  
2 as one of the 10 million households that it  
3 has -- it serves power to.

4 It can buy insurance. It's  
5 self-funded. It's not like other branches of  
6 -- departments of the government that need  
7 congressional appropriations.

8 And, three, this is not the kind of  
9 conduct -- liability here for raising a downed  
10 power line is not the kind of conduct that is  
11 going to affect the TVA's ability to go out  
12 tomorrow and the next day and every day after  
13 that and continue to produce power. It is not  
14 the kind of conduct. These facts will not  
15 gravely interfere with the TVA's functions.

16 If there are no further questions, I'd  
17 like to --

18 JUSTICE BREYER: I will go back for a  
19 second because I think that we have a statute,  
20 TVA exempt from the Federal Tort Claims Act. I  
21 thought the government is agreeing with you.  
22 Burr does apply. But Burr sometimes says that  
23 we have the equivalent of a Federal Tort Claims  
24 Act. Sometimes. Okay?

25 MR. ROUSE: Correct.

1 JUSTICE BREYER: At least. And you  
2 agree with that?

3 MR. ROUSE: Yes.

4 JUSTICE BREYER: Okay. So let's go  
5 back and see if you have anything else to say.

6 Suppose we wrote this in the opinion.  
7 Yes, when the TVA is performing a governmental  
8 function, the FTCA does apply, i.e., the  
9 discretionary exemption part. But when it is  
10 not and acting just like a private business  
11 person, it doesn't.

12 Does that satisfy you? And then we  
13 leave it to the lower courts to decide which is  
14 which. Okay? Suppose we did that. Would that  
15 satisfy you?

16 MR. ROUSE: What we have consistently  
17 argued in this case is that Burr is the test.  
18 And so --

19 JUSTICE BREYER: No, they don't  
20 disagree that Burr applies. I think -- I think  
21 I'm right about that. They don't disagree that  
22 there is an exemption from the FTCA.

23 So the problem I guess for me is not  
24 who's right or wrong, but what are the words  
25 that we use to describe when Burr applies and

1 when it doesn't? And that's where I need some  
2 help. I may have not analyzed the case yet  
3 correctly, but, if I have, then I need to know  
4 the answer to that question.

5 MR. ROUSE: I don't think there is a  
6 line for these entities between commercial and  
7 governmental. One is immune; one is not. I  
8 think the question is that all of its  
9 functions, whatever power it has, whatever it  
10 does, each and all of those things may come  
11 under Burr. You may have -- the  
12 discretionary-function test under the FTCA and  
13 Burr may reach the same conclusion, but they're  
14 different. And it's governmental functions  
15 here. It may be perfectly amenable to suit and  
16 not implicate the constitutional, statutory  
17 scheme, and there will be no grave interference  
18 in its ability to do the work the next day,  
19 even its governmental functions. And it also  
20 applies for its commercial functions.

21 So making that line, I don't know is  
22 -- meets Burr. And that one doesn't apply and  
23 one does. I think it all can apply, and you  
24 can have results, what the TVA forces here, and  
25 you can have results where nothing happens at

1 all. And it's sueable just like a private  
2 entity who might put up a dam.

3 But, if there are no further  
4 questions, I'd like to reserve my time.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Ms. Adams.

8 ORAL ARGUMENT OF ANN O'CONNELL ADAMS  
9 ON BEHALF OF THE RESPONDENT

10 MS. O'CONNELL ADAMS: Mr. Chief  
11 Justice, and may it please the Court:

12 This Court recognized in Burr that a  
13 sue-and-be-sued clause need not be read to  
14 waive immunity for absolutely everything that  
15 the agency could be sued for. It described  
16 categories of claims that might not be allowed,  
17 notwithstanding a purportedly broad waiver of  
18 immunity.

19 Discretionary-function immunity, which  
20 is grounded in constitutional separation of  
21 powers principles and preexisted the enactment  
22 of the Federal Tort Claims Act, is precisely  
23 the type of immunity that Congress had in mind  
24 when that -- and it would have expected to  
25 survive.

1           JUSTICE SOTOMAYOR: Ms. O'Connell, is  
2 it, though? As Justice Alito pointed out, it  
3 is a hybrid entity. It does governmental  
4 functions and it does commercial functions.

5           You'll have to explain to me why  
6 raising a power line is a government function.  
7 Every -- and I understand there are some  
8 private contractors who actually own and  
9 operate and sell fuel from dams. If a power  
10 line goes down, they have to raise it. Any  
11 commercial enterprise that creates a danger has  
12 to fix it. That's what businesses do, whether  
13 it's the government running the business or  
14 not.

15           What is a governmental discretionary  
16 policy having to do with creating a danger in  
17 the operation of its business, meaning the  
18 power line is down, no one's going to say the  
19 government is authorized to be negligent in  
20 fixing it and harming people?

21           You want to take it to the broader  
22 discretion of do I have one or two men, do I  
23 give this type of warning or that kind of  
24 warning. But why does that take it out of a  
25 commercial choice? Why does it put it into a

1 government choice?

