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CITIZENS TO PRESERVE OVERTON PARK v. VOLPE

[version of Fall, 2004]

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Administrative Law Stories

Citizens to Preserve Overton Park v. Volpe

Peter L. Strauss*

*Many years later, tired at last
I headed for home to look for my past
I looked for the meadows, there wasn't a trace
six lanes of highway had taken their place
where were the lilacs and all that they meant
nothing but acres of tar and cement. ...¹*

Citizens to Preserve Overton Park v. Volpe is easily one of the most important cases in the administrative law repertoire, with 4,640 citing opinions listed by Sheppards as of the end of 2004. The great bulk of those citations draw on its elaboration of the scope of review appropriate for agency exercises of judgment. In the instance, as you know, what was at issue was the Secretary of Transportation's judgment that federal funds could be expended to build Interstate 40 through Overton Park, in Memphis, Tennessee, in the face of a pair of federal statutes that seemed severely to burden that judgment in order to protect parkland values. What may not be so readily apparent to you is that the case helps mark a turning point in American administrative law, brought about by a relatively small number of recent law school graduates. Its legal innovations occurred at the hands of lawyers just a few years out of law school, who successfully entered largely uncharted territory *pro bono publico*. It seems at least possible that you would be inspired by such a story.

The burgeoning Interstate Highway system had spawned heartache and controversy across the

* Betts Professor of Law, Columbia University. The original version of this essay, which appeared as Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. Rev. 1251 (1992), began with this:

More people provided helpful support than one could normally list here -- Memphians such as James Jalenak and Charles Newman, opposing counsel in the Overton Park litigation; Dean Fred Davis and his colleagues at the Cecil B. Humphreys School of Law of Memphis State University; participants in faculty colloquia at Columbia and the University of Minnesota Law Schools; the participants in this Symposium; and individual colleagues and friends like Bernie Black, Cynthia Farina, and Daniel Gifford. Iqbal Ishar, Columbia, LL.M. '87, William Bruce, Memphis State University '94, and the staff of the Memphis and Shelby County and the Memphis State University Libraries provided valuable research support, and the Frank A. Sprole Fund and Columbia Law School Alumni provided welcome financial assistance.

Responsibility for any errors is, of course, mine. In this essay, in particular, I write with limited access to my research materials. Able to spend only a week in Memphis, I relied on the extensive clippings file and paper collections at the Memphis and Shelby County Library and the Memphis State University Library. Mr. Bruce subsequently went to the microfilm records of the Memphis Commercial Appeal and the Memphis Press-Scimitar to check what was in my notes and provide full citation forms. He was unable to find a few of these citations, as will be evident from the form of citation in some of the footnotes. This may be the result of my error in transcribing or a librarian's error in preparing a clipping for the file. While I am confident of the physical reality of the articles cited, I deeply regret that time has not permitted confirming the precise date and place of their publication.

I have not been able to return to the Memphis materials in revising this essay, but now have also to thank new colleagues Gillian Metzger and John Fabian Witt for their thoughtful readings and suggestions, CPOP attorney John Vardaman for hours of enlightening conversation and permission to cast my eye over his litigation files, and the faculty of the James Rogers School of Law at Arizona University.

¹ Verdelle Smith's "Tar and Cement" (1966) climbed as high as 38 in Billboard's ratings, according to <http://www.top40db.net/>; for one week it was the most popular song in Australia.

country, as the lyrics of a 1966 pop song attest. But until the litigation of *Overton Park* and a few other cases that accompanied it, citizens voiced their protests not in the courts but through politics. The beginning of public interest litigation on issues like highway construction or other environmental matters dates from its time. Lexis reveals that during the decade of the 60's, the two long-established national environmental organizations who were among the several named plaintiffs in *Overton Park*, the Sierra Club and the National Audubon Society, were plaintiffs in only one reported decision;² that decision was reported in 1969, the year in which the *Overton Park* complaint was filed and, as it happens, also concerned an element of the interstate highway system. For the 1970's, a search for these two names returns 149 hits; for the 1980's, 337; for the 1990's, 499; and for the period January 1, 2000 to mid-2004, 297.³ Something happened.

Overton Park represents a transition from political to judicial controls over decisions broadly affecting a wide range of community interests. Unmistakable and dramatic as it is, that transition is not universally applauded. One can easily find in decisions and legal literature today continuing hesitation over how deeply the courts should be engaged in controlling matters susceptible of political resolution – whether the gains in legality are not overmatched by losses to gridlock and inertia, whether the resulting system is not too open to the tactics of obstreperousness and delay. But the transition was striking and quick. The late sixties and early seventies saw an explosion of new national legislation on social and environmental issues, that often provided explicitly or implicitly for citizen remedies. Four scientists founded the Environmental Defense Fund in 1967, as part of their effort to halt the use of the pesticide DDT that devastated raptor populations by weakening their egg shells. In 1968, recent law school graduates founded Washington's Center for Law and Social Policy, a pioneering effort. Law Reports devoted to environmental law began to emerge in 1969,⁴ the year the National Environmental Policy Act was enacted. Newly minted lawyers established the Natural Resources Defense Council in 1970. In that year, too, as clinical legal education began, young lawyer-teachers at a Columbia Law School program on law and welfare brought to the Supreme Court – and won – *Goldberg v. Kelly*⁵ and *Barlow v. Collins*⁶ (one of a pair of cases significantly extending standing doctrine that year). The Sierra Club established its Legal Defense Fund, and Ralph Nader his Public Citizen, in 1971. In many respects, *Overton Park* marked the turn.

Stories are uniquely the product of a narrator's vision. For a case, like this one, that has appeared to different participants in remarkably different ways, what seems appropriate is to attempt to see how the course of events leading to decision in *Overton Park* might have appeared through a number of eyes. After a brief *mis en scene* to set the framework, that is what these pages will do. Of course, you the reader have only one narrator; but he has attempted to people these pages and evoke their varying perspectives as faithfully as his research and capacity for empathetic understanding permit. Much of what follows draws on his earlier essay, *Revisiting Overton Park*, which appeared in the pages of the UCLA Law Review in 1992 and on the sensitive story-setting "reply" contributed by

² *Citizens' Committee for the Hudson Valley v. Volpe*, 302 F.Supp. 1083 (SDNY 1969); *id.*, 297 F.Supp. 804 and 809.

³ Lexis search of combined federal and state cases for "Name(Sierra Club) or Name(National Audubon Society)" with appropriate date ranges, conducted July 28, 2004.

⁴ The *Citizen's Committee* case, n. 2 above, appears in Volume 1 of both the Environmental Law Reports (1 ELR 20001) and BNA's Environment Reporter (1 ERC (BNA) 1096).

⁵ 397 U.S. 254.

⁶ 397 U.S. 159.

Prof. Lucie White.⁷ The release of the papers of Justices Blackmun, Brennan and Marshall for public view, and the availability of transcripts of oral argument in the United States Supreme Court library and litigation files in the possession of CPOP Attorney John Vardaman, have permitted supplementing the 1992 account.

Overton Park and Interstate 40

In the 1950's, Memphis, Tennessee was a southern city of 450,000 or so, about sixty percent white and forty percent black. Long the center of the cotton trade, it was the largest commercial center on the Mississippi between New Orleans to the south and St. Louis to the north. Its civic leaders supposed it to be in competition with each. If one imagines a boll of cotton oriented east from a Mississippi River stem, the commercial center of town was where the boll joins the stem; the black population lived in the dark casing of the boll, north and south and bending eastward; and the white population lived in the cotton itself.⁸ There was no circumferential road system – indeed, no highway system at all – and a single bridge across the Mississippi, a bit to the south of the city center, brought long distance travellers through.

Overton Park is the Central Park of Memphis, a 342-acre city park long considered the city's principal greenspace asset. It is roughly rectangular in shape, approximately a mile long by half a mile wide, with its longer sides pointing east and west. Surrounded by campuses and gracious homes, it lies in the center of the cotton, embedded in its predominantly white residential area. Its eastern boundary is a major north-south connector. At a time when the city was reasonably compact, the two wide boulevards marking the park's northern and southern boundaries were the principal streets carrying traffic between eastern suburbs and downtown. A zoo lies in the western half of the park's northernmost part; the zoo's fenced southern boundary is a long-established, two lane road whose use was restricted to municipal buses. South of the bus road and zoo are a nine-hole golf course, a theater, an art museum, and landscaped open areas. To the east, Lick Creek, a rivulet occasionally swollen by storm run-off, runs north to south. The eastern half of the park contains picnic areas and 170 acres (about a quarter of a square mile) of virgin forest; riding and walking trails integrate the ensemble.

The planners who created the interstate highway system in the 1950's mapped out Interstate 40 as a transcontinental route that would cross the Mississippi at Memphis on a new bridge, somewhat north of the existing one. It would connect Memphis with Nashville to the northeast and Little Rock, Arkansas to the southwest. As usual, the plans combined inter-city expressway with enhanced local commuter access, locating the bridge and route to provide a high-speed east-west corridor through the city's heart. A circumferential beltway was also planned, but the tight character of its interchanges (together with the economies of driving fewer miles) made clear the expectation that through traffic would stay on I-40 itself. From the outset, the plans called for the intra-city corridor to bisect Overton Park. Although the park might have been avoided without giving up that corridor, its central location, the established commutation routes, and the expected impacts of the alternatives all made this the "obvious" choice. Initially, I-40's footprint on the park was going to be quite large.

⁷ Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 *UCLA L. Rev.* 1251 (1992); Lucie E. White, *Revaluing Politics: a Reply to Professor Strauss*, 39 *UCLA L. Rev.* 1331(1992). The reader is entitled to know that I was an attorney in the Office of the Solicitor General, but not the attorney responsible for Overton Park, during this period. That professional relationship has, I hope understandably, limited my ability and willingness to write about the history of the case in that office.

⁸ See D. Tucker, *Memphis since Crump: Bossism, Blacks and Civic Reformers, 1948-1968* 104 (1980)

Eventually, however – part of the following story – its imposition shrank to only 26 acres.⁹

The issues of *location* and *design* were treated separately both statutorily and administratively, and it will be useful to keep them separate. Although many locations were studied, two emerged as the park's chief competitors. One, following the northern edge of the park, would have cut off the park from the north, and disrupted university, school, church and other facilities that existed there.¹⁰ The second followed creekbeds and a railroad right of way somewhat to the north; among its other disadvantages, it would severely have impacted one of the few racially mixed residential areas in the city. Location *within* the park was a more fluid issue: an early accommodation to the resistance was to superimpose the route through the park on the existing bus road rather than have it cut a new path; and moving a planned interchange outside the park boundaries significantly reduced the park acreage required.

Four principal design alternatives were debated throughout the long history of the controversy: building the road on the surface; building it below grade to the extent the water table and natural drainage constraints permitted; building it below surface throughout its length, overcoming water table and drainage problems; and constructing a tunnel in some fashion, hiding the road completely throughout its traverse of the park. Prior to the Court's decision, Tennessee highway officials consistently sought the first alternative – the cheapest, least complicated, and most familiar form of construction – relying on landscaping to reduce the impact of the road and its traffic on the park. City officials were more open to building below grade, but consistently expressed concerns about both costs and the possible results of ignoring water table and drainage constraints: they feared that building the road below water table and creek levels would risk flooding if power outages in storms stopped the electric pumps that would then be required; and in any event they believed it would create bodies of still water in which malarial mosquitoes could breed at each end of the inverted syphon that would be used to conduct the creek under the roadway. Thus, for the city, the high local water table meant that I-40 should never be more than ten feet or so lower than the surrounding park, and that it should rise above grade to cross Lick Creek. Federal officials consistently pursued the more dramatic and far more expensive possibilities of building the road in a trench below the water table, of syphoning Lick Creek's flow under the entrenched roadway, or indeed of tunneling the whole length of the park. When in 1969 the Bureau of Public Roads approved the second design – below grade to the maximum extent drainage and the water table permitted – the parties to the litigation may well have thought that the principal statutory issue the courts would be called upon to decide would be whether this choice reflected "all possible planning to minimize harm to [the] park"; this was the *design* issue under the two federal statutes enacted late in the planning process. In the wake of the Court's decision, the Secretary never identified another feasible route; design remained the principal administrative issue for as long as Tennessee pursued its hopes of completing I-40 by constructing its inner-city Memphis leg, with federal officials offering a tunnel, and state and local officials proposing a ditch..

A Chronology

⁹ As described by the 6th Circuit,

[A]pproximately 4,800 feet in length[, t]he existing highway is 40 to 50 feet wide. The proposed interstate will consist of six lanes -- three running in each direction, separated by a median strip approximately 40 feet wide. The interstate right-of-way will vary from approximately 250 feet in width to approximately 450 feet in width, and will require the use of approximately 26 acres of the Park. *Citizens to Preserve Overton Park v. Volpe*, 432 F.2d 1307, 1309-10 (1970).

¹⁰ *Id.* at 1311.

- 1944** Federal-Aid Highway Act of 1944 initiates federal role in planning a national system of highways.
- 1950** Congress requires state highway officials to provide an opportunity for public meetings if they plan for a federally supported highway to “bypass” a center of population.
- 1953** Memphis undertakes its first study of limited access freeway possibilities.
- 1955** Memphis’s new “civic reform” government receives and preliminarily approves the study, proposing a circumferential ring highway, a new Mississippi River Bridge, a north-south expressway east of the commercial center, and an east-west expressway through the park.
- 1956** The Interstate highway system and Highway Trust Fund are launched; Congress amends the existing requirement that states hold a local hearing if a federally funded road will “bypass” a population center, by adding “or going through” such a center. I-40’s siting in Overton Park is federally approved for the first time.
- 1957** Surveys for I-40 begin, giving prominence to the plan to use Overton Park; Citizens to Preserve Overton Park [CPOP] is founded; in November, the City Commission holds well-attended public hearings, resulting in an extensive restudy of alternative routes.
- 1958** Federal-Aid Highway Act extends the state hearing requirements to encompass *rural* routing of limited access highways, which might bisect farms or cut them off from town.
- 1961** Tennessee holds the federally required hearing for the Overton Park segment in Memphis, with the State Highway Commissioner presiding and much opposition voiced. Recordings are incomplete. The city’s Engineer later promises to build it last, and only if needed. The first five miles of the southern circumferential highway are built.
- 1962** Federal-Aid Highway Acts further amended; state officials must now cooperate with the officials of cities larger than 50,000 in a “continuing, comprehensive transportation planning process” to resolve routing issues.
- 1964** The circumferential highways are substantially completed, and political pressure concerning the east-west highway mounts, reaching the governor (in an election year) and the head of the Federal Bureau of Public Roads [BPR]. BPR officials negotiate a reduced park footprint.
- 1965** The City Commission votes to approve the route 4-1, assuring the State Highway Commissioner of its support. He adopts further measures ameliorating its impact and, under gubernatorial pressure, again studies alternative routes. The north-south legs of the expressway are built. In December, the federal BPR head visits Memphis to consult.
- 1966** In January, “reaffirm[ing] our previous approval,” the BPR head wrote the Tennessee Highway Commissioner that “the most exacting efforts to assure a finished product which is in keeping with the area and future park usage [are a] condition to our action.” Congress later enacted the Federal-Aid Highway Act of 1966; effective July 1, 1968, states must assure “all possible planning, including consideration of alternatives ... to minimize any harm to ... [any] park” that might be affected by interstate highway construction. Within weeks, it also enacted the Department of Transportation Act creating the Department of Transportation [DOT] and giving new attention to environmental and “beautification” issues. Section §4(f) of *this* statute, effective April 1967, directed the Secretary not to approve the use of important parklands for highways “unless (1) there is no feasible or prudent alternative to the

use of such land, and (2) such program includes all possible planning to minimize harm to such park.” In November, Tennessee voters elected a new Governor, and Memphis voters approved a new form of city government.

1967 Tennessee’s new Governor and Highway Commissioner characterized the route through the park as “the most direct and the most economically feasible.” On March 15, before §4(f) became effective, the BPR gave preliminary approval to the *design* for I-40 in the park. On May 2, the City Commission again voted 4-1 to accept the route. Also that month, BPR authorized acquisition of approaches, and the state began preparing the ground for the east-west road. In November, the new city government was elected; the road was not a significant election issue. The Senate Public Roads Committee held hearings into urban highways, treating Overton Park as a trouble spot. In December, DOT promised a visit by top officials to help Memphis make a decision it “should make ... because you are best equipped to make it – because you will know what will make your commerce thrive and what will make the lives of your people more meaningful.”