2 MS. O'CONNELL ADAMS: I think the --

3 JUSTICE SOTOMAYOR: When this Act can  
4 be both government and business?

5 MS. O'CONNELL ADAMS: I think --

6 JUSTICE SOTOMAYOR: Depending on who  
7 the operator is, not because it is the  
8 government doing it.

9 MS. O'CONNELL ADAMS: I think that the  
10 larger issue here, Justice Sotomayor, is that  
11 the discretionary-function immunity  
12 historically has never drawn a distinction  
13 between governmental functions and commercial  
14 functions. It started out --

15 JUSTICE SOTOMAYOR: It hasn't, but  
16 Congress did with the sue-and-be-sued clause.

17 MS. O'CONNELL ADAMS: Well, and -- but  
18 Congress also, in the Federal Tort Claims Act,  
19 brought all sue-and-be-sued agencies except for  
20 the TVA, with --

21 JUSTICE SOTOMAYOR: Exactly. It was  
22 three agencies that it said are not governed by  
23 this. So shouldn't we give meaning to what  
24 Congress said?

25 MS. O'CONNELL ADAMS: No. I --



1 JUSTICE SOTOMAYOR: It took it out of.

2 MS. O'CONNELL ADAMS: I don't -- but,  
3 by doing that, I don't think Congress -- the --  
4 the legislative history of the Federal Tort  
5 Claims Act that this Court described in  
6 Dalehite and --

7 JUSTICE SOTOMAYOR: By the way, if it  
8 had left it in the FTCA, what additional suits  
9 do you think could have been brought -- could  
10 not have been brought? Meaning, by giving it a  
11 sue-and-to-be-sued clause, what other  
12 activities by the TVA would be subject to suit  
13 that would not be subject to sue under the  
14 FTCA?

15 MS. O'CONNELL ADAMS: Any -- any of  
16 the other exceptions listed in the Federal Tort  
17 Claims Act. So the intentional torts  
18 exception, for example, TVA doesn't assert  
19 immunity from intentional tort claims.

20 It's just the discretionary function  
21 exception, which has this unique pedigree in  
22 the common law leading up to the enactment of  
23 the Federal Tort Claims Act that -- that TVA  
24 asserts in court.

25 JUSTICE KAGAN: But, Ms. O'Connell,

1     how does that make it any different from all  
2     the agencies that are subject to the FTCA?  In  
3     other words, your brief says over and over  
4     again -- and you have to say this, because  
5     we've said it would be improper simply to  
6     engraft the FTCA exception onto agencies that  
7     have been excluded from the FTCA in whole or in  
8     part.

9                     But the test that you're giving us  
10     would essentially do the exact same thing,  
11     wouldn't it?  It would exempt the TVA from  
12     exactly the same suits that the TVA would be  
13     exempted from if the TVA were included in the  
14     FTCA?

15                    MS. O'CONNELL ADAMS:  In terms of  
16     discretionary decision-making, yes, because  
17     that's -- but that's because the tests under  
18     the statute and the tests at common law are  
19     coterminous with one another.

20                    JUSTICE KAGAN:  Well, in terms of  
21     discretionary decision-making, what -- what  
22     would be different?  I mean, what would be the  
23     consequence of the fact that Congress  
24     specifically excluded the TVA from the FTCA  
25     that's really of any meaning?

1 I know you said that there are some  
2 procedural differences in how you bring a suit,  
3 but that's really of any meaning to anybody.

4 MS. O'CONNELL ADAMS: In terms of --  
5 of discretionary decisions, there would be no  
6 difference.

7 JUSTICE KAGAN: Well, in terms of what  
8 would there be a difference?

9 MS. O'CONNELL ADAMS: Well, anything  
10 else having to do with -- with the Federal Tort  
11 Claims Act. So if -- if your question is about  
12 why TVA was excluded, I think that's --

13 JUSTICE KAGAN: No, my question is  
14 what's the practical difference, given your  
15 position, that the FT -- that the TVA was  
16 excluded? What's the difference for the TV --  
17 TVA --

18 MS. O'CONNELL ADAMS: Back --

19 JUSTICE KAGAN: -- that it was  
20 excluded?

21 MS. O'CONNELL ADAMS: Well, I think  
22 the -- the main reasons -- and this is  
23 described a little bit on page 42 of our brief  
24 --

25 JUSTICE KAGAN: Not the reasons.

1 What's the practical consequence of being  
2 excluded?

3 MS. O'CONNELL ADAMS: Well, people  
4 that -- that would like to sue the TVA back in  
5 1942, the agency would have lost settlement  
6 authority at a thousand dollars. The -- the  
7 people would have to file a suit in federal  
8 district court and then negotiate with the  
9 Attorney General or the U.S. Attorney's Offices  
10 on terms set by Washington, D.C.

11 There was a shorter statute of  
12 limitations. I think, at the time that the  
13 FTCA was enacted, the TVA and legislators were  
14 concerned on the heels of the Depression about  
15 subjecting residents of the Tennessee Valley to  
16 those types of claims when they had already  
17 been interacting with the TVA for about a  
18 decade and had come to have certain rights.

19 But discretionary-function, the  
20 ability to sue TVA for its exercise of  
21 discretion in tort claims, was not one such  
22 right. TVA had been asserting  
23 discretionary-function immunity in the courts  
24 even before the FTCA was enacted, and it had  
25 been winning.

1           And so, at the time TVA was excluded,  
2           you know, the legislative history of the FTCA  
3           shows that it was Congress's understanding that  
4           even if it didn't enact a statutory exception,  
5           that courts would have come to the same place  
6           by judicial construction, and there's nothing  
7           to indicate that the TVA was uniquely outside  
8           of Congress's expectation that this common law  
9           discretionary-function immunity would continue  
10          to apply.

11           JUSTICE BREYER: But, overall, what  
12          was it --

13           CHIEF JUSTICE ROBERTS: Ms. Adams, I  
14          -- I'm not sure I follow the separation of  
15          powers argument. I mean, I picked up the  
16          briefs and I'm reading along. It says a nice  
17          statutory interpretation question,  
18          discretionary-function. All of a sudden, it's  
19          a separation of powers case.

20           Who -- which powers are -- I mean, the  
21          Congress is separated from Mr. Thacker's?

22           MS. O'CONNELL ADAMS: It's -- the  
23          separation of powers principle that's at play  
24          is -- is the one that's protected by the  
25          discretionary-function immunity historically,

1     which is that you don't want courts  
2     second-guessing the discretionary decisions of  
3     the -- the Executive Branch.

4             CHIEF JUSTICE ROBERTS:  But -- but  
5     this wouldn't be unusual, whichever side of the  
6     case wins, that handling a tort case is --  
7     we're not intruding upon Congress's functions.  
8     That's what we do every day.

9             MS. O'CONNELL ADAMS:  It -- it would  
10    be -- well, intruding on the -- on the  
11    executive functions, and --

12            JUSTICE GORSUCH:  Well, but,  
13    Ms. Adams, on that, I was stuck where the Chief  
14    was on -- on your brief.  And are you arguing  
15    -- I -- I don't take you to be arguing, but I'm  
16    not sure -- that Congress is unable to waive  
17    sovereign immunity?

18            MS. O'CONNELL ADAMS:  No.

19            JUSTICE GORSUCH:  So Congress could  
20    waive even the executive's immunity on  
21    discretionary functions?

22            MS. O'CONNELL ADAMS:  Yes.  And the --  
23    the question here is just whether -- whether  
24    you think Congress has done so by enacting a  
25    general sue-and-be-sued clause with all of

1 these other indications that Congress  
2 understood that discretionary-function immunity  
3 would survive --

4 JUSTICE GORSUCH: I mean, it would be  
5 perfectly sensible if Congress wanted to  
6 create, say, a cola company because it thought  
7 there wasn't sufficient competition in the soft  
8 drink industry, a true commercial entity, that  
9 it would allow suit for negligence and those --  
10 against such an entity so that it has to  
11 internalize its costs of operation and compete  
12 on equal footing with other private commercial  
13 entities.

14 That would be perfectly appropriate in  
15 the government's view I -- I take it?

16 MS. O'CONNELL ADAMS: Yes.

17 JUSTICE GORSUCH: Okay. So why isn't  
18 it a strike against your interpretation that  
19 you -- you would interpret the  
20 discretionary-function so broad as to not just  
21 encompass classic governmental decisions but  
22 really pretty ministerial commercial activity  
23 by the TVA, like raising a power line?

24 MS. O'CONNELL ADAMS: If there's  
25 something that's a -- that's a ministerial

1 decision, that's going to be kicked out under  
2 the second prong or under the discretionary  
3 function.

4 JUSTICE GORSUCH: But -- but the  
5 government's not -- the government would defend  
6 the judgment in this case.

7 MS. O'CONNELL ADAMS: Yes.

8 JUSTICE GORSUCH: Okay. Yeah.

9 MS. O'CONNELL ADAMS: And -- and I  
10 guess I should go back to this distinction  
11 between commercial and governmental activities.

12 So, historically, the  
13 discretionary-function immunity protected both  
14 officers and agencies that were engaged in any  
15 function, regardless of whether it was  
16 commercial or governmental.

17 And so there's been no distinction as  
18 this doctrine has developed between those  
19 different types of activities. The -- the  
20 distinction seems to be coming from the Court's  
21 opinion in *Burr*, where the Court says it has to  
22 be a grave interference with a governmental  
23 function in order for these exceptions to  
24 apply.

25 But we don't read *Burr* to actually be



1 distinguishing between governmental and  
2 commercial activities. It -- it used the word  
3 "governmental," but it didn't contrast it to  
4 something else that would be commercial.

5 The issue in that case was whether an  
6 agency could be sued for garnishment of wages  
7 that it owed to an employee, and the Court said  
8 that's not the type of thing we're talking  
9 about.

10 The agency tried to make an argument  
11 that if it had to process all these garnishment  
12 requests that would interfere with --

13 JUSTICE ALITO: So, basically, you're  
14 --

15 JUSTICE KAGAN: But, Ms. O'Connell, I  
16 -- I think --

17 JUSTICE ALITO: Go ahead. Your  
18 argument is that every discretionary decision  
19 that the TVA makes in doing exactly the sort of  
20 thing that is done by a private power company  
21 is covered by sovereign immunity?

22 MS. O'CONNELL ADAMS: Correct.

23 JUSTICE ALITO: Governmental doesn't  
24 -- is not distinguished from commercial?

25 MS. O'CONNELL ADAMS: No. And -- and,

1 you know, that's -- the TVA -- this Court's  
2 cases have kind of thrown cold water on that  
3 distinction between governmental and commercial  
4 activities, so TVA is specifically authorized  
5 to build power lines, and, you know, that was  
6 one of the -- the main reasons why it was  
7 created in the 1930s, was to bring electricity  
8 to this area of the country when commercial  
9 power companies would not.

10 JUSTICE ALITO: So, if TVA does --  
11 engages in an act of negligence in doing  
12 exactly the same thing that is done every day  
13 by, let's say, PEPCO, the TVA is completely  
14 immune?