1968 January: A number of political meetings in Memphis, including several with CPOP.

February: FHA Administrator Bridwell visits Memphis to talk with the new City Council and CPOP. After a public hearing, he says I-40 will be built through Overton Park unless the City Council changes its view. The racially charged garbage men’s strike begins.

March: On March 5, the Council unanimously adopted a resolution stating its preference that I-40 be routed elsewhere – if need be, along the park’s northern boundary. Much political lobbying ensued, with Administrator Bridwell seeking a specific, reasonably well developed routing proposal. Equivocating, the Council asked to meet with Bridwell again. The garbage men’s strike escalated, leading to riots and the visit of Martin Luther King. On March 31, reflecting turmoil over Vietnam, Lyndon Baines Johnson announced that he would not be seeking reelection to the presidency.

April: On April 3, Administrator Bridwell met with City Council at the Memphis Airport. CPOP was excluded and recording instruments proved to have been inoperative. On April 4, the City Council voted 8-2 to approve both “the route presently designated” and its design. Moments later, Martin Luther King was assassinated at the Lorraine Motel, and the country erupted in flames. On April 19, Administrator Bridwell reaffirmed the earlier route approvals and called for further attention to design. Tennessee’s governor and the congressman from Memphis announced their support of this decision.

May: Transportation Secretary Boyd and Administrator Bridwell testified at length in congressional hearings about their administration of §4(f) in general and the Overton Park controversy in particular. The Committee appeared to receive his testimony sympathetically, and to reflect that in its subsequent report supporting what became the Federal-Aid Highway Act of 1968. That Act, effective August 23, 1968, changed the statutory formula of the FAHA to match §4(f) of Department of Transportation Act.

June: Robert Kennedy was assassinated. Administrator Bridwell required the Tennessee Highway Department to considering deepening the trench in which I-40 would be placed or a tunnel, previously excluded for expense and engineering reasons.

November: A new federal President, Richard Nixon, is elected. His Secretary of Transportation will be John Volpe, former principal of a major construction company.

- 1969** After further discussions with federal officials about deepening the trench, the Tennessee Highway Department held a design hearing in Memphis May 19. Recording equipment again failed. Pressure for a tunnel continued, with a reported intervention by the Secretary of the Interior. In September, Tennessee paid Memphis over \$2 million for 26 acres of Overton Park; by ordinance, the city committed those funds to purchasing 405 acres of additional park lands. On November 5 Secretary Volpe granted design approval after the state and city had accepted further deepening of the trench (but no tunnel). In December, CPOP filed suit to block construction of I-40 through Overton Park.
- 1970** CPOP lost in both the District Court and the 6th Circuit. Construction preceded on the approaches to the park, clearing all property up to its borders. CPOP filed in the US Supreme Court an emergency motion for stay pending the filing of a petition for certiorari; opposed by the government, it was argued December 7. Certiorari was immediately granted, with CPOP's brief on the merits due December 21 and the government's January 4, 1971; argument was set for January 11. The government then filed a motion to remand (to permit departmental officials to file statements of reasons), which was denied December 18.
- 1971** At oral argument, the Solicitor General presented statements by the Secretary and the Administrator purporting to explain their reasoning. The opinions remanding the case were handed down seven weeks later, on March 2. The district court then held a 27-day hearing.
- 1972** On Jan. 5, 1972, the district court remanded the case to the Secretary with instructions to reconsider the case under a correct understanding of the statute. The Secretary held hearings in Memphis in the fall.
- 1973** Without specifying what it was, Secretary Volpe found that there was at least one "feasible and prudent alternative" to the route through Overton Park.
- 1974** The 6th Circuit upheld the Secretary's judgment, declining to require him to say what the "feasible and prudent alternative" is. President Nixon resigned and was replaced by President Ford. Tennessee submitted a new proposal to use an open cut in the park.
- 1975** William Coleman became Secretary of Transportation and announced a provisional decision favoring tunneling under the Park.
- 1976** In August, Tennessee held hearings on tunnel design in Memphis; when Jimmy Carter was elected President, federal officials cancelled a mid-November hearing at the state's request.
- 1977** Tennessee twice submitted designs for partial tunneling; the Department rejected both.
- 1978** The U.S. Senate held hearings on the tunnel/trench controversy
- 1981** Three days before the inauguration of Ronald Reagan, Tennessee asked that the segment of I-40 through Memphis be dropped from the Interstate system and that \$300 million in federal funds committed to the project be released to the city for other transportation purposes.
- 1987** Tennessee deeded the 26 acres of Overton Park back to Memphis.

BUILDING THE INTERSTATES NATIONALLY

The United States Congress

As the preceding timeline reveals, highway planning legislation developed step by step over the quarter century preceding *Overton Park*. It began with straightforward economic concerns and gradually incorporated a wider range of issues and an expanding federal bureaucracy. Congress reached the environmental and amenity issues of parkland use ambiguously and late, and before the courts had been invoked. As is hardly surprising in the absence of highway planning litigation, the congressional documents and debates address neither the place of the courts nor the utility of judicial processes. In this story the issues are largely political ones. To the extent politics was distrusted – as, for example, productive of corruption at the hands of those who stood to profit from routing decisions¹¹ – the proper response was to put planning into the hands of professional technocrats – first, the highway engineers, and then the city planners.

Until the second half of the 20th century, roads were the business of local communities if they were in-town; states if they connected towns; and the federal government hardly at all. Federal aid to the states for highway construction began in 1916,¹² but a federal role in planning did not emerge until definition of the National Interstate and Defense Highway system in mid-century. By the time Congress began to focus on road-building as a setting for possible federal standards and/or procedures, states and localities had settled into a general pattern: outside incorporated areas, states generally controlled which roads would be built and where. If Highway 13 passed through Elmtown, the state would bring the road to the town limits on either side, leaving the town to plot and pay for its transit. It was the state that made the judgment whether to go through Elmtown at all, or rather to bypass it in favor of a straighter, cheaper, or faster route elsewhere.

These allocations of responsibility, and the tensions and political temptations they produced, were reflected in the arrangements made for decision. Highway planning at the state level became the domain of the professionalized highway engineer. Limited funds were available for building the connective road tissue of the state, and every community had a stake in how those judgments were made; judgments had to be made about construction, safety and carrying capacity as well as route. It was obvious in the circumstances that responsibility should be placed in the hands of a technocratic office removed from the distortions of politics and informed by the science of road-building, that could translate traffic patterns, geography and engineering parameters into an efficient network.¹³

Within the cities, roads were in the domain of the urban planner. People more easily saw that roads were only one element of infrastructure and of future growth, in relation to others. And the professional interests of city planners are correspondingly more embracing than those of highway

¹¹ See Tippy, *Review of Route Selections for the Federal-Aid Highway Systems*, 27 MONT. L. REV. 131, 137 (1966)

¹² Federal-Aid Road Act, ch. 291, 39 Stat. 355 (1916).

¹³ As the President of the American Association of State Highway Officials told Congress in 1968,

State highway administrators by and large dislike the philosophy that local lay people [should] have a more prominent role in highway location and design. ... To allow local people to have a greater voice ... for which they are not trained would negate the experience of trained highway professionals.

Quoted in Ben Kelley, *The Pavers and the Paved* 128-29 (1971). Kelley directed the press office in the Department of Transportation from its founding in the Johnson administration. While his book has some of the flavor of the several "highway exposes" published in the late 1960's and early 1970's (e.g., A. Q. Mowbray, *Road to Ruin* (1968); H. Leavitt, *Superhighways - Superhoax* (1970)), his position gives his account particular interest. The account of general change in these paragraphs draws significantly on it.

engineers; whether to use roads or subways to transport urban workers, or what balance to strike between transportation and the need for urban green spaces, were questions much more likely to appeal to, and to be relevant to the professional judgments of, the one than of the other. State and urban political tensions were mirrored in the resulting professional juxtapositions.¹⁴

Thus we see in 1950, as the first effect of the post-war explosion of suburban growth and road-haul commerce, Congress requiring states to hold public meetings to air the possible economic effects of bypassing a center of population before it could route a federally supported highway around town. The state must certify that the state official making a bypass judgment has considered the question of economic impact. Evident in the limited legislative history of the provision is both an awareness of the professionalization of state judgments on such questions, and skepticism about their soundness.¹⁵ Providing a forum for the small businessmen of a community to express their views on the proposal (there can have been little doubt what those views would be) would arm political processes that might avoid the worst excesses of cold technocratic judgment.

Congress soon heard from other voices wanting a seat at the state planning table. In 1956 it amended the statute to require a hearing on the question of economic effects (and a certification by the state department that these issues had been considered) for every routing decision made in the vicinity of a concentration of population – whether it would “bypass” a city, town or village, or go through it. And 1958, with limited-access interstate highways now in prospect, it acted again – to extend the hearing process to persons in rural areas through or contiguous to whose property a highway would pass; the engineers were making their decisions without much regard for the impact on Farmer Jones’ acres or his ability to get to town.¹⁶

The political character of the remedies thus created is clear when one sees that Congress attached no substantive requirement to its hearing demands. It did not ask the hearer to opine or to judge, or to articulate a reasoned conclusion; it does not seem to have imagined that judicial review could ensue. Within the structure of the highway grant program, as it was understood, the federal government had little if any enforcement role. Congress put such federal responsibility as there was in the Bureau of Public Roads, a unit of the Department of Commerce. The BPR served largely as a conduit for grant program funds, did not actively supervise state highway commissions. Refusing funds because a state made the wrong choice, or imperfectly implemented procedures, does not seem to have been part of its repertoire.¹⁷ Without flatly banning any routing choice, these provisions

¹⁴ See M. Levin & N. Abend, *Bureaucrats in Collision: Case Studies in Area Transportation Planning* 236-42 (1971).

¹⁵ Little towns and villages are being ruined because . . . an engineer has an idea that automobiles going to the next town should be able to reach it five minutes sooner.
96 Cong. Rec. 13,006 (1950) (statement of Sen. Chavez, chairman of the Senate Public Works Committee).

¹⁶ The resulting statute may now be found in 23 U.S.C. §128, an element of the 1958 codification of the Federal-Aid Highway Acts.

¹⁷ As the Federal Highway Administrator informed his senatorial oversight committee:

Under Bureau procedures, the States first propose the general location of a designated route or section thereof, which, if found satisfactory, is tentatively agreed upon by the Bureau. Following this, the States proceed with the development of preliminary plans for the route proposed by the State to the degree adequate for presentation at a public hearing. They also collect appropriate data concerning alternate locations. This material is presented and fully discussed at the public hearing. The States then weigh the evidence presented at the hearing, determine a final location, and request Bureau approval for further advancement of the project.

Hearings before a Subcommittee of the Senate Committee on Public Works on Bills Relating to the Federal-Aid Highway Act of 1958, 85th Cong. 2d Sess. 98-99 (1958).

provided a focus for arousing opposition. Such congressional discussion of the provisions as there was – and there was very little – focused on the immediate political benefits of having an opportunity to be heard. It expressed the hope, perhaps even sentimentally, of having some impact within state processes; there was no plan for enhancing federal bureaucratic, much less federal judicial, controls.¹⁸ The evident expectation was that having to discuss plans in public before they were made final would both tend to assure attention to the issues and arm the informal processes by which various interests might be expected to make their wishes known. The legal literature of the time, two decades before “The Reformation of American Administrative Law,”¹⁹ is virtually empty of discussion²⁰ and the caselaw, undeveloped.

To cast the provisions in this light is not to suggest that they were thought inconsequential. Members of Congress are practical politicians, and need not have acted with either judicial or bureaucratic controls foremost in their thoughts. They would have understood that road-building decisions were matters of tremendous consequence to states and localities, and that the states would have decision mechanisms roughly responsive to political realities. Leaving the judgment to politics, in this sense, was a natural instinct; forcing the issue onto the table, thus giving access to local politics, was a significant federal intrusion – yet one that respected the local character of the ultimate decision.

By 1962, Congress was directly responding to tensions between highway engineers and urban planners over roadbuilding issues. Now the Federal-Aid Highway Acts conditioned approval of federal-aid highway projects in an urban area of more than 50,000 population on the use of a "continuing, comprehensive transportation planning process carried on cooperatively by states and local communities." The states *must* talk to the cities; and they must talk to them in the professional terms that most concerned the cities – city planning, not simply highway engineering. This change was not connected with the hearing processes, as such; indeed, explanations of it tended to stress (however unrealistically) that city planning, like highway engineering, was a technocratic process removed from "the vagaries of the political system."²¹ The apparent impulse was to provide for inputs that, within state processes, would inform and perhaps divert the highway juggernaut from concerns only about speed, directness, safety and cost.

Parklands entered the picture in the mid-1960's. The publication of Rachel Carson's **Silent Spring** in 1962 catalyzed environmentalism as a public movement. People began to see the Interstate Highway System as a threat to beloved parks and historic areas – not just Overton Park, but the French Quarter in New Orleans and, notably, Breckinridge Park in San Antonio, Texas. Although the BPR was already requiring administratively that state processes include consultation with public agencies having jurisdiction over parks and other outdoor amenities that might be affected by highway construction, the political uproar – and perhaps the convenience of a

¹⁸ The decision to honor local interests in this way, it may be noted, had overtones contrary to the usual federal interest in interstate commerce. It was *bypassing* a town that would facilitate the interstate carriage of goods; there would be no traffic light at the intersection of Main and Oak, no slowing for a school crossing or reduced speed limit. To insist that towns about to be by-passed have notice and an opportunity to speak – roughly translated, to gather whatever political force they could in opposition to the plan – was to acknowledge the local character of the decision in an unusually forceful way.

¹⁹ Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760-90 (1975).

²⁰ See Schwartz, *Urban Freeways and the Interstate System*, 49 S. CAL. L. REV. 406, 480-82 & n.455 (1976).

²¹ *Hearings Before the Subcomm. on Roads of the Senate Committee on Public Works*, 90th Cong., 2d. Sess., 509 (1968) [hereinafter *Hearings*] (testimony of FHWA Administrator Bridwell).

beautification diversion from the horrors of the war in Vietnam²² – persuaded Congress that this was an issue it had to address.

Texas Senator Ralph Yarborough's concern over Breckinridge Park spurred enactment in 1966 of the park-protective provisions in both the Federal-Aid Highway Act of 1966 and the Department of Transportation Act. The two provisions differed in their requirements for consideration of park values. The Federal-Aid Highway Act, passed in September and effective July 1, 1968, required federal highway administrators to engage in "all possible planning, including consideration of alternatives . . . to minimize any harm to . . . [any] park" that might be affected by interstate highway construction.²³ Section 4(f) of the Department of Transportation Act, passed one month later but effective upon the Department's formation in April, 1967, directed the Secretary not to

approve any program or project which requires the use of any publicly owned land from a public park . . . of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof . . . unless (1) there is no feasible or prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use.²⁴

The meaning of §4(f) proved central to decision in *Overton Park*.

While one could go on at length about the specific legislative histories of these two provisions and their differences,²⁵ perhaps the most important point – and one that helps explain the apparent casualness of the difference between two provisions on the same subject enacted within weeks of one another – is that they were small elements of larger packages, elements respecting which close congressional attention was not to be expected. In framing the larger context, the change of importance was the creation of a national Department of Transportation, which assumed the prior responsibility of the Department of Commerce for highway construction, but now as an element of national transportation planning generally. Embedding the Bureau of Public Roads (now the Federal Highway Administration) in a new structure with responsibilities for mass transportation and other like issues changed the dynamics from promotion to balance, made it more likely as a political and bureaucratic matter that highway decisions would be taken with more in view than the professional concerns of highway engineers. To take only one example – itself a product of increasing environmental awareness – the engineers would now have to deal with an office within the

²² Lady Bird Johnson's role in promoting highway beautification was perhaps her most visible activity as First Lady.

²³ Federal Highway Act of 1966, Pub. L. No. 89-574, 80 Stat. 766, 771.