15 MS. O'CONNELL ADAMS: If it's a -- if  
16 it involves the exercise of discretionary  
17 judgment, yes. And that's not different from  
18 other agencies.

19 JUSTICE GORSUCH: Shouldn't --  
20 shouldn't we expect a little more clarity from  
21 Congress than that? If -- if the government  
22 wishes to compete in private industry and the  
23 commercial world, shouldn't we expect the  
24 government to make it clear that it wishes to  
25 retain its immunity a little bit more clearly

1 than enacting a statute that says the entity  
2 may be sued?

3 MS. O'CONNELL ADAMS: I don't -- I  
4 don't think so. And --

5 JUSTICE GORSUCH: I mean, those are  
6 the only words we have in the statute. You're  
7 asking us to embroider them quite a bit, aren't  
8 you?

9 MS. O'CONNELL ADAMS: When the Federal  
10 Tort Claims Act was enacted, the legislative  
11 history shows that Congress understood that --

12 JUSTICE GORSUCH: I'm not interested  
13 in that, as you know, Ms. Adams. Talk to me  
14 about the words.

15 MS. O'CONNELL ADAMS: No, I know, but  
16 the idea is that Congress brought  
17 sue-and-be-sued entities under the scope of the  
18 Federal Tort Claims Act. And -- and the  
19 history shows that its understanding was those  
20 entities would have received  
21 discretionary-function immunity even without  
22 the statutory exception.

23 So I don't think Congress ever drew  
24 that distinction. And it's not just that PEPCO  
25 could put up a power line or something like

1 that, but other government agencies do that  
2 too.

3 The Corps of Engineers, the Bureau of  
4 Reclamation, they have -- create hydroelectric  
5 power --

6 JUSTICE BREYER: And the original --  
7 the origin, the origin. Go back for a minute,  
8 because I -- I want to see if I understand  
9 that.

10 Before the FTCA and then after the  
11 FTCA, I thought by and large, but perhaps not  
12 correctly, that the FTCA made it easier for an  
13 injured person to sue the government compared  
14 to what happened before. Is that right or  
15 wrong?

16 MS. O'CONNELL ADAMS: That's correct.

17 JUSTICE BREYER: So, if they exempt  
18 from the FTCA, that should, in general, make it  
19 harder to sue TVA, not easier. And now we're  
20 bringing in an exemption you want to from --  
21 from the FTCA which is not really clear as to  
22 what Congress intended.

23 Now do I have the basic framework  
24 correct?

25 MS. O'CONNELL ADAMS: No, because

1 while in general --

2 JUSTICE BREYER: Yeah.

3 MS. O'CONNELL ADAMS: -- the FTCA was  
4 a good thing for people and made it easier for  
5 people --

6 JUSTICE BREYER: Yeah.

7 MS. O'CONNELL ADAMS: -- to sue the  
8 federal government because there was no waiver  
9 of immunity before, in the -- in the Tennessee  
10 Valley specifically, there had been an agency  
11 operating there and interacting with people in  
12 a variety of different ways for about a decade.

13 And so, by scooping the -- the TVA  
14 into the Federal Tort Claims Act, it -- it  
15 would actually make life harder for those  
16 people because, as I explained before, the  
17 agency loses settlement authority over a  
18 thousand dollars, there's -- there's much less  
19 discretion in how to settle the case.

20 JUSTICE BREYER: All right. That's  
21 helpful. That's helpful.

22 MS. O'CONNELL ADAMS: Yes.

23 JUSTICE BREYER: There's -- the other  
24 thing I'm not certain about is, if you look at  
25 the power industry, in selling power to

1 customers, they're mostly government-owned,  
2 municipalities -- or there are loads of  
3 government-owned agencies.

4 In transmission, they are by and large  
5 privately owned but highly regulated. And with  
6 a few exceptions, the generation of power is  
7 privately owned but highly regulated, with the  
8 exception, say, of TVA, which is totally  
9 government-owned. All right?

10 Now I'm not sure what Congress did  
11 intend to agencies. Well, they're not  
12 agencies. They're private companies, but  
13 they're highly regulated companies and they do  
14 a specialized task. Or they're governmental  
15 companies and -- and they are run by  
16 municipalities.

17 Is there anything that will help me on  
18 that? And I do look at the legislative  
19 history.

20 MS. O'CONNELL ADAMS: Well, I think --  
21 I guess the fact that Congress brought  
22 sue-and-be-sued agencies generally under the  
23 protection of the Federal Tort Claims Act shows  
24 that it didn't care what function the agency  
25 was performing, whether it was a commercial

1 function or some, as -- as the phrase has been  
2 used, core governmental function. They're all  
3 scooped up within the scope of the Federal Tort  
4 Claims Act.

5 And the legislative history shows that  
6 Congress expected that those agencies would be  
7 exempted for discretionary decision-making from  
8 tort damages even without enacting the  
9 statutory exception.

10 JUSTICE KAVANAUGH: But it --

11 JUSTICE KAGAN: Ms. --

12 JUSTICE KAVANAUGH: But it's --

13 JUSTICE KAGAN: Ms. O'Connell, if --  
14 if -- if -- if I'm a Tennessee resident and I  
15 can't sue the TVA for this conduct, for raising  
16 a transmission line negligently, what kind of  
17 negligent suit can I bring against the TVA?