²⁴ Department of Transportation Act of 1966, § 4(f), Pub. L. No. 89-670, 80 Stat. 931, 934.

²⁵ Both provisions originated in the Senate. The Federal-Aid Highway Act originated in the Senate Public Works Committee, the Department of Transportation Act, concerned overall with government organization, in the Senate Committee on Governmental Operations. In each case, the Senate language concerning park values was more restrictive than ultimately enacted, reflecting the Senate's (and, particularly, Senator Yarborough's) consistently greater enthusiasm for elevating park protection than the House felt. In the House, these measures were explained in the House as reflecting concern for human values ("if there were a choice between using public parkland or displacing hundreds of families . . . I would want the Secretary to weigh his decision carefully and not feel he was forced by the provision of the bill to disrupt the lives of hundreds of human beings," Rep. Rowstenkowski, 112 Cong. Rec. 25,591-92 (daily ed. 10/13/66)), although it was associated in some other minds with greater House attachment to pork barrel politics and the highway lobby. See, e.g., Mowbray, n.13 above, p. 220 ff. In considering the Federal-Aid Highway Act of 1966, the conference committee substituted the language enacted for a Senate-passed provision that would have prohibited approval unless there were "no feasible alternative to the use of [park] land", 112 Cong.Rec. 14074 (1966); in considering the Department of Transportation Act, it inserted the additional qualifier "and prudent." 112 Cong.Rec. 19530 (1966); see also Gray, Environmental Requirements of Highway and Historic Preservation Legislation, 20 Cath.U.L.Rev. 45 (1970). Neither provision was much discussed at the time; the difference in effective date was ascribed, in the House, to simple oversight on the part of the conference committee. 112 Cong.Rec. 25592 (Rep. Holifield, Daily ed. 10/13/66).

Department specifically responsible for promoting environmental awareness and responsiveness.²⁶

For the first time, Congress had unambiguously made federal highway officials the source of approval, not merely guidance, respecting highway location issues. Yet the legislation and its supporting materials suggest an expectation that these requirements would be enforced politically, not judicially. Section §4(f), like other aspects of the Department of Transportation Act, required consultation with other parts of the federal government – the Departments of Agriculture, Housing and Urban Development, and the Interior – that could be counted upon to bring other values to bear in controversial situations. The legislative materials suggest no recognition, much less expectation, that judicial enforcement might be in the offing. Congress's surprising experience with judicial enforcement of the National Environmental Protection Act still lay in the future. "Public interest representation" rationales had, as yet, no prominent voice. It is difficult to ascribe to the approval requirement any expectation that highway decisions would be controlled by other than bureaucratic and associated political means.

Two years later, Congress was asked to reconcile the competing statutory formulations; in the Federal-Aid Highway Act of 1968²⁷ it chose the formulation of §4(f). Litigation was in the air by now, but had not yet emerged as a significant source of control over highway administrators. In May of 1968, both Secretary Boyd and Federal Highway Administrator Bridwell testified as months of hearings on urban planning, location and design before the Subcommittee on Roads of the Senate's Committee on Public Work drew to a close. Their testimony continued to envision highway decisionmaking in essentially political terms. It strongly supported wide consultation and the involvement of local politics to determine community interests and engage planning across a wide range of issues, rather than simply rely on the professional expertise of highway engineers. "We have no choice," the Secretary argued, "but to follow planning procedures which are sensitive to the needs of individual communities and elicit community involvement in the development of the plans."²⁸

What transpired about Overton Park in particular is best left to later discussion,²⁹ but one can say summarily that the committee heard the administrators sympathetically, and then turned immediately to the Federal-Aid Highway Act of 1968. This bill would resolve the linguistic inconsistency between section 138 of the Federal-Aid Highway Act of 1966 and §4(f) by choosing the §4(f)

²⁶ Gray, n. 25 above.

²⁷ Pub. L. No. 90-495, 82 Stat. 815 (1968).

²⁸ *Hearings, supra* note 21, at 455 (testimony of Alan S. Boyd, Secretary of Transportation). In contrast, consider the May 6 testimony of Governor John Volpe of Massachusetts, the former contractor who would shortly become President Nixon's first Secretary of Transportation, who spoke on behalf of the Governor's Conference. Perhaps state highway departments should expand the range of disciplines they incorporated, he conceded, but to provide for an urban design team or for consultation with local politics in competition with these professionals would be to invite chaos. *Id.* at 248-49 (testimony of John A. Volpe, Governor of Massachusetts and Chairman of the Governor's Conference).

To the same effect, again promoting professionalization centered in the highway department over politics or authority shared with municipal planners, see the testimony of the President of the American Association of State Highway Officials before the same subcommittee at its June 4, 1968 hearings specifically on S. 3418, which became the Federal-Aid Highway Act of 1968: "[T]he manner in which section 4(f) of the Transportation Act of 1966 is being administered is working as a delaying factor in getting the program completed and some of the material being drafted relative to double public hearings would allow dissidents, through legal procedures, to tie highway projects up almost indefinitely"; the Department was guilty of "over-emphasis and over-enthusiasm in administering Section 4(f)"; and Section 4(f) was "being used to reopen decisions previously made or to slow down the program." *Highway Safety, Design and Operations; Freeway Signing, and Related Geometrics: Hearings Before a Special Subcomm. on the Federal Aid Highway Program of the House Comm. on Public Works*, 90th Cong., 2d Sess. 74, 76, 108-09 (1968).

²⁹ See p. 29 below.

formulation.³⁰ The bill's focus, however, was not on this detail but on the general problem of urban disruption occasioned by expressway construction. In that context, the legislation moved unmistakably toward balance, and larger participation of local political processes as against the state highway technocracies. Thus, much of the Committee effort, led by Senator Baker of Tennessee, was to develop a more effective and equitable program for relocation of displaced individuals, an effort which matured as Title II of the 1968 Highway Act. Section 128 of Title 23, which previously required State highway departments to provide public hearings only to consider the *economic* effects of urban highway projects, was amended to require that these hearings also consider the "social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community."³¹ Having heard both departmental plans for enlarging political participation in highway planning, and highway officials' objections that the Department's political approach to §4(f) would slow and deprofessionalize the process,³² the Committee knew that adding these factors would require greater involvement by local government officials and agencies and by private individuals and groups.³³ It followed the Secretary's suggestion and endorsed the §4(f) formulation. There was no discussion of the possibility or effects of judicial enforcement.

The Senate Committee's actions overall seem strongly to endorse the general approach to that section the Department had described in its testimony. The Committee remarked in its report,

The Committee is firmly committed to the protection of vital park lands, parks, historic sites, and the like. We would emphasize that every thing possible should be done to insure their being kept free of damage or destruction by reason of highway construction. The Committee would, however, put equal emphasis on the statutory language which provides that in the event no feasible and prudent alternative exists, that efforts be made to minimize damage.

. . .

The committee would further emphasize that while the areas sought to be protected by section 4(f) . . . and section 138 . . . are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of the park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people.³⁴

³⁰ See text following note 23 above.

³¹ Section 128 of Title 23 was amended again in December 1970, effective immediately, to add the requirement that the certification by the State Highway Department regarding public hearings and the consideration of economic, social, and environmental effects "shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered." Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 135, 84 Stat. 1713, 1734.

³² See n. 13 above

³³ S. REP. NO. 1340, 90th Cong., 2d Sess. 11, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 3482, 3492. Based on the information received during the hearings, the Committee was of the view that many controversies now facing the highway projects would be ameliorated, if not eliminated, had local officials been brought into discussions at a sufficiently early stage in the hearing process. *Id.*

³⁴ *Id.* at 18-19, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 3482, 3500.

The Committee leadership reiterated this understanding on the Senate floor.³⁵

Transportation Secretary Boyd also argued for the §4(f) formulation on the House side:

The [House] report indicates the Committee's belief that the perspective in decision-making should be broadened, not narrowed, and that preservation for use is sound conservation philosophy. . . . It is in this spirit that the [Department of Transportation] proposes to administer the Act. . . . The department is aware of no problems which have arisen in the course of administering the present language, nor does the Committee report refer to any. We think the present language of 4(f) is a clear statement of Congressional purpose.³⁶

The House nonetheless chose the words of §138 over those of §4(f). While the Senate prevailed on this issue in the ensuing conference, choosing the §4(f) formulation, it would be hard to take its victory as a repudiation of what the Administration had advised Congress it was doing. This was the course the Administration had urged on both houses.

The Managers on behalf of the House included the following statement in their conference report to their colleagues:

This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority.³⁷

In the Senate, discussion of this aspect of the conference report focused on preserving the Secretary's *discretion* to disapprove local choices that ran counter to the statute, not the possibility that external enforcement might ensue.³⁸ As would be surprising if it expected the latter, Congress did not explore the consequences of its choice either for ongoing projects or for other strongly held values at stake in highway construction – in particular, for the urban relocation of residents of poor and/or minority neighborhoods that was the principal focus of the legislation at hand. Significantly, President Johnson felt that the statute, as a whole, was a defeat of his campaign for highway beautification and amenity at the hands of highway interests.³⁹ The Federal-Aid Highway Act of 1968 became effective August 24, 1968.

PLANNING I-40 FOR MEMPHIS

³⁵ 114 CONG. REC. 19,530 (1968). When Senator Jackson sought assurance from Senator Randolph, Chairman of the Public Works Committee, that his Committee had determined not to modify Section 4(f) and to uphold the previously expressed intent of the Congress on the question of protection of parks, Senator Randolph gave that assurance by quoting from the Senate Public Works Committee Report the second of the two passages in the text as evidence of what the Committee had decided.

³⁶ *Id.*

³⁷ H.R. CONF. REP. NO. 1799, 90th Cong., 2d Sess. 32 (1968) (statement of House managers) (emphasis in original).

³⁸ 114 CONG. REC. 24,033, 24,036-37 (1968) (statements of Sens. Jackson, Yarborough, Randolph, and Cooper).

³⁹ Statement of President upon signing bill into law, 4 WEEKLY COMP. PRES. DOC. 1277 (Sept. 23, 1968); J. ROBINSON, HIGHWAYS AND OUR ENVIRONMENT 296-99 (1971); Callison, *National Outlook*, AUDUBON, Sept.-Oct. 1968, at 94-95.

The Memphis Chamber of Commerce

The business community of Memphis had high stakes in I-40 and the progressive change it represented. When thoughts about that highway first emerged in the 1950's, their city lacked any circumferential road system – indeed, any highway system at all. For decades, Memphis had been administered under the watchful eye of E. H. Crump, an unusually effective machine politician whose taste for low taxes led him to ignore infrastructure and planning.⁴⁰ His hand-picked Mayor from 1949 to 1953, Watkins Overton, for whose distant relative Overton Park had been named, was also a bitter opponent of planning and reform. It was not until 1953, when Overton was succeeded by Frank Tobey and Crump's grip on the city was beginning to fail, that the city began to think about the limited access freeways other southern cities had already begun to construct. In the effort to catch up, the city commissioned a thorough planning study by Harlan Bartholomew & Associates, a St. Louis firm, in 1953. With Crump's death the following fall, a civic reform group that had been working with progressive business leaders to develop support for planning and urban development emerged as the most important political force among the white voters of the city. In 1955, shortly after submission of the multivolume comprehensive plan, they would elect their leader, Edmund Orgill, as mayor.

For the limited access roads that were among its recommendations, the Harlan Bartholomew plan proposed the familiar pattern of a circumferential ring, with north-south and east-west expressway components to carry traffic to and through the commercial center (and Overton Park). Although the Chamber of Commerce was not particularly concerned with the displacements these projects would cause, one could note that they mostly passed through relatively undeveloped or African-American population areas, including a park used by the African-American community; the east-west expressway was the one element of the proposed system that crossed the white residential area of Memphis (as well as Overton Park). For the business community, having the new Mississippi River bridge and the central artery were the central concerns – even before the city's effective center had moved away from the river, and competing shopping and commercial areas had sprung up along the circumferential. Over the years, as threats to the proposal rose and fell – at one point, for example, a major hospital threatened to move out of concern for the impact of vibrations, noise and fumes⁴¹ – they were among its most consistent and vociferous supporters. Overton Park, as such, figured little in their support; perhaps some valued the marginally shorter commute they might expect from homes in the eastern suburbs, but this does not surface in the materials. Their central concern was the health of the downtown financial and commercial community, as well as containing the costs of the enterprise as they understood them.

The business community remained, as well, a force for “modern government” for Memphis. It supported a number of civic reform initiatives, beginning with the ouster of the Crump regime and ending for our purposes in 1966. On the eve of the Overton Park controversy, Memphians voted to replace the existing five-member City Commission with a Mayor and a thirteen-member City Council, whose members would be elected by representative districts to strictly legislative capacities rather than by the city as a whole to executive responsibilities (as the commissioners had been). In 1966, too, the flight of conservative southern white voters from the Democrats to the Republicans led to the election of Memphis's first Republican Member of Congress, Dan Kuykendall. The subsequent municipal elections, in 1967, elected a collection of political tyros – “a business oriented

⁴⁰ The narrative in this paragraph draws largely on the accounts given by Tucker, n. 8 above at 67-72.

⁴¹ n141 Williams, *Expressway Project Voted a Green Light Despite Ingram's "No,"* Com. Appeal, Apr. 14, 1965, at 1; *Ingram Loses X-Way Vote by 4 to 1*, Memphis Press-Scimitar, Apr. 14, 1965, at 1.

group . . . moderately wealthy and middle class," only one of whose members had previously held elective office – as the first City Council.⁴² Racial polarization in the mayoral elections that year, however, had also resulted in the election of former Mayor Henry Loeb, a well-established opponent of civil rights; this set the stage for the 1968 Memphis garbage men's strike that tragically culminated in the assassination of the Reverend Martin Luther King. The proposal to build an expressway through Overton Park received its final municipal imprimatur, for our purposes, when this new City Council took time from its consideration of that agonizing and racially charged strike to meet twice with Federal Highway Administrator Lowell Bridwell and, after vacillating, to assure him that the proposal had the city's support.

The African-American Community of Memphis

The feelings of Memphis's sizeable African-American community about Overton Park do not often emerge from the available materials, but they can be imagined. Before segregation was disestablished – that is, during much of the run-up to the dispute – the park was generally available to whites only; black citizens could visit its Zoo on Tuesdays. Professor Lucie White sensitively imagined the feelings of a

Memphis school girl ... of African descent. If this girl were visiting Overton Park, it would be a Tuesday This girl's school bus would drive from a segregated school on the black fringes of the city – fringes that were already crossed by a freeway. It would pass the elegant homes where her own people, forty percent of the city's population, worked as maids and yardmen, until finally, in the center of this area, it would enter Overton Park. As I imagined this ... girl taking that journey, I imagined mixed-up feelings of bitterness and awe. Although she loved the park, she also hated what its *preservation* would represent. Therefore, I imagined her spitefully, if also silently, allying with the bulldozers to fight those privileged groups who would suffer neither highways nor Negroes anywhere near their neighborhoods, and who knew how to work the system to get their way. I imagined her concluding that unless some of the freeways were built in the Overton Parks of the world – at least as a precedent – all of them would end up in her own back yard.⁴³

Indeed, the other Memphis elements of the Interstate system *were* in her back yard, and a park she might have used had been taken without evident concern for park or community values. The principal alternative to Overton Park investigated, the one using railroad rights of way and old creek beds north of the park, would have had a major impact on a stable mixed residential area in Memphis, one of the few places where its two communities lived together. Unmentioned by the planners, this characteristic of the area became, for some, an important reason to resist moving I-40 away from the park.