18 MS. O'CONNELL ADAMS: I think the --  
19 the typical example, when you have these  
20 buckets of things that are discretionary versus  
21 things that are not, the typical example of  
22 something that doesn't fall within the  
23 discretionary-function exception is you're  
24 driving down the road and a TVA truck rear-ends  
25 you. That is a -- is a type of tort that

1 doesn't involve any kind of exercise of  
2 discretion.

3 JUSTICE KAGAN: Okay. But, with  
4 respect to the TVA's actual operations in  
5 running a power company, what kind of  
6 negligence suit can I bring?

7 MS. O'CONNELL ADAMS: Um --

8 JUSTICE KAGAN: I mean, you know,  
9 somebody rear-ending you, it's just -- it could  
10 be a TVA driver or it could be anybody else on  
11 the road. The point is in -- in the -- in the  
12 functions that are necessary to run a power  
13 company, like raising transmission lines, doing  
14 all the things that are necessary to run a  
15 power line, what could a Tennessee citizen sue  
16 the FD -- the TVA for?

17 MS. O'CONNELL ADAMS: I mean, I'm --  
18 I'm not sure that I have any examples from the  
19 case law or anything like that, but it would be  
20 similar types of things where you're -- you're  
21 walking past and something hits you or  
22 something like that, some kind of a -- a -- an  
23 action by the agency that didn't involve any  
24 discretion in deciding to take a certain  
25 action. So it's a --



1           CHIEF JUSTICE ROBERTS:  What like if  
2   you have, you know, a fence -- you should have  
3   had a fence along one of the rivers and you  
4   don't, and so, you know, a child runs into the  
5   river and is harmed?  Is that like rear-ending  
6   a -- a car?

7           MS. O'CONNELL ADAMS:  I think under --  
8   now, again, this is all on Question Presented 2  
9   under which the Court did not grant cert, but I  
10  think under -- there's a case, Edwards versus  
11  TVA, where somebody tried to make a similar  
12  example, that they fell into the water near a  
13  reservoir, and they should -- there should have  
14  been a warning, and the court said no, that the  
15  -- how to warn people about the hazards and  
16  the -- you know, the economic decisions that go  
17  into where you put the signs and how you warn  
18  people and things like that involves an  
19  exercise of discretion.

20          JUSTICE KAVANAUGH:  One way to look at  
21  this case is that the discretionary-function  
22  exemption does not apply because it's not  
23  statutorily provided, but, nonetheless, Burr  
24  applies in that Burr sets up what seems to me  
25  on its face to be a higher bar or a more

1 narrower exception than the  
2 discretionary-function exception because it  
3 uses terms like "grave interference" with  
4 governmental function.

5 What is wrong with looking at the case  
6 that way? Which would leave figuring out  
7 exactly what Burr means either to the court of  
8 appeals or future elaboration.

9 MS. O'CONNELL ADAMS: I -- I don't  
10 think that Burr, Justice Kavanaugh, is meant to  
11 be a replacement for the discretionary-function  
12 test. It's not -- Burr was not a  
13 discretionary-function case. It's not a -- a  
14 test by which you run individual sets of facts  
15 through the Burr test and decide whether or not  
16 that case can go forward.

17 JUSTICE KAVANAUGH: But, if we  
18 conclude that you don't have this  
19 discretionary-function exception because it's  
20 not provided in the statute, we're left with  
21 Burr, right?

22 MS. O'CONNELL ADAMS: Right. Well --

23 JUSTICE KAVANAUGH: I know -- I know  
24 you're fighting the premise of the "if" clause,  
25 but if we conclude that, then you're left with

1 Burr. And how do you think Burr should be  
2 applied?

3 MS. O'CONNELL ADAMS: I think that  
4 Burr is what gets you to the point that you say  
5 there is a discretionary-function exception.  
6 So Burr should be a preliminary step before --

7 JUSTICE KAVANAUGH: Right.

8 MS. O'CONNELL ADAMS: --  
9 discretionary-function test is applied where  
10 the court --

11 JUSTICE KAVANAUGH: So -- so you don't  
12 do it case by case. You say to not have a  
13 discretionary-function exception would cause a  
14 grave interference with governmental function?

15 MS. O'CONNELL ADAMS: That's exactly  
16 right. So that's the way that we view Burr.  
17 Burr talks in those same terms, so Burr asks  
18 whether a particular category of cases should  
19 be allowed to go forward. It doesn't ask you  
20 to run fact patterns through the Burr test case  
21 by case.

22 And the question in Burr, again, was  
23 whether the -- the agency, the Federal Housing  
24 Administration, was subject to garnishment.  
25 And the -- the court analyzed that question on

1 a macro basis, not just whether paying this one  
2 garnishment order would interfere with the  
3 operations of the agency.

4 JUSTICE KAGAN: But, if -- if your  
5 answer to Justice Kavanaugh is right, that  
6 would mean you are engrafting the FTCA  
7 exception onto the TVA, an -- an entity that  
8 has been specifically excluded from the FTCA.

9 MS. O'CONNELL ADAMS: The -- the idea  
10 here is that we're -- we're not trying to  
11 borrow something from the FTCA that we were  
12 specifically excluded from. The -- the  
13 discretionary-function immunity existed at  
14 common law and was carried forward into the  
15 Federal Tort Claims Act. It -- they mirror one  
16 another. And the exclusion of TVA from the  
17 Federal Tort Claimz Act doesn't abrogate that  
18 immunity that existed.