By the time the Overton Park issue emerged sharply, black Memphians would have learned of problems associated with the routing of I-40 through Nashville – an episode that reached the Sixth Circuit in 1967.⁴⁴ There, the proposed route would have separated the campuses of two traditionally African-American faculties, Fisk University and Meharry Medical College, from the nearby black community of North Nashville. In addition to disrupting their classes with its noise and diverted

⁴² J. BEIFUSS, AT THE RIVER I STAND: MEMPHIS, THE 1968 STRIKE, AND MARTIN LUTHER KING 145 (2d ed. 1989). The first council, and by early March 1968 entirely distracted by the garbage workers' strike. *Id.*

⁴³ See n. 7 above, 39 UCLA L.Rev. at p. 1336

⁴⁴ Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

traffic, it would have destroyed a public park used largely by blacks. Accompanying street changes the city proposed would have closed a substantial segment of Jefferson Street, site of Nashville's most successful black merchant community. According to the plaintiffs in litigation challenging these plans, preliminary indications of I-40's route had not revealed these dramatic impacts. As originally proposed in 1956, the route had been a direct east-west road traversing railroad tracks, rail yards, and a few white-owned retail businesses. This was the only portion of the initial plan not finally approved in preliminary meetings among state and local officials; by the time the proposal was made public for the federally required hearing in 1957, it had been mysteriously rerouted to swing north through the black community.⁴⁵ As would not be the case in Memphis, the required public hearing was – perhaps intentionally – obscure; notices were sent only to the County Judge, to the Mayor, and to a few post offices located in white neighborhoods. The notices were unspecific about the route, and they gave as the date for the hearing May 14, 1957; in fact, the hearing occurred May 15.⁴⁶ While the *Ellington* court concluded that the location issue had in fact been prominent in Nashville politics for over a decade,⁴⁷ it also agreed with the district court's conclusion that "the consideration given to the total impact of the link of I-40 on the North Nashville community was inadequate."⁴⁸ And while the *Ellington* court found on the merits that claims of racial discrimination had not been well enough proved to require reversing the lower court's denial of preliminary relief,⁴⁹

⁴⁵ See B. Kelley, n. 13 above, at 98-99; A. Mowbray, n. 13 above, at 178-79, 181.

⁴⁶ As *would* often be repeated for important meetings in Memphis, the hearing was imperfectly transcribed – only remarks from the podium were recorded, not those from the audience – and the only formal reference to its use appeared in the following statement of the attorney for the state highway department, responsible for route selection:

I certify that I am an official of the Department of Highways and Public Works of the State of Tennessee and that the above transcript of the public hearing heretofore conducted regarding the location of the above mentioned project has been read by me. I further certify that said Department has considered the economic effects of the location of said project and that it is of the opinion that said project is properly located and should be constructed as located.

Ellington, 387 F.2d at 184.

⁴⁷ *Id.* at 183.

⁴⁸ *Ibid.*

⁴⁹ *Ellington*, 387 F.2d at 185.

Acting on such claims would have carried its own risks to a setting complicated by the existence of many conflicting and important interests. Not only would "alternative routes undoubtedly . . . impose hardships upon others"; the more public precise route selection is required to be, the greater the chance for real estate manipulations increasing public costs for private profit. Moreover, delay in effecting a project that will serve the public good also creates public expense; at some point, one must be able to act.

Id. The *Ellington* court drew on the preliminary character of the proceedings it was being asked to review, and the corresponding prospect that the asserted harms might still be avoided.

In oral argument, the United States Department of Transportation has announced that it will not approve the letting of the contract for this project pending further study, it would appear that final approval of this segment of highway may not yet have been given by that Department. We cannot presume that the Department of Transportation will fail to give consideration to possible revisions in the plans and specifications so as to alleviate as much as feasible the grave consequences which this record shows will be imposed under the present plans upon the North Nashville community.

Ellington, 387 F.2d at 186. Similar awareness of the place of politics may be reflected in the court's reasons for reversing the district court's dismissal of one defendant, the Metropolitan Mayor of Nashville and Davidson County, on the ground that this official lacked jurisdiction over the locating of an interstate highway and could not participate in any decision with respect thereto.

(continued...)

it would not have been hard for a black Memphian to believe that the state highway department had been a party to manipulations producing an outcome improperly favoring dominant white interests over black interests; another contemporary account, this in one of the several "superhighway exposé" books of the time, presented Nashville officials as having refused to specify the exact route until construction bids were sought in 1967.⁵⁰

In any event, as the Overton Park controversy reached its climax in local politics, the dominating concern of the Memphis black community was not how the city, state and federal government would accommodate transportation needs with an unfamiliar urban amenity. It was how the new city government would deal with a racially polarizing garbage men's strike, a strike that would end in tragedy and outrage when the Reverend Martin Luther King was assassinated in Memphis, just as the City Council took its final vote to accept the routing of I-40 through the park.

Citizens to Preserve Overton Park

Professor White imagined, alongside the young African American woman evoked above, a young white girl who

had grown up in the elegant residential enclave bordering Overton Park. This young girl had many wonderful memories of the park -- of hikes through the acres of virgin woodland, family picnics, visits to the zoo. I could imagine her feeling not just saddened, but threatened by the prospect of a freeway cutting through her park, even a freeway unobtrusively depressed below street level for most of its length. It would not just be a question of noise and pollution. Rather, a freeway invading Overton Park would rupture her entire social world. As the 1950s became the 1960s, the tranquility of that world was beginning to unravel -- first with the desegregation of the park itself; then with the civil rights movement and the urban riots; and finally with the assassination of Martin Luther King in Memphis; and the enactment, a week later, of a sweeping federal Fair Housing Act. To this young girl, the prospect of a freeway through Overton Park was not just a tradeoff of trees for asphalt; it signified the threat that she felt all around her ..., a threat to her very way of life.⁵¹

⁴⁹ (...continued)

Although the District Court is correct in its conclusion that the Mayor has no legal power to decide the location of an interstate highway, it cannot be doubted that he possesses considerable powers of persuasion and cooperation. We cannot predict the ultimate disposition of this case in the District Court on its merits. It is conceivable that the final solution could require the closing, opening, or rerouting of city streets, rezoning or other municipal action. A correction of these problems could require cooperation among Federal, State and local governments. We consider it proper to retain a representative of the Metropolitan Government as a party defendant.

Id.

FHWA Administrator Bridwell eventually reaffirmed approval of the route, but with some changes to reduce the barrier effect of the highway and recommendations to the city for action that would ease the relocation of black businesses. A. Mowbray, *supra* note 13, at 183. His explanation for the approval, that by this point the location issue was fait accompli, and his specification of desirable changes are part of the record of the 1968 hearings on Urban Highway Planning, Location and Design that also figured significantly in the Overton Park controversy. *See Hearings, supra* note 21, at 509-16, 560-64.

⁵⁰ *See* A. Mowbray, n. 13 above, at 179-80.

⁵¹ White, n. 7 above, 39 UCLA L.Rev. at 1335-36.

Although planning began earlier (the first federal route approval came as early as November 1956),⁵² that threat became manifest in April 1957, when Memphis newspapers first printed maps that clearly showed the proposed routes I-40 would take through the city, including the park, and indicated that the public would get its chance to speak out on routing issues. There followed a well-attended meeting of the City Commissioners to hear citizen questions and views (Overton Park was only one of the subjects), and the formation of Citizens to Preserve Overton Park (CPOP).⁵³

Citizens to Preserve Overton Park was a citizen's action group in familiar form, created in outrage and enduring for the time it took finally to defeat the project. Its papers, preserved in the Shelby County Library in Memphis, reveal an organization that was never very large, and had dwindled considerably by the late '60's.⁵⁴ Certainly some of the initial support for Citizens to Preserve Overton Park (CPOP) – remnants of the old, anti-planning Crumb machine, for example – seemed to be in the defensive mode Professor White's narrative suggests; former mayor Overton was among its more active early members. As the following narrative suggests, its leaders were resourceful and imaginative in their efforts to marshal political support against I-40; they did not turn to litigation for over a decade. Neither, however, were they willing to accept the compromises and modifications that their political efforts in fact produced. CPOP's core membership was unmistakably animated by a passion for the park; little else could explain their energy and perseverance in the face of an establishment – local, state, and federal – that was willing to bend, but not to deviate from its path.

In its initial efforts, CPOP enjoyed partial success. By mid-May, the city was urging the state to change the expressway's route through the park to reduce its impact by aligning it with the existing bus road.⁵⁵ In September, William Pollard, Harlan Bartholomew's chief engineer in Memphis, appeared before a hearing of the City Commission to present a design that he hoped would accommodate the Commissioners' concerns. It proposed a roadway depressed below the surface, fenced, with provision for pedestrian crossings, and landscaped to reduce its impact. He was met by more than 300 protesting citizens, unwilling to hear him speak or to entertain any plan that would use the park; they had gathered more than 10,000 signatures on petitions opposed to use of the park – the apparent highwater mark in numerical support for the opposition. Fred Ragsdale, head of the city's traffic advisory commission, strongly urged limiting the expressways to the circumferential highway.⁵⁶

On the surface, accommodation was all that those favoring the park route seemed willing to

⁵² *City Looks to Future on Expressway Plan*, Com. Appeal, Sept. 17, 1955, at 3; *Expressway Is OK-ed by City Commission*, Com. Appeal, Sept. 21, 1955, at 16; see also Richard H. Ginn, *Interstate 40 Through Overton Park: A Case Study of Location Decision-making 26* (1970) (unpublished M. Sci. thesis, University of Tennessee) (citing correspondence between engineers of the Tennessee Highway Department and the federal Bureau of Public Roads to place the first federal approval on November 8, 1956).

⁵³ Gray, *Public Gets Chance Thursday to Speak Out on Expressway*, Com. Appeal, Apr. 16, 1957, at 17; Gunter, *Residents Confused at State's Hearing on City Expressway*, Com. Appeal, Apr. 19, 1957, at 1.

⁵⁴ John Vardaman, who became CPOP's attorney shortly after it had decided to litigate over the Park in 1969, doubts there were more than ten members during the time he was dealing with it; he recalls that Amona Stoner, its tireless secretary, would type copies of documents for him, rather than incur the then more considerable costs of Xeroxing. Telephone conversation of August 6, 2004. His law firm's correspondence files hold several boxes of this material; Ms. Stoner and a few other members of CPOP were tireless and passionate correspondents.

⁵⁵ Gray, *Altered Expressway Route Suggested in Overton Park*, Com. Appeal, May 9, 1957, at 1.

⁵⁶ Gray, *Foes of Expressway Clamor: Keep Overton Park Intact*, Com. Appeal, Sept. 18, 1957, at 1; Johnson, *Protesters Plead "Don't Take an Inch of Overton Park"*, Memphis Press-Scimitar, Sept. 18, 1957, at 1; Johnson, *A Young Man Learns About Democracy's "Noisy Side,"* Memphis Press-Scimitar, Oct. 25, 1957, at 31.

offer. Mayor Orgill, presiding, expressed annoyance: "[A]ny group of people who will sit down and listen to how the expressways were planned, the reasons they were placed where they are, will be just as convinced as I am."⁵⁷ Perhaps he experienced the meeting as an echo of his earlier struggles with then-Mayor Overton and the Crump machine whether to have such planning at all. Nonetheless, the Commission asked Harlan Bartholomew to restudy the railway/creekbed route; it reported back a continued preference for the park route – although not for the reasons that later generated the greatest resistance from the local black community, its neighborhood impacts.⁵⁸

The Overton Park controversy then receded from public prominence⁵⁹ until the federally prescribed hearing for the segment of the east-west route, including Overton Park, in 1961. The Commissioner himself conducted that hearing in light of the controversy, with Harlan Bartholomew's engineer Pollard presenting a strictly economic analysis of the route. Several hundred crowded the auditorium. Downtown Association speakers were supportive, but on the whole the largely white and well-dressed audience wanted to ask "what we can do to stop you from going through the park?"⁶⁰ Within two weeks, Mayor Loeb had met with CPOP and endorsed the east-west expressway as the route that "will help Memphis more than any other expressway segment."⁶¹ A month later, the City Engineer is reported to have said that the controversial route would be built last, to see if it was in fact required; "We've tried to get every other possible route approved by the engineers, and they have made at least 32 studies to avoid going through Overton Park, and they found it impossible."⁶²

Controversy subsided until 1964, while construction of other parts of the expressway pushed forward steadily. In that year, as their completion neared the half-way point, the east-west

⁵⁷ Johnson, *A Young Man, supra*.

⁵⁸ All in all, Harlan Bartholomew would undertake preliminary studies of twenty-five distinct routes using the railway/creekbed alternative, with more detailed studies of six; it considered as factors present development, neighborhood boundaries, traffic needs, relation to the current road system (including crossings of major thoroughfares and the ease of locating desired interchanges), maximizing use of the railroad right-of-way, extent of taking required, and relationship to routes to public schools. It chose the park as much more direct (saving time and energy resources), more readily accommodated to existing roads and useful spacing of interchanges, and as offering less disruption to industry. See Ginn, n. 52 above, at 31 (citing 1970 correspondence within the Bureau of Public Roads). At the height of the Overton Park dispute in 1968, the *Press-Scimitar* published excerpts from what was apparently this report, taken from the Federal Highway Commissioner's files. Ray, *Federal Highway Commission Says City Council Must Act on Overton Cross-Way*, *Memphis Press-Scimitar*, Mar. 26, 1968, at 1.

⁵⁹ Clippings files are dominated by general debate about the Ragsdale proposal to limit the expressway system to a circumferential highway, and stories about the construction that had begun on the southern part of the circumferential. It appears that one candidate for Public Works Commissioner ran on a platform of opposition to the east-west route in 1959; he lost the election -- but then, he had not been selected as a member of the "white unity" ticket that swept all results that fall. D. Tucker, n.8 above, at 102-03.

⁶⁰ Allen, *State Officials Get Earful at Hearing on Expressway*, *Com. Appeal*, Mar. 15, 1961, at 1.

The report given to Federal Highway Commissioner Bridwell characterized the hearing this way:

At a public hearing . . . there was some opposition to the location that goes through the park. The opposition came from private citizens whereas approval for the route came from city and county authorities, various planning groups and civic groups as well as individuals and businesses. Because of opposition at the hearing and by letters received after the hearing, the State Highway Department had further alternate studies made in 1964.

Ray, n. 58 above. The report characterized in some detail the comparative merits of the routes studied.

⁶¹ *Loeb Opposed to Rerouting Expressway*, *Memphis Press-Scimitar*, Mar. 29, 1961, at 8.

⁶² *East and West Crossway Will be Built Last*, *Memphis Press-Scimitar*, Apr. 26, 1961.

expressway issues resurfaced, now in the administration of Mayor William Ingram. The Tennessee Highway Department hired Buchart-Horn, an engineering firm, to design this segment; this was the *only* segment for which the original planners, Harlan Bartholomew, were not hired.⁶³ By late spring, CPOP had promised an eleventh hour blitz,⁶⁴ and it seems to have been successful in gaining the attention of relevant figures: although the City Beautiful Commission ("CBC")⁶⁵ and local newspapers⁶⁶ supported the expressway, others voiced shared concern. The Park Commission, the Shelby Forest Council, a number of City Commissioners, and Mayor Ingram all said they'd prefer that Overton Park not be used – although doubtful that change was now possible, and in some cases satisfied that "every effort" had already been made to find another feasible location.⁶⁷

CPOP extended its political efforts well past city government. State Highway Commissioner David Pack (later, Tennessee's Attorney General) first announced that the state planned "to push right ahead,"⁶⁸ but then (apparently under instructions from Tennessee Governor Frank Clement, who was seeking the Democratic nomination for U.S. Senator) wrote CPOP that his office would study all possible alternatives before going ahead. He did this in the face of pressure from the Memphis Chamber of Commerce and the Downtown Association for an immediate start on what was already a considerably delayed project.⁶⁹ His public vacillation continued through the campaign season;⁷⁰ newspaper reports asserted that, in an early fall meeting with Governor Clement and CPOP, the Governor had said that he "didn't mind saying . . . in front of the engineers [that he] would prefer to keep the expressway out of the park."⁷¹ The same story indicates that the controversy had reached the head of the Federal Bureau of Public Roads ("BPR"), Rex Whitton, who had said that the

⁶³ See Record at 134, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (No. 70-1066) (Keeler affidavit).

⁶⁴ *Should the New Expressway Go Through Overton Park?*, Memphis Press-Scimitar, June 3, 1964, at 6; *Bridge Meet Set June 9*, Memphis Press-Scimitar, May 27, 1964, at 1; *Overton Park Group Renews Fight to Block Expressway*, Memphis Press-Scimitar, May 27, 1964, at 5; Edmundson, *Push Is Given to Expressway*, Com. Appeal, May 4, 1964, at 1.

⁶⁵ *Overton Park Group Renews Fight to Block Expressway*, Memphis Press-Scimitar, May 27, 1964, at 5. Formed in the Crump days as an official women's organization to monitor the neatness of Memphis neighborhoods in each of the city's wards, the CBC had survived as a voluntary group since Mayor Orgill's election. D. Tucker, n.8 above, at 27, 80.

⁶⁶ *Through the City*, Com. Appeal, May 5, 1964, at 6 (editorial). Newspaper support for the roads presented the route choices as the product of balanced judgment ("If we saw another way, we would oppose the Overton Park route," response to Skinner, Letter to the Editor, Memphis Press-Scimitar, Mar. 8, 1961). This was a constant irritant to the supporters of CPOP, who believed their viewpoint had no fair hearing in the press.

⁶⁷ Brown, *Commissioners Think Park Route Is Certain*, Memphis Press-Scimitar, June 22, 1964, at 1; White, *Moore Is Opposed to Overton Park Route*, Memphis Press-Scimitar, June 18, 1964, at 25; Porteous, *Forest Council, Park Board Oppose Overton Expressway*, Memphis Press-Scimitar, June 5, 1964, at 17.

⁶⁸ "We have studied and restudied this question and decided some time ago that the Overton Park route is the most realistic. To change now would mean a loss of considerable money and time . . . We're definitely going through Overton Park . . . barring intervention by Washington." Vanderwood, *X-Way Will Go Through Park*, Memphis Press-Scimitar, June 24, 1964, at 1.

⁶⁹ Vanderwood, *Park X-Way Studied Again*, Memphis Press-Scimitar, July 30, 1964, at 1.

⁷⁰ Compare Topp, *Overton Park Route Seems All Settled*, Memphis Press-Scimitar, Sept. 24, 1964, at 1 Whisenhunt, *X-Way Opponents Win New Delay*, Memphis Press-Scimitar, Oct. 10, 1964, at 7, reporting the meeting next described in text.

⁷¹ *Ibid.*

necessary studies had not yet been finalized, and that no effort would be spared to see that all considerations were properly balanced. Within a few weeks, CPOP was meeting with mid-level BPR officials and the engineers from Buehler-Horn to discuss possible changes – albeit changes to reduce the road's impact rather than reroute it altogether. By mid-winter, CPOP had approached Tennessee Senator Albert Gore, Sr., prompting him to ask Mr. Whitton for a status report after the BPR visit. The response, which he forwarded to CPOP, ascribed support for the Overton Park routing to city officials, but indicated the matter had not yet been resolved at the state level.

CPOP's engagement with city politics reappeared after Memphians had agreed to replace their City Commission with Mayor and City Council.⁷² It attempted without *apparent* success to make the expressway an overt issue in the 1967 Council elections, sending each of the more than one hundred candidates a questionnaire about his or her attitude. Only a third responded;⁷³ the one candidate for the Council who made opposition to the road a centerpiece of his campaign lost. Nonetheless, once the elections were over CPOP quickly sought meetings with the new Council to explore the possibility of change.⁷⁴

At the same time, CPOP had been actively seeking intervention in Washington. By this time, §4(f) was in force, and the Johnson administration had given prominence to highway beautification – a diversion from Vietnam, perhaps, but from CPOP's perspective certainly a welcome one. The Senate Public Roads Committee opened hearings into urban highways in November 1967, with Overton Park identified as a trouble spot from the outset. In early December, Representative Kuykendall announced that Highway Administrator Bridwell would be visiting Memphis, and asked for reexamination of the route.⁷⁵ CPOP's indefatigable secretary Anona Stoner – older than Prof. White's young schoolgirl but surely just as passionate about the park – repeatedly wrote Secretary of Transportation Boyd and Administrator Bridwell. Bridwell now responded that "I have spent some time looking into the issues . . . and reviewing the files . . . [and] plan to visit Memphis to take a first-hand look at the situation and discuss the problem with interested citizens and State and city officials."⁷⁶

Bridwell's first visit (overall, at least the third visit that a ranking federal highway official had made) would eventually occur in mid-February; in the two months intervening, proponents and opponents jockeyed for position. In January, CPOP and other interested opponents had the first of two meetings with the new Council to express their views, and CPOP's Chair, Arlo Smith, wrote Bridwell that it hoped for a *private* audience with him, at which CPOP, rather than Mayor Loeb, would control the presentation made:

The new Mayor Henry Loeb is one of the most obstinate proponents . . . although this was not a campaign issue of his. . . . The new council members are strongly influenced by the mayor, and anxious to get along with him, and they are unaware of the factual information

⁷² See text at p. 15 above.

⁷³ That third, not surprisingly, said they preferred alternatives over the park route by a substantial margin. Correspondence in Box 6, CPOP collection, Memphis & Shelby County Library.

⁷⁴ *Ibid.*

⁷⁵ *The Overton Park Issue Again*, Memphis Press-Scimitar, Dec. 7, 1967, at 8 (editorial). The Representative hedged his bets -- he was not seeking "economic suicide" -- but still encountered predictable editorial criticism. "Instead of rising at this late hour in support of die-hard opposition to the project," wrote the *Press-Scimitar*, "Kuykendall should be exerting his efforts toward speeding completion of the expressway as planned and approved."

⁷⁶ CPOP collection, n. 73 above.

as we have long been in a news blackout, in all media, relative to such information.⁷⁷ . . . Previous "hearings" . . . have been chaired and controlled by persons refusing to hear or "have time for" further consideration. . . . [Attending a meeting between you and the Council] will not enable us to fairly present to you our well documented factual information. We will still need a minimum of an hour with you, privately, for our case to be presented. If you wish a joint meeting with the council and the mayor, it should follow our private meeting with you. . . . We are anxious to have you visit Memphis as soon as possible, because frantic efforts are being made to . . . skip-buy property to show "it is too late to change" now.⁷⁸

On February 13 – the day on which the Memphis garbage men's strike began – CPOP spent half an hour with the Council presenting its case. The next day it was among seventy-five persons both opposing and favoring the road who participated in a four-hour hearing with federal Administrator Bridwell. On March 5, it seemed finally to have won its case; the City Council unanimously adopted a resolution expressing its preference that another route be used – if necessary the northern boundary of the park. But CPOP feared, with reason as matters eventuated, that the Council might not hold its ground.⁷⁹ During the weeks following, CPOP and the proponents of the road contended for the attention of the Council and Administrator Bridwell. For its part, CPOP kept up a steady stream of letters, keeping Bridwell informed of local machinations such as the Highway Department's efforts (as CPOP saw them) to force the issue by removing tenants from housing on the approaches to either side of the park.⁸⁰ Similarly, it wrote privately to the chair of the Council to be sure he was aware of Bridwell's eagerness, as it averred it had learned, to have the Council's help in "reaffirming its stand against the Expressway."⁸¹ On April 4, a few days after the strikers' riots and minutes before Martin Luther King, Jr. would be assassinated at the Lorraine Motel, the City Council reversed its course and approved the route through the park.

This resolution resulted from an April 3 meeting between the Council and Administrator Bridwell. CPOP was excluded from this meeting, although the press, state and city representatives,

⁷⁷ While the letter is not explicit just what this information was, it probably concerned the projected costs of alternative routes. State officials regularly presented these costs as millions higher than the costs of the park route, and newspaper stories tended to repeat these figures. Opponents of the park route had a different set of figures, which showed less community disruption and lower costs for some alternatives. Repeatedly presented to various official bodies, including Administrator Bridwell in this instance, these competing figures were never accepted.

⁷⁸ Letter from Arlo Smith to Lowell Bridwell (Jan. 19, 1968), CPOP Collection, n. 73 above. Preparation and even construction at the outer ends of the ten-mile east-west highway had, of course, been going on for some time. An account of progress appearing in the *Press-Scimitar* on March 26, 1968 gives a break-down tending to confirm the skip-buying complaint.

⁷⁹ Thus, barely a week after the Council's vote, Councilwoman Gwen Awsumb had written Anona Stoner of CPOP that "The Council does not wish to be responsible for further delay on a needed section of the Expressway, nor for added unnecessary expense. The response to the resolution seems to indicate that no doubt the original route will more than likely prevail. But we felt we had to try to do what we could. It was worth a try but probably an effort made at too late a date." Letter from Gwen Awsumb to Anona Stoner (Mar. 11, 1968).

⁸⁰ *E.g.*, Letter from Arlo Smith to Lowell Bridwell (Mar. 8, 1968), CPOP Collection, n. 73 above (also questioning the good faith of one council member's reported second thoughts about the March 5 resolution); Letter from Arlo Smith to Lowell Bridwell (Mar. 18, 1968), *id.*, (also asking whether, and if so why, federal funds were being used to finance the acquisitions, if the Department had reopened the park issue); *cf.* Lentz, *Homeowners Stew over I-40 Path Uncertainties*, Com. Appeal, Mar. 17, 1968, at 12.

⁸¹ "So much pressure has been brought to bear on Mr. Bridwell and his supporter, Secretary Boyd, by conservation and recreation organizations throughout the country that they are ready to favorably negotiate alternate routes." Letter from Anona Stoner to Charles Pryor (Mar. 30, 1968), CPOP Collection, n. 73 above.

and a representative of Harlan Bartholomew & Associates were present. CPOP knew that in the 1961 state hearing, audience comments, largely opposing the route, somehow had not been recorded; a similar mishap had befallen the Nashville I-40 process. It got Bridwell to promise that the April 3 meeting would be recorded; but no sooner had the meeting concluded than he called CPOP Chair Smith to report that the City Council's recording equipment had been, embarrassingly, inoperative.⁸² An anguished letter of April 6 from Smith to Bridwell refers to television clips he had seen of Bridwell explaining the diversion costs of the outside-the-park alternatives and to reports he had received from a councilman about Bridwell's "very fair . . . magnificent presentation." What, Smith wanted to know, were the alternatives discussed? Did Bridwell realize with how much regret Council members had now cast their votes favoring the park route? Wasn't this all the product of permitting the state to continue purchases that basically forced the city's hand?⁸³ At about the same time, CPOP's energetic secretary, Anona Stoner, was writing Secretary Udall of the Department of the Interior, seeking to enlist his aid.⁸⁴

CPOP would continue its fight, as indeed the litigation amply demonstrates; but it may be best at this point to turn to the engagement of other participants.

State Highway Officials

State highway officials (and perhaps, as well, other members of Tennessee government) were the most persistent advocates of putting I-40 through Overton Park, and doing so for the professional reasons of highway engineers – it would be the cheapest route, the most direct route, and the route that served the most traffic.⁸⁵ It is worth emphasizing that, as a legal matter, state offices and state officials were the persons primarily responsible for the routing decisions made, and for conducting any public hearings that concerned those decisions. Their relationship with the federal government was as a supplicant for funds; federal financial support would cover 90% of the expense of the roadway if federal approvals could be won. What the federal government might or might not be approving, however, were decisions made by the state of Tennessee and its Highway Commission.

The year 1965 saw a series of events involving state officials and politicians that suggest both the consistent pressure from its highway establishment for resolution, and the political pressures being brought to bear in Nashville. Perhaps, Commissioner Pack intimated, the new bridge over the Mississippi would not be built in Memphis if the east-west leg were not constructed, and the funds would be used to speed construction of another bridge further to the north. But perhaps, also, building the expressway would lead a major Memphis facility, St. Jude's Hospital, to move out of the city, as its leadership began to express fears that vibrations and fumes from the highway would

⁸² A year later, at the hearing on design, recording equipment would again fail as those challenging the proposal came forward to present their views.

⁸³ CPOP Collection, n. 73 above. Newspaper accounts confirmed the regret with which the vote had been cast and the members' stated sense that it was virtually forced by decisions made a decade earlier. Kellett, *Overton Parkway Route Cleared by City Council*, Com. Appeal, Apr. 5, 1968, at 25.

⁸⁴ Letter from Mackey to Anona Stoner (June 11, 1968) CPOP collection n. 73 above, (referring to letter of Apr. 15, 1968, *ibid.*)

⁸⁵ Whatever may have been the racial element in Nashville, and however black Memphians may have viewed their state government generally during the period we are discussing, it is hard to find any element of racial exploitation in the state establishment's support for the routing through Overton Park. The route it preferred for *this* segment of the Memphis limited-access highway system did not significantly impinge African-American interests.

interfere with medical care.⁸⁶ Aware that this dispute was becoming a national symbol of a viewpoint with which Pack claimed some sympathy,⁸⁷ and with the results of a new alternative route study again demonstrating the economic advantages of the park route in hand,⁸⁸ Commissioner Pack announced two modifications at the end of July: construction measures would be taken to protect the hospital, and the design of the projected interchange on the eastern edge of Overton Park would be altered to remove most of it from the park. There would, however, be no departure from the route as a whole.⁸⁹

Commissioner Pack's correspondence with Administrator Whitton makes plain that his purpose was to recognize the opposition to the road, to go a substantial distance toward meeting it, but to keep the road in Overton Park.⁹⁰ He led the resistance to design changes in the park that would add to I-40's expense. In January 1966, after personally inspecting the route and possible alternates, Administrator Whitton wrote him to "reaffirm our previous approval" of the Overton Park route, subject however to "the most exacting efforts to assure a finished product which is in keeping with the area and future Park usage" as "a condition to our action. We ask that the design be subjected to continuous evaluation by qualified architectural landscape personnel . . . fully coordinated with the appropriate city park officials."⁹¹ Pack's reported and peculiarly ungracious reaction was to respond that "the route through the park probably will not be depressed, as was earlier considered. Rather, the plan is to have the route on grade and to make full use of landscaping."⁹² This reaction must have suggested to those Memphians who wanted to have the road, but protect the park, that the engineers in Nashville could not be fully trusted.

Nineteen sixty-seven brought a new governor and a new highway commissioner, who soon indicated that after reconsidering the route and its alternatives they were convinced that "the route through the park is the most direct and the most economically feasible."⁹³ Not long after, D. Jack Smith, the member of the Tennessee House of Representative serving the Overton Park district, introduced in the House a bill to prohibit the spending state funds to build a road through any public park in Shelby County – i.e., to block I-40's routing through Overton Park.⁹⁴ To the Press-Scimitar, the bill illustrated the evils of the small election districts against which it had recently inveighed, by putting "a legislator under pressure to put the wishes of his particular district ahead of the welfare

⁸⁶ Williams, *Expressway Project Voted a Green Light Despite Ingram's "No,"* Com. Appeal, Apr. 14, 1965, at 1; *Ingram Loses X-Way Vote by 4 to 1*, Memphis Press-Scimitar, Apr. 14, 1965, at 1.

⁸⁷ *Park v. X-Way -- A "National Symbol,"* Memphis Press-Scimitar, June 1, 1965, at 4.

⁸⁸ See Ginn, n. 52 above, at 49.

⁸⁹ Brown, *Green Light Flashes for E-W X-Way*, Memphis Press-Scimitar, July 31, 1965, at 11.

⁹⁰ See Letter from David M. Pack to Rex M. Whitton (Aug. 23, 1965), *reprinted in* Record at 143-48, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (No. 70-1066).

⁹¹ Letter from Rex M. Whitton to David M. Pack (Jan. 17, 1966), *reprinted in* Record at 149, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (No. 70-1066).

⁹² Bennett, *U.S. Endorses Freeway Link Through Park*, Com. Appeal, Jan. 19, 1966, at 1.

⁹³ Bennett, *Interstate 40 Route Through Park Called "Final" by Ellington*, Com. Appeal, Feb. 4, 1967.

⁹⁴ *Park, I-40 Bill Rekindles Friction*, Com. Appeal, Mar. 11, 1967, at 1. Ginn cites a March 9 meeting of the Shelby County caucus with a CPOP representative as the genesis of this measure. Ginn, n. 52 above, at 63.

of the whole community."⁹⁵ Representative Smith's proposed statute appears to have sunk into oblivion.

In the wake of the *Overton Park* decision, consistent with their previous efforts, state highway officials continued to push not only for the route through the park, but for the least expensive design elements.