19 JUSTICE KAGAN: But you see what I'm  
20 saying, Ms. O'Connell. It's that those are --  
21 it's -- you know, you can say, well, we're --  
22 we're -- we're formulating the result in a  
23 different way. We're not engrafting the FTCA  
24 exception; rather, we're engrafting an  
25 exception that the FTCA codified. But it all

1 amounts to the same thing, doesn't it?

2 MS. O'CONNELL ADAMS: It all amounts  
3 to the -- to the idea that TVA gets  
4 discretionary-function immunity --

5 JUSTICE KAGAN: Yeah.

6 MS. O'CONNELL ADAMS: -- yes. But I  
7 guess the -- the question is whether you're  
8 taking it from a statute that it's been  
9 excluded from, which, you know, we completely  
10 understand TVA's excluded from the statute, you  
11 wouldn't be saying that that -- 2680(a)  
12 applies, but that immunity was recognized as a  
13 matter of common law before the FTCA was  
14 enacted and it's -- it's coterminous with the  
15 test that's --

16 JUSTICE BREYER: Can I read this to --

17 MS. O'CONNELL ADAMS: -- that's  
18 relevant to the statute.

19 JUSTICE BREYER: Can I read one  
20 sentence to you that was just pointed out to  
21 me? In Prosser, on page 1053, I didn't know  
22 this, it was -- it was just pointed out, if the  
23 city operates a local electric or water company  
24 for which fees are charged, this looks very  
25 much like private enterprise and is usually

1 considered proprietary, for torts committed in  
2 these operations then, the city is usually held  
3 liable.

4 So that's contrary to what I was  
5 thinking before, but that's what Prosser says.  
6 And if you hold local electricity companies  
7 owned by the city liable for the distribution  
8 of electricity, why shouldn't you hold the TVA  
9 liable, at least when they're engaged in  
10 electricity distribution through wires?

11 MS. O'CONNELL ADAMS: I'm -- I'm not  
12 familiar --

13 JUSTICE BREYER: Okay.

14 MS. O'CONNELL ADAMS: -- with that  
15 statement from Prosser. I don't know what it's  
16 citing to. But, of course, TVA is the federal  
17 government that is immune from suit unless  
18 Congress waives it.

19 And -- and, historically, there's  
20 never been a distinction drawn between  
21 commercial functions and -- and governmental  
22 functions in terms of applying the -- the  
23 discretionary-function immunity.

24 JUSTICE SOTOMAYOR: But Burr does --  
25 Burr itself recognizes that. Burr says that

1 there are some entities that are sued or to be  
2 sued that you have to look at differently  
3 because they're not functioning merely as  
4 government entities.

5 MS. O'CONNELL ADAMS: I -- I don't --

6 JUSTICE SOTOMAYOR: So do you --

7 MS. O'CONNELL ADAMS: Respectfully, I

8 -- I --

9 JUSTICE SOTOMAYOR: Do you agree that  
10 Burr and the discretionary policy exception  
11 overlap in some respects?

12 MS. O'CONNELL ADAMS: No. I think  
13 that Burr is a preliminary test that you use to  
14 see whether a category of claims should be  
15 excluded and the agency should get --  
16 nevertheless get immunity, even though there is  
17 a general sue-and-be-sued clause. Once you --

18 JUSTICE SOTOMAYOR: And some of that  
19 has to do with governmental functions and the  
20 discretion the government has in that area?

21 MS. O'CONNELL ADAMS: No. So,  
22 respectfully, I don't think Burr made that  
23 distinction. Burr used the word "governmental  
24 functions," but it was not drawing a  
25 distinction between governmental and commercial

1 activities.

2 JUSTICE SOTOMAYOR: So you -- you  
3 totally give up the idea that there's any  
4 overlap between the two?

5 MS. O'CONNELL ADAMS: Correct.

6 JUSTICE SOTOMAYOR: You think they're  
7 just totally --

8 MS. O'CONNELL ADAMS: I think Burr is  
9 a preliminary test.

10 JUSTICE SOTOMAYOR: So, if you lose,  
11 the way Justice Kavanaugh set up the possible  
12 loss, Burr controls, you would give up any  
13 claim to discretionary function exemption, you  
14 would not claim that this interferes with the  
15 government because it cabins its discretionary  
16 function?

17 MS. O'CONNELL ADAMS: Well, we -- we  
18 just don't think that Burr is applied on a  
19 case-by-case basis in that way.

20 JUSTICE SOTOMAYOR: I know, but if  
21 you're wrong, if we decide you're wrong, are  
22 you here going to disavow relying on the  
23 discretionary exemption in claiming that prong  
24 2 is not met under Burr?

25 MS. O'CONNELL ADAMS: I mean, I guess



1 we would still try to argue that, as a category  
2 of cases, if you allow -- I mean, I think  
3 that's the whole application of Burr, is  
4 whether -- I think the dispute in part is  
5 whether you look at Burr with respect to  
6 categories of cases or on a case-by-case basis.

7 JUSTICE GORSUCH: Right. But I'm --  
8 I'm -- I'm going to try and pin you down just a  
9 little bit. Let's assume you've lost that  
10 argument. Okay? I -- I -- I -- I know.

11 MS. O'CONNELL ADAMS: So the argument  
12 I've lost is what, that there's no  
13 discretionary --

14 JUSTICE GORSUCH: Is -- is -- is that  
15 Burr is just a categorical question,  
16 preliminary question, as to whether the  
17 discretionary-function exception applies.  
18 You've lost that. Okay? Just a hypothesis.