Federal Highway Officials

Although this might not be the impression readers would get from the *Overton Park* opinion, federal highway officials were at the other end of the spectrum from those in the states. We have seen already how often instructions to attend to amenities like parks came, first, from the Bureau of Public Roads and then, after its creation in 1966, from the Department of Transportation. Of course, as prior pages will also have suggested, there was an evolution, as the fact and impacts of the interstate system became more evident. But whether as a result of their dealings with Congress – which as we have seen was almost yearly sending signals of increasing complexity and responsibility about the road-planning enterprise – or simply as the product of a somewhat different kind of professionalization of their bureaucratic function, federal highway officials were more likely to see the larger picture, the contending interests, the need for accommodation and compromise.

Rex Whitton, for example, one of earlier federal administrators to deal with the *Overton Park* issue, was no enemy of parks. Within six months of his flurry of correspondence in the fall of 1964 and subsequent visit to Memphis,⁹⁶ the BPR had issued a circular promoting the protection and improvement of public recreational resources in the road-building process. Not long after (following a BPR conference calling on highway planners to relate transportation plans and programs to social and community values⁹⁷ and before legislation on the subject), Administrator Whitton wrote that the Bureau now required states to give "full consideration to the preservation" of parklands and to demonstrate their responsiveness to suggestions made.⁹⁸ Although doubtless other pressures sometimes contributed to rather quick and dirty decision-making by the federal bureaucracy, it was sending clear signals that these considerations were valid and valued. Recall in this respect Administrator Whitton's 1966 direction to State Highway Commissioner Pack to make "the most exacting efforts to assure a finished product which is in keeping with the area and future Park usage" as "a condition to our action."⁹⁹

Lowell Bridwell, Whitton's successor (and the first administrator of highway programs for the

⁹⁵ *The Expressway, and Log-Rolling*, Memphis Press-Scimitar, Mar. 13, 1967, at 6 (editorial). In a southern city, so soon after the Voting Rights Act had been passed, the virtues (or vices) of election district size included the greater tendency of small districts to return an ethnically diverse body of representatives. The recent agreement of Memphians to adopt a city council form of government, in which district representation would for the first time play a role, promised to inject African -Americans into municipal government.

⁹⁶ P. 21 above.

⁹⁷ See Holmes, *The State-of-the-Art in Urban Transportation Planning or How We Got Here*, 1 TRANSP. 379, 391-93 (1973).

⁹⁸ Whitton, *Highway Location: A Socio-Economic Problem*, 1 PARKS & RECREATION 24, 26 (1966) (emphasis omitted).

⁹⁹ See p. 25 above.

new Department of Transportation), was also attentive to park issues.¹⁰⁰ Indeed, this was true of DOT officials generally – albeit in the context of a general and continuing effort to hear, not from state highway bureaucrats but from city politicians. The creation of the Department of Transportation had produced typically complex, not dichotomous, change. Certainly, in creating the new Department with its multiple responsibilities, Congress had repudiated the almost mechanical "cost-benefit" calculations of economic advantage that had marked early highway planning. Planners must now consider more than the quantifiable issues of time, cost, anticipated traffic burden, and miles. To demand that the not-readily-quantified be considered, however, is not to choose *which* such value is to be favored; the political history gave the Department little reason to think that Congress and the President had required more than that they require local processes to consider these questions in the first instance, under some supervision to see that park values were seriously weighed. Neighborhood disruption, the requirement of resettling, the erection of racial barriers and interference with racial integration entailed values as ineffable as the use of parks, and the new statutes (like the political temper of the times) were emphatic about these values too. Intuitively, one would believe that the first Secretary of Transportation and his associates would have a reasonable understanding of the political play.

What one sees in the relevant federal materials, then, is sensitivity, but *not* an understanding that any one of these ineffable values – park values in particular – must be controlling. Many elements of the then developing Interstate Highway network were in contentious play, often in the context of local politics and city planning issues generally.¹⁰¹ Internally, the issues of §4(f) and its initial seeming inconsistency with the Federal-Aid Highway Act of 1966 were debated. Yet no one, not even those responsible for its environmentalist bureaucracy, imagined that in problematic contexts the park value would be regarded as absolute or presumptively controlling.¹⁰² And one can see that this is the course the Department followed, without resistance from the Congress.

Certainly this was how the new Department and Administrator saw the issues concerning the use of Overton Park. Thus, in connection with his visits in the winter of 1967-68, a DOT Assistant Secretary, referring specifically to the Overton Park controversy and Bridwell's coming visit, told Memphis Kiwanis that Memphians would have a "much greater voice" in making the transportation decisions that affect their lives. "We [DOT] feel you should make this decision because you are best equipped to make it -- because you will know what will make your commerce thrive and what will make the lives of your people more meaningful."¹⁰³

¹⁰⁰ Bridwell's personal commitment to environmental values is suggested, *inter alia*, by a talk given during this period to a Pennsylvania Department of Highways seminar. 1968 Highway Research Record, Highway Research Board (1968). Addressing the problems his office faced in quantifying many values, Bridwell spoke about the importance of considering and integrating them; highways are not everything, he acknowledged, and must coexist with the rest of the communities they serve. He used as his example in this talk a recent effort in Baltimore, where he had undertaken a series of meetings, contacts, etc., seeking to develop consensus and understanding. Without these efforts, he warned, likely results included poor design, loss of community values, placards and lawsuits. See also n. 21 above.

¹⁰¹ New Yorkers well remember the long battles over the proposed West Side Expressway; as in San Antonio the brouhaha over Breckinridge Park, in New Orleans that over the French Quarter and in Washington, D.C. the Three Sisters Bridge – probably every major metropolitan area had at least one such battle royale.

¹⁰² See Gray, Section 4(f) of the Department of Transportation Act, 32 Md.L.Rev. 327, 371-72 (1973). Oscar Gray, director of the Department of Transportation's environmental programs during the Overton Park controversy and a strong supporter of an aggressive approach to the requirements of §4(f), acknowledges that the Court's interpretation was beyond what even the "stau[n]chest environmentalists in the Office of the Secretary" had urged during the internal considerations; they had argued that the statute prohibited regarding parkland values as on a par with non-environmental considerations, but did not exclude the possibility of a balancing approach within that framework.

¹⁰³ *Federal Aide Cites Independent Ideas*, Com. Appeal, Dec. 14, 1967, at 7.

Administrator Bridwell must have been aware that the course of action he took that winter reopened the siting issue and thus permitted the new standards of §4(f) to apply. He was under no apparent *legal* obligation to do this. On his first visit, the day after CPOP had spent half an hour presenting its case to the new Council,¹⁰⁴ he briefly met the Mayor, the Chairman of the Council and representatives of the Downtown Association together with the press. He then made a tour of the park and the expressway route, and returned to the federal building for a four-hour hearing at which CPOP and others both opposing and favoring the road made presentations; about seventy-five were in attendance. He left the city indicating that he had a decision to make in "several days"; that "we have had all the studies on this that we need"; that if he didn't act, the expressway would be built; and that "as of right now, the city of Memphis' official position is in favor of I-40 and going through Overton Park."¹⁰⁵

The City Council changed that position with its March 5 resolution seeking rerouting.¹⁰⁶ In response, he let it be known that he needed a specific, reasonably well-developed alternative routing proposal; the newspapers presented this in a manner that made him appear impatient – possibly threatening the east-west expressway project and the Mississippi River bridge.¹⁰⁷ Yet underlying the stories was not only Bridwell's clear understanding that the requirements of §4(f) would now have to be met if the route were to go through Overton Park, but also his acknowledgment of an enforcement device within the Executive branch that would serve to keep the Department honest in its approach to the provision. Secretary of the Interior Udall had been charged by a President notably committed to highway beautification with assuring the enforcement of the new law, and would not likely be satisfied unless the Council were to take a positive position.¹⁰⁸

Annoyed that the Administrator would air the controversy in the pages of newspapers already full of criticism over the garbage men's strike,¹⁰⁹ the Council first discussed the matter with him in a conference call, and then persuaded him to meet them at Memphis airport on April 3. He remarked on the eve of that meeting – which, as we have seen, produced Council approval of the route¹¹⁰ – that

the Overton Park route and a similar park crossing in San Antonio are two "hot spots" being eyed closely by the conservation interests for compliance with a 1966 federal law limiting the use of park property for expressways. What we have in Memphis is a question of conflicting values It is preferable for the City of Memphis, through the mayor and council, to decide what values are to be applied. If city officials don't do this, then I have the obligation of doing it. But I would much rather be guided by local officials. This doesn't mean of course, that I

¹⁰⁴ See p. 23 above.

¹⁰⁵ Riker, *Expressway Case Gets Last "Ride"*, Com. Appeal, Feb. 15, 1968, at 55; McKee, *X-Way Man Tells City: Decide*, Memphis Press-Scimitar, Feb. 14, 1968, at 1.

¹⁰⁶ See p. 23 above.

¹⁰⁷ *City Sticks to X-Way Alternate*, Memphis Press-Scimitar, Mar. 12, 1968, at 1.

¹⁰⁸ *Id.* By 1968, Bridwell appeared also to be aware that a lawsuit might be brought to challenge any final decision to route I-40 through the park.

¹⁰⁹ Porteous, *Council Delays Action on Overton Park X-Way, Will Reconsider Next Week*, Memphis Press-Scimitar, Mar. 27, 1968, at 16.

¹¹⁰ See p. 23 above.

will accept any kind of guidance from them. It must be reasonable, rational and prudent.¹¹¹

Later arguments would question how open Bridwell was to reconsideration, whether he had not extorted the Council's agreement by monetary threats or perhaps misrepresentation. Yet although contemporary newspaper accounts and correspondence give some support to this view, it is hard to square with the general course of action he took toward Overton Park in particular, and toward his responsibilities in the new Department in general. His DOT administration repeatedly emphasized its openness to the consideration of multiple values, and took a variety of steps (including the legally unnecessary step of reopening the Overton Park controversy) to implement that attitude. It knew it was acting under close political oversight. For the Administrator to make two trips in a two-month period personally to review a three-mile segment of public road was an extraordinary commitment of effort, one not readily made simply for show. More than a decade had transpired since the route had been fixed; it had been reconsidered again and again under political impetus not readily discredited as a comprehensive and continuing sham. And life *had* continued. The issues *were* close; as the remainder of Memphis expressway system grew and as citizens and businesses began to appreciate and accommodate themselves to its changes, commitments *had* been made that over time narrowed options and hardened attitudes.

On April 19, Administrator Bridwell announced his decision to reaffirm the earlier federal approvals to direct I-40 through Overton Park. As with earlier federal approvals, this one came with instructions – now undergirded by federal statutory requirements – that “in the actual design stages we will try to minimize as much as possible the impact of the highway on the park facilities.”¹¹² And it came with evidence of political blessing; simultaneously, Governor Ellington and Representative Kuykendall announced their acceptance of the decision.¹¹³ Secretary Boyd wrote to CPOP Chairman Arlo Smith in explanation of the decision, saying “Now that the decision has been made on the specific alignment of the route, I have asked Mr. Bridwell ... to develop a number of specific design alternatives to minimize damage to the park and its facilities.”¹¹⁴ As would be lost on neither CPOP nor, eventually, the Justices of the Supreme Court, this letter neither used the statutory “feasible and prudent alternative” formula nor asserted that Secretary Boyd had himself made the decision he was purporting to explain.

Within a month, Administrator Bridwell and Transportation Secretary Boyd would be testifying in the congressional hearings that led to enactment of the Federal-Aid Highway Act of 1968. As we have seen, with the Department’s encouragement, this Act reiterated the §4(f) formulation.¹¹⁵ In his testimony, Administrator Bridwell had detailed both the Department's understanding of and support for §4(f), and the course of action it had followed in a number of controversial highway decisions, specifically including Overton Park. “Unfortunately,” he told them, “there is no legislative history on [§4(f),] so there is no real guidance from the Congress in interpreting the act. Therefore, we are faced with the bare words, ‘if prudent and feasible,’ and if it is not prudent and feasible, to minimize

¹¹¹ *Expressway Route Decision Urged by US Road Official*, Com. Appeal, Apr. 3, 1968, at 21.

¹¹² Adams, *Park X-Way Route Gets Final O.K.*, Memphis Press-Scimitar, Apr. 19, 1968, at 1.

¹¹³ *Ibid.*

¹¹⁴ Transcript of Oral Argument on a Motion for Stay before the United States Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, OT 1970-1076, 25 (Dec. 7, 1970).

¹¹⁵ See p. 11 above.

the damage."¹¹⁶ The Department had been experimenting with a variety of approaches to section 4(f) in a number of urban settings where conflict had arisen over conflicting values: redevelopment, community displacement, racial justice, "white flight," business district reorganization, environmental and historic preservation, and so forth.

He described an approach that relied heavily on the injection of park values into local hearing processes where issues such as neighborhood integrity and dislocations would also be considered. Rather than treat route decisions as primarily for the Washington bureaucracy, it accorded substantial decisional responsibility to properly instructed and supported local officials. The statutory recognition that there might be no "prudent" alternative route permitted a balancing of competing interests – safety, neighborhood integrity, and the avoidance of large-scale urban relocations. Although "a few years ago" federal officials had emphasized both "developing local planning competence . . . and . . . removing it from the vagaries of the political system," he now acknowledged that the professionals had proved insufficiently responsive to community values;¹¹⁷ hence the Department was seeking to promote greater community involvement in the development of the transportation plans, to make professional planners and engineers more responsive to community needs and goals.¹¹⁸ Bridwell told the Subcommittee that approximately twenty-five cases pending in the Department raised "fundamentally . . . the same problem, namely, the conflict of community values."¹¹⁹

I reject the idea that we have an either/or situation before us, either/or in the sense that you must choose one as distinct from the other and that you cannot have both. In other words, either you can't have highway or you can't have housing or you can't have a highway and you can't have a park, because in my opinion if we do our job, do it thoroughly, do it right, and

¹¹⁶ *Hearings* n. 21 above, at 473.

¹¹⁷ *Id.* at 533. The point was well expressed in M. Levin & N. Abend, n. 14 above, at 245:

Area transportation planning, like other subjects that most people find both complex and boring, is relegated to professionals. Decisions are frequently made in back rooms on the basis of narrow technical criteria far removed from public discussion. Public hearings, until recently at any rate, have tended to be perfunctory pro forma affairs in which the participants are overwhelmed by masses of expensive maps and data. Accordingly, most significant development decisions are made by members of narrow professional guilds. Alan Altshuler has called this "creeping fait accompli," in which agency professionals adopt a series of decisions under the guise of technical necessity until those decisions eventually, and sometimes unwittingly, accumulate into a major policy.

The colliding bureaucrats, in Levin and Abend's account, are highway planners and general purpose city planners -- the one group focused in the Department of Transportation (at the federal level), the other at the Department of Housing and Urban Development. Their case studies, they thought,

helped to bring into focus the long-standing suspicion, current among [city] planners, that highway engineers are narrow, callous technicians, heedless of the social impact of their efforts. Highway engineers were confirmed in their belief that planners are woolly-headed theoreticians lacking the practical sense to build a birdhouse, let alone to exert a useful influence on the routing of major expressways. The planning agencies were firmly committed to the concept of citizen participation, the highway agencies to the limited involvement of affected individuals and groups through statute-satisfying public hearings.

Id. at 244.

¹¹⁸ We are trying to accommodate it by much more deeply involving the public in discussion, in the presentation of facts, and hearing of their points of view, and instead of letting the professional planners make the decision saying to the elected representatives of these people, 'this is your decision to make'.

Hearings, n. 21 above, at 533-34.

¹¹⁹ *Id.* at 486.

you give us the tools to work with there isn't a reason in the world why we can't accomplish both.¹²⁰

Bridwell told the committee that in Memphis the controversy involved a park that was "extremely attractive and highly used," and that the long-standing plans to build the highway through it had culminated "recently in considerable controversy over whether the park could or should be used" for the highway.¹²¹

Once again this 4(f) portion of the Department of Transportation Act came into play. In effect it required us to do the same type of thing that we did in New Orleans,¹²² go back and look at, is there another feasible and prudent location.