19 Does the government have any backup  
20 argument at all, or is that the end of it?

21 MS. O'CONNELL ADAMS: Well, I guess  
22 that --

23 JUSTICE GORSUCH: And I'd -- and I'd  
24 really appreciate, if it's possible, to start  
25 with a yes or a no.

1 MS. O'CONNELL ADAMS: Yes. I mean, I  
2 -- I think, under Burr, we would still say  
3 that, as a category of claims, that it would  
4 interfere with the -- with governmental  
5 functions or the TVA's functions to allow this  
6 category of claims to go forward.

7 JUSTICE ALITO: And by "this category  
8 of claim," what do you mean?

9 MS. O'CONNELL ADAMS: Claims that are  
10 -- tort claims for damages for activities that  
11 arise from discretionary activities of the  
12 executive.

13 JUSTICE ALITO: All right. Suppose I  
14 think -- this is a similar question, maybe a  
15 little bit different -- suppose that I think  
16 what we should do is apply Burr, and suppose I  
17 think that governmental does not mean  
18 commercial, that there's a distinction between  
19 the two.

20 How should I proceed after that, or am  
21 I just so far down the wrong road that you have  
22 nothing -- there's nothing you can do to help  
23 me?

24 (Laughter.)

25 MS. O'CONNELL ADAMS: I think you're

1 pretty far down the wrong road at that point,  
2 but I think one other thing that I guess I  
3 maybe haven't said yet is that, if you're  
4 looking whether something is -- is governmental  
5 or commercial, if it's a federal government  
6 agency doing it, it is a governmental activity.

7 This Court has said that in a couple  
8 of different cases. They're not  
9 discretionary-function cases, but Federal Land  
10 Bank versus the Board of County Commissioners.

11 JUSTICE GORSUCH: Oh, sure, land --  
12 federal lands, absolutely, but if -- if -- if  
13 -- if the government were setting up a cola  
14 company, why should we, with this very limited  
15 language before us, which actually seems to go  
16 the other way -- should we require Congress, if  
17 it wishes to assert sovereign immunity in cases  
18 of classic commercial conduct, like my cola  
19 company, to say so a little more clearly than  
20 this? This, after all, being go ahead and sue  
21 us.

22 MS. O'CONNELL ADAMS: I think if the  
23 -- if the Court is looking for something in  
24 terms of the Coca-Cola company or something  
25 that is just a purely commercial function,

1 there may be room in prong 2 of the actual  
2 discretionary-function test for that.

3 The discretionary-function test itself  
4 asks first whether this was an act that  
5 involved the exercise of discretion and then,  
6 second, whether it's grounded in social,  
7 economic, or political policy.

8 So maybe the Court could say for --

9 JUSTICE GORSUCH: Well, no, that would  
10 be grounded in political policy, sure, but  
11 that's my whole point of my hypothetical.  
12 Congress decided that it needed another cola  
13 company in the world, we needed one for some  
14 reason, we needed another cola company in the  
15 world. So there's a political decision there,  
16 clearly, when Congress acts to create a  
17 commercial entity.

18 MS. O'CONNELL ADAMS: Well, I guess --

19 JUSTICE GORSUCH: So I don't think  
20 that would solve our problem.

21 We'd need something else, wouldn't we?

22 MS. O'CONNELL ADAMS: In that case, I  
23 guess the -- the TVA is obviously quite  
24 different than a Coca-Cola company. Putting  
25 aside its power generation activities, as we've

1 talked about for -- for much of the argument,  
2 TVA also operates a system of dams on the  
3 Tennessee River that often involved --

4 JUSTICE GORSUCH: Now you're just  
5 fighting the hypothetical. I understand you  
6 disagree with the hypothetical. But, in that  
7 hypothetical, shouldn't we ask Congress to be a  
8 little clearer if it wants to provide immunity  
9 and allow -- I mean, actually, what we're  
10 talking about is allowing a commercial entity  
11 to externalize its costs, to the victims of its  
12 negligence, have to bear the cost, rather than  
13 internalize the cost like every other  
14 commercial operator has to bear its costs of  
15 negligence.

16 MS. O'CONNELL ADAMS: Well --

17 JUSTICE GORSUCH: That's quite an  
18 extraordinary thing you're asking for, isn't  
19 it?

20 MS. O'CONNELL ADAMS: I -- I'm not  
21 sure it is. This -- again, this is a  
22 government agency that was created to do lots  
23 of things to bring prosperity to the Tennessee  
24 Valley during the Great Depression, and one of  
25 those was to bring power and electricity to the

1 region.

2           It's actually statutorily mandated  
3 that it offer power to the -- to the residents  
4 of the Tennessee Valley at the lowest cost  
5 feasible. So if -- you know, if the idea is,  
6 well, this is just a typical power company, it  
7 should internalize its costs and just raise  
8 rates, that -- that may even be inconsistent  
9 with the --

10           CHIEF JUSTICE ROBERTS: So you're  
11 saying lowest cost feasible means, to the  
12 extent you can deprive individuals harmed by  
13 their activities, purely commercial activities,  
14 that that counts in trying to keep the costs  
15 low?

16           MS. O'CONNELL ADAMS: I mean, I think  
17 that's an argument. We haven't really rolled  
18 out that argument, but it is an argument that's  
19 in the statute. And -- and, again, I would  
20 just --

21           CHIEF JUSTICE ROBERTS: Well, I'm not  
22 sure you haven't rolled it out. The idea that  
23 -- that someone who's harmed, who would  
24 otherwise get a recovery from a private entity,  
25 but because of the immunity doesn't, I thought

1 that was the basic idea. It interferes with  
2 the governmental function to make them pay tort  
3 damages.

4 MS. O'CONNELL ADAMS: Well, yeah,  
5 perhaps that's right. Maybe that's just an  
6 additional way of saying that it's inconsistent  
7 with the statutory scheme to -- to have TVA  
8 paying out damages claims and having the -- the  
9 -- the court second-guess the discretionary  
10 decisions that TVA is making.

11 JUSTICE KAVANAUGH: But the -- you're  
12 trying to fold the discretionary-function  
13 exception into the second part of Burr.

14 But is it really the case -- I guess  
15 one response would be is it really the case  
16 that you need this broad discretionary-function  
17 exception in all these kinds of hypothetical  
18 cases that have been raised in order to avoid a  
19 grave interference for the governmental  
20 function, which seems like a high bar set forth  
21 in Burr?

22 MS. O'CONNELL ADAMS: Yes. I mean, we  
23 -- again, we think that whether to recognize a  
24 discretionary-function exception is like what  
25 you're applying -- and Burr is not like a

1 codified statute. It's describing general  
2 categories of claims that may be excluded from  
3 a sue-and-be-sued clause even though Congress  
4 has said the agency could be sued.

5 And -- and this is a category of  
6 claims that we think, anything involving the  
7 exercise of discretion, if you permitted suits  
8 allowing that, that it would interfere with the  
9 agency's function.

10 So I think that's what we're asking  
11 for here, is for the Court to say that, under  
12 Burr, TVA gets discretionary-function immunity.  
13 And then, in any individual case, you could  
14 apply the discretionary-function test to see if  
15 the facts of the case meet that  
16 well-established immunity.

17 JUSTICE KAGAN: Just on the facts of  
18 this case, why would allowing a negligence suit  
19 to proceed interfere with important government  
20 functions?

21 MS. O'CONNELL ADAMS: May I answer?

22 CHIEF JUSTICE ROBERTS: Sure.

23 MS. O'CONNELL ADAMS: It's -- on the  
24 facts of this case, you know, the Petitioners  
25 say, well, TVA could continue operating the



1 next day, even if they're required to pay out  
2 damages to this particular plaintiff. But Burr  
3 is not set up to be a case-by-case test.

4 It's looking for categories of cases  
5 that should be excluded, just like paying out  
6 damages to one individual person whose crops  
7 were destroyed by water that was let out of the  
8 reservoir wouldn't be a big deal, but, as a  
9 category of cases, those would interfere with  
10 the government's functions.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 Ms. Adams.

13 Mr. Rouse, you have four minutes  
14 remaining.

15 REBUTTAL ARGUMENT OF FRANKLIN TAYLOR

16 ROUSE ON BEHALF OF THE PETITIONERS

17 MR. ROUSE: The FTCA and discretionary  
18 function analysis just don't apply to Tennessee  
19 Valley Authority. Congress hasn't given the  
20 Tennessee Valley Authority that immunity. It's  
21 just said the Tennessee Valley Authority may be  
22 sued, period.

23 And so, if the TVA's going to get any  
24 immunity at all, it's going to have to meet  
25 this Court's test. It's going to have to

1 clearly show one of the three things that this  
2 Court has said is required.

3 It hasn't done that. It didn't do it  
4 below and it's not doing it now.

5 It's instead just trying to smuggle in  
6 the discretionary analysis under Burr's  
7 constitutional scheme language. It's trying to  
8 say, no, it would violate separation of powers.

9 But that's not violation of separation  
10 of powers. Not here. Nothing here would  
11 prevent the Executive Branch from accomplishing  
12 its constitutionally-assigned functions or  
13 would be the Judiciary's impermissible trespass  
14 upon the Executive or an undertaking --

15 JUSTICE BREYER: What about the other  
16 sentence in Prosser: "For example, activities  
17 of police or firefighters, though tortious, are  
18 usually considered governmental, in the sense  
19 that they involve the kind of power expected of  
20 government, even if its exercise in the  
21 specific case is wrongful, the city is immune  
22 as to such activities for this reason."

23 So Prosser seems to distinguish  
24 between what's commercial and what's basically  
25 governmental.

1           Now they're legislating in Congress  
2           against that background. The words are rather  
3           unclear. Why don't we assume it picks up that  
4           background, which is where Justice Alito  
5           started?

6           MR. ROUSE: That -- there is certainly  
7           a distinction between governmental work,  
8           deciding where to put a dam up, and running new  
9           power lines across a line, lifting one up out  
10          of the water. There is certainly a distinction  
11          in that.

12          Burr accounts for them. Burr accounts  
13          for the policy decisions, whether commercial,  
14          governmental, or not, it just accounts for the  
15          policy decisions that those can be immune, that  
16          those should be immune, that it is necessary in  
17          some circumstances to give immunity for policy  
18          decisions that -- that contemplate social,  
19          economic, or political decisions.

20          That all exists under Burr. But  
21          commercial conduct here that is not grounded in  
22          any of those things is not protected. It has  
23          not been protected by Congress. And the Court  
24          shouldn't do it again here.

25          If there are no further questions,

1       thank you for your time.

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

4                   (Whereupon, at 11:06 a.m., the case  
5       was submitted.)

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## Official - Subject to Final Review

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