Again experimenting we handled this one a little bit differently. We went to the city council of Memphis and we said, "Yes, there are alternatives. . .". We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly [sic] it was feasible . . . We went through this for approximately [three and a half] hours in which we left it completely in the hands of the city council to choose anything they wanted to choose, and after several days the city council voted to stick with the original line through the park.¹²³

Bridwell said he and the City Council had discussed four alternatives and the disruptions each would cause, and that he had put to them the issue of priorities. Many sociological factors, that are not particularly susceptible to quantification "in our ordinary use of the word 'quantification' have been and are being taken into account and without any question increasingly so now and in the recent past."¹²⁴ Although some of the contending community values in Memphis could be measured, some could not be, and none could be measured in a "completely satisfactory sense." Nor could hearings be relied upon to supply a resolution. Witnesses who appeared in Memphis hearings, as elsewhere, had been critical of the decision to go through the Park; but those witnesses were understandably expressing a preference for "their own personal set of values" in a situation of inevitable conflict.

There is no nice, easy answer to this and there never will be. . . . Anytime there is disruption

¹²⁰ *Ibid.*

¹²¹ *Id.* at 479.

¹²² Bridwell explained, *id.* at 471-73, that the New Orleans project, like the Memphis project, illustrated the Department's effort to form "joint concept teams" to bring "a multiple professional discipline effort" to bear on the problems of highway location and design. The issue in New Orleans had been the city's historic French Quarter, which both state and city planned to use. The FHWA understood §4(f) to entail two issues – first, whether there was "another reasonable, feasible location for this highway"; and second, whether all possible measures had been taken to make the road in its projected location consistent with "preserving and enhancing the historical features of the city of New Orleans and the French Quarter."

Regarding location, the Department had found that

alternative locations would have been more disruptive to the community than the originally chosen; or that the alternative locations, did not serve the same corridor of traffic or; third, that alternatives were so much different that those originally planned that they couldn't be accomplished for other reasons, for example, limitation upon the number of interstate miles available.

Design thus became a central issue. "From my standpoint, we have made the determination that there is no feasible and prudent alternative so the problem then becomes one of minimizing damage." Bridwell used photographs to show how the design had been altered to minimize the damage.

¹²³ *Id.* at 479-80.

¹²⁴ *Ibid.*

to an established pattern in the urban environment there necessarily must be conflicting sets of values brought into play and some one has to make the decision about which set of values prevails. The Secretary testified yesterday that except for very unusual circumstances the decision of the local people would prevail, in the form of the action of the elected representatives, their mayor, their city council, their appropriate local officials.

That was precisely the reason that we went to the Memphis city council and in effect said, 'Take your choice. You can have anything you want and we won't even as much as tell you how many dollars it costs because we don't want to influence your decision. You have to decide on the basis of contending unquantifiable community values.'¹²⁵

His lively dialogue with the Subcommittee sympathetically explored, and did not condemn, the approach he described. And once these hearings were concluded, the Subcommittee moved immediately to consider the Federal-Aid Highway Act of 1968.

To understand the remaining events leading up to the court's decision in *Overton Park*, it may suffice merely to sketch the events leading to Secretary Volpe's refusal to revisit the location issue, and his approval of a design sunk more deeply into the ground than the state wanted, albeit not deep enough to avoid the impacts the road's opponents feared. As the preceding narratives show, issues of design to protect the park had been important from at least the hiring of Buchart-Horn to design the park segment in 1964, and "the most exacting efforts" to protect the park had been a stated condition of the federal route approval in January 1966, months before the appearance of a statutory command. The effect of §4(f), however, was to permit the Secretary to force the Tennessee Highway Department's hand on the question of design; and the effect of section 128, as the Secretary understood it,¹²⁶ was to increase the political pressures on this issue. Thus, when in early June of 1968 the Highway Department sought federal approval of its design for the road, which the City Council had already approved, Bridwell promptly responded with a request that it study a lowered grade line.¹²⁷ A September story in the *Commercial Appeal* made it clear that East-West expressway construction had been slowed on instructions from Washington to take all possible steps to minimize damage to the park.¹²⁸

With the pendency of a presidential election and then the election of Richard Nixon, construction slowed still further – now, at the initiative of state and city officials who may have understood that Secretary Boyd was likely to require some form of tunnel¹²⁹ and hoped a Republican Secretary of Transportation and Highway Administrator would permit the road to be built at or near ground

¹²⁵ *Ibid.* As part of his deposition on the 1971 remand in *Overton Park*, Mr. Bridwell's then deputy, Edgar Swick, would testify that Bridwell had been concerned throughout the process with the overall attitude of Memphians to the controversy. "He had a real desire to know if the people wanted it, if it was just a splinter group opposed to it and if there was any real concern in the city as a whole about the route. It was an attitude he took in regard to all urban controversies of this nature . . ." Black & Jones, *Appeal Court Denies Pleas by X-City Route Protesters*, Memphis Press-Scimitar, Sept. 29, 1971.

¹²⁶ See p. 13 above.

¹²⁷ Record at 134, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (No. 70-1066) (Keeler affidavit).

¹²⁸ See *Brakes Put to Expressways*, Com. Appeal, Sept. 15, 1968, at 2.

¹²⁹ He would so testify at the hearing on remand. Lollar, *Planning Expert Offers Alternate Park Routes*, Com. Appeal, Oct. 1, 1971; Lollar, *Nixon Officials Cut Plan to Depress Park Route, Says Johnson-Era Chief*, Com. Appeal, Oct. 13, 1971; see also *supra* note 187.

level.¹³⁰ President Nixon had appointed as his first Secretary of Transportation the former head of a large construction company, John Volpe. Revised plans for a lowered grade line traveled from the DOT to the Tennessee Highway Department and back again in February and March of 1969. On May 19, the THD held the required design hearing in Memphis before an audience of about 100. The principal issue discussed was whether the road should be tunneled under the park; the Department of the Interior's Bureau of Outdoor Recreation and the National Park and Recreation Association, among others, strongly supported that option.¹³¹ The state's recording of the proceedings once again failed, although at DOT's insistence written submissions were obtained.

While design approval was pending, state and city officials took an action that seems strongly to reflect an understanding that they were obliged to protect park values. Tennessee had permission to secure the necessary rights of way, and in September it completed that process by purchasing from the city the 26 acres of Overton Park land it required, for a negotiated price in excess of \$ 2,000,000. The city had undertaken by ordinance to spend all the funds thus received for the acquisition of new park lands; half the purchase price was immediately committed to purchase a 160-acre golf course that had long been on the city's list of possible park acquisitions.¹³² Although the materials consulted for this study are not explicit that the ordinance was prompted by the requirements of §4(f), one readily understands the undertaking as a direct means by which park values were protected in the transaction as a whole.

In the meantime, the opposition to the road once again had reached the Secretary of Transportation. In July, the Secretary of the Interior wrote to urge the use of a tunnel "to minimize harm to the park";¹³³ a late September story in the *Press-Scimitar* remarked that Department officials had ordered a halt to development of I-40, pending Secretary Volpe's return from a European trip;¹³⁴ and the *Commercial Appeal* reported first a telephone interview on October 1 indicating that he was having a "second look [at the route] to see that it is the most feasible location" and then a telegram that "there is no feasible alternate route" and "therefore my decision, which will be made as soon after my return as possible, will be related to design considerations in preserving the environmental quality of the park."¹³⁵ Those considerations, the story related, included a tunnel in at least some portions of the park; and documents at the hearing on remand showed that there had been a strong internal

¹³⁰ See Means, *Freeway Route Bisecting Park Delayed Again*, Com. Appeal, Jan. 30, 1969, at 1; *Park Route's Up-or-Down Issue: Whose Decision?*, Com. Appeal, Feb. 11, 1969, at 15 ("[Tennessee Highway Commissioner] Speight decided two weeks ago to stop expressway work and see what the Nixon Administration's view would be. 'Any engineers that would recommend that we build that monstrosity [a depressed freeway across the park] ought to have his head examined,' he said.")

¹³¹ Chisum, *Expressway Through Park Is Likely to Start in Fall*, Com. Appeal, May 20, 1969, at 1; Porteous, *Foes Attack X-way Route Once Again*, Memphis Press-Scimitar, May 19, 1969, at 1.

¹³² Eventually, 405 acres of new park land would be acquired to "replace" the 26 acres to be removed from Overton Park. Memphians had recently been told that the city had only about half the acreage national standards suggested for a city of its size, *Land Purchases from Overton Park Account*, Com. Appeal, Oct. 7, 1977, at 29, and the new acreage represented only a very small proportion of the new park facilities a city planning document had suggested were required (Vol. 5, Community Facilities Study for the Memphis City Council, June 1968, in CPOP Box 1, recommended that city parks be expanded from 10,334 acres to 42,719 by 1990, at a cost in excess of \$ 100,000,000). Yet the transaction produced a 16:1 improvement in committed "green space." A map of land purchased from the Overton Park land account, published in the *Commercial Appeal* for October 7, 1977, shows the bulk of the new acreage falling outside the city center and, as with Overton Park, in areas of predominantly white population.

¹³³ *Numerous Expressway Memos Revealed*, Memphis Press-Scimitar, Oct. 2, 1971, at 6.

¹³⁴ *U.S. Official Blocks Park X-Way, Loeb Says*, Memphis Press-Scimitar, Sept. 30, 1969, at 1.

¹³⁵ Covington, *Volpe Now Says Design Only in Overton Park Route Case*, Com. Appeal, Oct. 4, 1969, at 1.

recommendation to that effect from the Department's Assistant Secretary for Urban Systems and Environment.¹³⁶

Secretary Volpe issued his approval of I-40's design November 5, 1969, after the state and city had agreed to depress most of the roadway by an additional one or two feet, so that even the tops of trucks would be below ground level at most locations. Whether for reasons of expense or genuine fear of the consequences of floods and of still water as a breeding ground for mosquitoes, however, the city remained adamant that the road could not interfere with the natural drainage of Lick Creek, and so the design provided for the road to rise above grade level to cross the creek.¹³⁷ One month later, CPOP filed its lawsuit. Preparation moved fitfully as the case made its way from district court to Sixth Circuit to the Supreme Court, with the Department prevailing in each venue but the last; the park itself was untouched, but the approaches could be – and were – prepared.

City Officials

Cities have bureaucracies, too, and it would be a mistake to see the city issues as if they were solely for the Mayor and Commissioners or, after 1967, the Mayor and City Council. As we have already seen, the City Engineer was constantly heard from concerning design issues, and a variety of boards and commissions were consulted or voiced opinions from time to time. Memphis politicians might easily see the use of Overton Park as a decisive political issue.¹³⁸ One might even characterize the course of development leading up to the Council decision of April 5, 1968 as one that increasingly placed responsibility for this decision on elected City's officials. As late as 1964, the Mayor and Commissioners had tended to discuss decisions as ones to be made by state and federal officials, not them. In 1965, Mayor Ingram could remember no Commission vote on the subject,¹³⁹ and in an April vote only he opposed the route.¹⁴⁰ On May 2, 1967 (after Representative Smith's abortive bill in the Tennessee House of Representatives and BPR's preliminary approval of the road design), the City Commission again voted to accept the park route, with Mayor Ingram again in dissent.¹⁴¹

Then came the new form of city government, and Administrator Bridwell's willingness to reopen the routing issue in a context to which §4(f) would clearly apply, all the while insisting that what he wanted to do was to make this a decision for Memphians. As late as January, 1968, the *Commercial Appeal* reported that Mayor Loeb (Memphis' Commissioner of Public Works and a supporter of the road when the plan was first received in the mid-'50's) had assured Tennessee Highway Commissioner

¹³⁶ *Numerous Expressway Memos Revealed*, Memphis Press-Scimitar, Oct. 2, 1971, at 6; Black, *Witness Says U.S. Rejected X-Way Tunnel on Cost Basis*, Memphis Press-Scimitar, Oct. 9, 1971, at 11 (testimony of Oscar Gray, Director of DOT's Office of Environmental Impact).

¹³⁷ *Expressway Improved and OK'ed*, Memphis Press-Scimitar, Nov. 5, 1969, at 8 (editorial).

¹³⁸ The voters of Memphis never clearly treated it as such; CPOP and others tried to make I-40 an issue in local elections, but no declared opponent of the road ever won election.

¹³⁹ Whisenhunt, *Mayor Bucks Overton Park Expressway*, Memphis Press-Scimitar, Jan. 4, 1965, at 18.

¹⁴⁰ See D. Tucker, n. 8 above., at 111-12. Ingram, it may be remarked, was something of a maverick in Memphis politics; his election had been an unpleasant surprise to the city establishment, and four-to-one face-offs between him and his commissioners seem to have been commonplace.

¹⁴¹ *Park Freeway Gets City's OK*, Com. Appeal, May 3, 1967, at 25.

Speight that the city stood behind use of the park and urged its construction.¹⁴² Then came the February meetings already recounted, and the same paper was able to count at least three City Council members as "obviously support[ing] relocation, [one, the immediate past president of the Downtown Association,] to the point of presenting his own alternative route swinging north."¹⁴³ Perhaps distracted by the garbage men's strike, the Council did not act until its March 5 meeting, when it unanimously adopted the following resolution:

The Council of the City of Memphis prefers that the Expressway through Overton Park not be routed in its present proposed location but that the said proper authorities select another feasible route, with the provision that if no better route can be obtained, the route using the northern perimeter of Overton Park and the southern part of Northern Parkway be chosen.¹⁴⁴

One month later, following Administrator Bridwell's interventions and their meeting at the Memphis airport, and in the face of CPOP's continuing effort to hold on to its seeming victory, the City Council adopted the following resolution by a vote of 8-2 (three members not participating):

Whereas . . . representatives of the Federal Government and the Department of Highways of the state of Tennessee have furnished the Council with considerable information and data to the effect that no other feasible and prudent route is available through Overton Park for Expressway I-40; and

Whereas the Council has likewise been informed . . . that its action to date has caused no delay in the building of this part of the expressway, but that further study and hearings could materially affect the beginning of construction;

Whereas the Council realizes that the construction is very essential for the growth and progress of the City of Memphis;

Now Therefore be it resolved . . . that the Council finds the route presently designated . . . is the feasible and prudent location for said route and that the design as presently made is acceptable to the Council.¹⁴⁵

FROM POLITICAL TO JUDICIAL OVERSIGHT

The story of Overton Park to this point – specifically, from 1955 to late in 1969 when Secretary Volpe finally approved the proposed design of I-40 and CPOP sought a lawyer to take its case to the courts – has been a political story. In this respect, it mirrored the growth of controversies throughout the country; and so also, one may say, in the turn now from the world of politics to the courts. While in a sense judicial review (looking backwards) is always a late entrant, litigation did not emerge as an important control strategy for routing decisions until late in this story. Like the Nashville dispute earlier recounted,¹⁴⁶ lawsuits over routing issues blossomed in the late 60's.

When it began, anti-highway litigation tended to raise straightforward legal issues, rather than

¹⁴² *Mayor Reaffirms Park Route Stand*, Com. Appeal, Jan. 23, 1968, at 13.

¹⁴³ *Riker, Plan for Rerouting Gains Support*, Com. Appeal, Feb. 14, 1968, at 19.

¹⁴⁴ 49 MINUTES OF THE MEMPHIS CITY COUNCIL 410 (1968).

¹⁴⁵ *Id.* at 515.

¹⁴⁶ See p. ? above.

challenges to the exercise of discretion and judgment. Thus, the Nashville case turned on assertions of racial motivations, a familiar litigation subject at the time. A challenge to the Three Sisters' Bridge in Washington, D.C., ultimately successful on political grounds that would help shape the argument in *Overton Park*, began with contentions that municipal officials had simply ignored obligations long in place in city legislation;¹⁴⁷ another lawsuit, challenging construction of an expressway that would have been constructed on fill placed in the Hudson River alongside Westchester county, alleged simple noncompliance with statutes requiring permits from the Army Corps of Engineers, that had never been applied for.¹⁴⁸ *Overton Park* was initially framed in a similar way – whether the Secretary of Transportation had complied with his statutory obligations, not whether his judgment in exercising statutorily conferred discretion was “arbitrary, capricious, or an abuse of discretion.” CPOP’s attorney’s first brief in the Supreme Court, although also expressing concern how a court could know what decisions had been taken in the absence of a formal administrative record and opinion, would assure the Court that

The question here is not, as [respondents] would pose it, the vague and limitless one of whether the officials have correctly balanced the need to preserve the parks against all other governmental projects such as health care and welfare. Instead the question is whether those officials have complied with specific laws governing expenditure of federal monies from the Highway Trust Fund.¹⁴⁹

The Supreme Court’s decision in *Overton Park* marks the expansion of lawyers’ targets from claims of *ultra vires* action to assertions that a discretion decisionmakers possessed had not been reasonably exercised. The remainder of these pages explore that change.

Lawyers today may find it hard to understand quite how unusual and challenging litigation like *Overton Park* was – although, fair to say, the distress created by developments imperiling beautiful, wealthy neighborhoods as well as their parks helped to animate its development. The ground was prepared in the latter part of the 1960's, when important decisions opened doors to “public interest” participation before agencies,¹⁵⁰ judicial review,¹⁵¹ and the standing to seek it¹⁵² that previously had seemed closed; one section of the new Department of Transportation Act explicitly subjected DOT’s decisions to the Administrative Procedure Act, and the APA at least for a time was seen to have conferred federal subject matter jurisdiction over challenges invoking its review standards.¹⁵³ Still,

¹⁴⁷ See n. 157 below.

¹⁴⁸ Citizen’s Committee for the Hudson Valley v. Volpe, 297 Fed. Supp. 804 and 809, 302 Fed. Supp. 1083 (SDNY 1969).

¹⁴⁹ Brief in Support of Petitioner’s Application for a Stay Pending Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit 15 (filed Dec. 3, 1970).

¹⁵⁰ Office of Communication, United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

¹⁵¹ Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967).

¹⁵² Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965)(protection of scenic amenity an important motivator). It would be five years before the Supreme Court would confirm the expanded concept of standing *Scenic Hudson* had embraced; it handed down *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) just a year prior to its decision in *Overton Park*, and in doing so virtually leveled the “standing” obstacle. See Allan Butzel, *Intervention and Class Actions Before the Agencies and the Courts*, 25 Ad.L.Rev. 135, 136 (1973).

¹⁵³ 49 U.S.C. § 1655(h); see *Road Review League v. Boyd*, 205 F.Supp. 650, 659-60 (SDNY 1967). In 1977, the Supreme Court would hold that the APA did not grant subject-matter jurisdiction, *Califano v. Sanders*, 430 U.S. 99, a
(continued...)

large questions remained unanswered. Were volunteers, only indirectly affected by highway development, proper persons to invoke the jurisdiction of the federal courts, when the effects even of delay might be substantially to increase public costs? Could they be required to post a bond to cover those additional expenses, should their actions prove unavailing? Were the judgments entrusted to departmental officials susceptible of judicial review, or rather matters to be treated as having been committed to their executive discretion – matters citizens could hope to control as they controlled legislation or executive functioning generally, “in the only way they can be in a complex society, by their [political] power, immediate or remote, over those who make the rul[ing].”¹⁵⁴

The place of politics and political power raised the most delicate questions. One way to understand these questions is to consider that political influences are often felt outside the usual formalities of a hearing process, even a process as informal and legislative as accompanied highway decision-making. If in fact these administrative judgments were subject to the controls of judicial review, what was the “record” against which they should be measured? How could that record be prepared and authenticated for judicial use? The processes we have been describing were fundamentally bureaucratic and political ones. Certainly at that time, no one was thinking about creating internal records of decision, like those that attend trials. We have been viewing the development of I-40 as one almost necessarily would, through newspaper accounts, congressional records, correspondence and other informal means. How could one establish what actually had happened inside the government, as questions went from desk to desk to their ultimate resolution there? By, for example, pretrial discovery directed to the myriad government officials who may have been involved in its creation over the years that a decision moved back and forth within the bureaucracy?¹⁵⁵ And if politics had played a role in the decisions – as, indeed, in highway routing and design it inevitably did – in what if any circumstances was that an improper element? Could a reviewing court inquire into political influences as well as the bureaucratic decision path? Must a decision communicating to a state the DOT’s decision to approve a given route (or design) for 90% federal funding take the form of an opinion, communicating findings and conclusions? If such decisions were reviewable, what was the standard of review to be applied, and how should it be understood?

Although efforts to explore the Department’s decision processes generally failed,¹⁵⁶ they succeeded in protracted and bitter litigation well known to the Justices and also closely coordinated

¹⁵³ (...continued)

problem easily cured by pleading the general federal-question statute, 28 U.S.C. § 1331. In the interim, placing the DOT under the APA had been taken as an affirmative decision, as well, to place its decisions under court review.

¹⁵⁴ *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915). This decision, of course, directly concerned only a constitutional claim to procedural rights – an issue not presented here. Yet plaintiffs in cases like *Overton Park* did not fit the Hohfeldian mode of persons whose individual legal rights had been directly affected by government action; they were, rather, like the citizens of Holmes’s famous distinction, persons holding only one of many possible political stakes in the outcome of the many-sided disputes they were attempting to control. One recalls as well Chief Justice Marshall’s famous assurance, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) that “where the heads of the department are the political ... agents of the executive ... to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.” (Emphasis added.)

¹⁵⁵ Cf. the Morgan cases, n. 158 below.

¹⁵⁶ See, e.g., *Road Review League, Town of Bedford v. Boyd*, n. 153 above. This case involved the routing of I-87 through Bedford, N.Y., a wealthy and bucolic New York City suburb, and the opinion chronicles a political, bureaucratic struggle just like CPOP’s; although the developments of the mid-’60’s permitted a lawsuit, the Bedford plaintiffs failed to persuade the presiding judge that the political contacts were questionable or that DOT’s officials had acted unlawfully.

with the litigation of *Overton Park*. This lawsuit concerned the Three Sisters' Bridge proposed to carry I-66 over the Potomac River from the Virginia suburbs into their hometown, Washington, D.C.; its later stages turned on a public and highly coercive congressional campaign to force the construction issue.¹⁵⁷ As it would later do in *Overton Park*, the government had sought to establish the regularity of its decision in the I-66 litigation by submitting an affidavit attested to by Edgar Swick. As Deputy Director of Public Roads, Swick could credibly assert familiarity with the bureaucratic processes before and after the Department's creation. Ordinarily, government attorneys could be confident that private parties would be unsuccessful in efforts to peer behind such an affidavit; the *Morgan* cases of the early 1940's¹⁵⁸ stood as a nearly impervious barrier. But the public and extraordinary character of the congressional pressures on the I-66 process opened a door to further inquiry, and that inquiry produced an account that shadowed the dispute over I-40 in Memphis as well. The BPR official responsible for preparing Swick's affidavit "admitted that although the document purported to explain what the Secretary had done ...it was prepared some two months after the purported decision and that in fact [the official] had no personal knowledge on which to base the

¹⁵⁷ Initially, the District Government had lost a suit brought to block the project, because it had failed to observe statutorily required procedures. *D.C. Federation of Civic Associations v. Airis*, 391 F.2d 478 (DC Cir.1968), reversing 275 Fed. Supp. 540 (DDC 1967). The District government then decided to abandon the bridge proposal, and sought to remove that aspect of I-66 from the map. Perhaps more concerned with the ease of commuting from Virginia homes than local amenities, Congress in 1968 passed a statute seeming to command the project immediately go forward; when the municipal government did not resume construction, influential members of Congress reacted with unusual force. In the words of Judge Siraca, who conducted a subsequent hearing *after* permitting the deposition of Secretary Volpe,

... Congressman Natcher [chair of the House committee responsible for D.C. appropriations] stated publicly and made no secret of the fact that he would do everything that he could to withhold Congressional appropriations for the District of Columbia rapid transit system, the need for which is universally recognized in the Washington metropolitan area, until the District complied with the 1968 Act [seeming to require construction of the bridge]. On July 9, 1969, the House of Representatives passed the conference version of the supplemental appropriations bill for the District of Columbia which did not include the rapid transit funds.[115 Cong. Rec. H 5743 (daily ed. July 9, 1969).] Congressman Natcher at that time made his position perfectly clear, stating that "as soon as the freeway program gets under way beyond recall then we will come back to the House and recommend that construction funds for rapid transit be approved." [*Id.* at p. 5737.] Congressman Brodyhill also threatened at that time to withhold other appropriations for the District unless the freeway program went forward.[*Id.* at p. 5738.] Subsequently, on August 8, 1969, the District of Columbia revenue bill was reported to the House with an amendment which would "'freeze' the appropriation of any part of the authorized Federal payment to the District of Columbia, until the President has reported to the Congress that the city had committed itself irrevocably" to the construction of the freeway system.[H.R. Rep. No. 91-463, 91st Cong., 1st Sess. 21 (1969)].

D.C. Federation of Civic Associations v. Volpe, 316 F.Supp. 754, 762-63. (DDC 1970). The District folded, and Secretary Volpe then permitted construction to go forward, but *after* the park-protective statutes involved in *Overton Park* had taken effect; this stage of the litigation thus concerned his compliance with their requirements. Permitting deposition of the Secretary (a deposition Judge Siraca found reassuring about his integrity) was unusual, see n 158 below, but the necessary threshold had been crossed. In addition to the congressional action, the evidence included a letter from President Nixon to Congressman Natcher leading inescapably to the conclusion that Congressman Natcher's pressure had influenced not only the District government's but also Secretary Volpe's decision to go forward with the bridge project. Nonetheless, Judge Siraca found sufficient to sustain that decision

the Secretary's testimony that his decision was based on the merits of the project and not solely on extraneous political pressures. It is true that Mr. Volpe was also interested in securing the release of the rapid transit appropriations, and that the approval of the bridge led to the release of those funds. But the Court finds that the mere fact that the Secretary was aware of this pressure does not invalidate his decision that the Three Sisters Bridge is an important and necessary part of the Interstate Highway System.

at 765-66. The political influence issue would lead the D.C. Circuit to reverse Judge Siraca's decision six months after the Court had decided *Overton Park*, 459 F.2d 1231 (DC Cir. 1971), cert. den. 405 U.S. 1030. But the issue was in the air, and references to the I-66 dispute and, especially, the record irregularities it revealed, recurred often in petitioner's *Overton Park* papers.

¹⁵⁸ *Morgan v. United States*, 304 U.S. 1 (1938) and 313 U.S. 409 (1941).

memorandum. The court, somewhat incredulous at this procedure, asked [the official]:

‘THE COURT: Is this the only time that you can recall that it was followed, in this case?’

‘THE WITNESS: Well, there is something similar to this in I-40 in Memphis, but I am not just sure of the sequence of events.’¹⁵⁹

The Attorneys for CPOP

Because the I-66 and I-40 disputes were attorney-linked as well as issue-linked, we should turn now to the young attorneys involved in them. It may be as hard to appreciate the changes in legal practice occurring in the late 1960's and early 1970's as it is to appreciate the changes in doctrine. As remarked at the beginning of this essay, the “public interest law” movement’s litigation over environmental and social issues took shape only in the late 60's and early 70's.¹⁶⁰ In 1969, as CPOP finally contemplated the necessity to go to court, no organized group yet coordinated highway actions; people found each other by reading the reports. Thus it was not surprising to the attorney in the Three Sisters’ Bridge litigation, Gerald Norton,¹⁶¹ when CPOP called him to ask if he would represent them; Charles Newman of Memphis, a 1963 graduate of Yale Law School (who had spent the following year as law clerk to U.S. District Judge Bailey Brown of Memphis) and a future President of the Memphis Bar Association, served as local counsel.¹⁶² But at the time he was a young associate in the Washington, D.C. firm of Covington & Burling, barely five years out of law school, and his partners thought the bridge litigation he was handling *pro bono publico* was distracting enough. Norton thus recommended a friend, John Vardaman, Jr. Vardaman would remain lead counsel for CPOP throughout the litigation. Like Norton, Vardaman was a young associate at a leading Washington firm, in his case Wilmer, Cutler & Pickering.¹⁶³ A native Alabaman, he had been law clerk to Justice Hugo Black in 1965-66 immediately following his graduation from Harvard Law School, and this experience would stand him in good stead. Since he and Norton coordinated their work closely (as indeed did many of the young lawyers who were spearheading the growing number of highway cases), he knew all about the facts emerging in the I-66 litigation.

Vardaman filed CPOP’s action in Washington, D.C., where he and Secretary Volpe had their offices; but on government motion the case was soon transferred to the Western District of Tennessee, where Charles Speight, Commissioner of the Tennessee Department of Highways, was added as a defendant. Two local residents and two national organizations asserting an interest in the park values

¹⁵⁹ Brief in Support of Petitioner’s Application for a Stay Pending Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit 26 n. 17 (filed Dec. 3, 1970).

¹⁶⁰ See p. 2 above.

¹⁶¹ Telephone conversation with Gerald Norton, July 30, 2004. Mr. Norton graduated from Columbia Law School in 1964 and clerked on the Second Circuit before joining Covington & Burling; he subsequently worked in the Solicitor General’s Office and at the FTC, and is now a senior partner at the Washington firm of Harkins Cunningham LLP

¹⁶² Mr. Newman is now a senior partner in the Memphis law Firm, Burch, Porter & Johnson.

¹⁶³ Vardaman is now senior partner at Williams & Connolly, another prominent Washington law firm. In August 1970, with decision in *Overton Park* still pending in the Sixth Circuit, he moved from Wilmer Cutler to the law office of the noted litigator Edward Bennett Williams as a contract employee; the firm would not become a partnership for several years, when he would be one of the initial partnership group. It was a considerably smaller office than Wilmer Cutler, and offered a young lawyer more opportunities for litigation and responsibility than he had enjoyed there. See n. 54 above.

threatened by I-40, joined CPOP as plaintiffs. Appearing before the Honorable Bailey Brown in District Court, the judge for whom Charles Newman had clerked five years previous, CPOP pressed arguments of the kind that had already proved successful elsewhere – that the Secretary had failed to honor straightforward legal obligations. It claimed a variety of alleged procedural defects, including but not limited to the Secretary’s failure to make formal findings (in effect, his failure to write an opinion). It characterized §§4(f) and 138 as provisions imposing binding legal requirements that the Secretary had ignored, rather than as provisions giving him significant discretion whose abuse should be judicially measured. Under the caselaw of the time, attorney Vardaman could not have expected any examination of discretion, even if permitted, to be very demanding.

Perhaps the one chance he had of exploring the decision process arose out of the question of political influence. It appears from a dissent to the subsequent court of appeals decision that during the discovery period plaintiffs had unsuccessfully moved to depose departmental officials about their decision process.¹⁶⁴ Attorney Norton had by now been successful in deposing the Secretary in the Three Sisters Bridge case, still in process as *Overton Park* wound its way through the courts. The evidence of political coercion to force the building of that bridge was public and unmistakable.¹⁶⁵ But CPOP’s attorneys had no such smoking guns. They failed to persuade Judge Brown that they had overcome the presumption of regularity that ordinarily protects public officials against such inquiries,¹⁶⁶ and so the motions for summary judgment were decided on the basis of dueling affidavits. The government filed an extensive account by Edgar Swick, who as Deputy Director of Public Roads could credibly assert familiarity with the bureaucratic processes, before and after the Department’s creation.¹⁶⁷ Unable to use discovery to build a record in court and lacking any kind of findings document from the department, plaintiffs were limited to such public accounts of the process as had appeared in newspapers, to Administrator Bridwell’s testimony in the 1968 Senate Hearings,¹⁶⁸ and to an affidavit submitted by CPOP’s long-time leader, Arlo Smith, asserting on “information and belief” that the Secretary had “made no finding that there is no feasible and prudent alternative to the use of [Overton Park].”¹⁶⁹

On February 26, 1970, Judge Brown denied CPOP’s motion for a preliminary injunction and granted the government’s motion for summary judgment; he dismissed the complaint.¹⁷⁰ Already, the court noted, “All of the property along the proposed corridor has been condemned, most of the buildings within the expressway path have been destroyed, and the persons and businesses affected have been relocated.”¹⁷¹ The bulk of Judge Brown’s opinion dealt with and dismissed the claims of procedural violation.¹⁷² Turning then to the provisions of §§138 and 4(f), he concluded that their

¹⁶⁴ *Citizens to Preserve Overton Park v. Volpe*, 432 F.2d 1307, 1315 n.1 (Celebrezze, J., dissenting).

¹⁶⁵ See n. 157 above.

¹⁶⁶ As established by the *Morgan* cases, n. 158 above.

¹⁶⁷ It is lengthily described in the 6th Circuit opinion, n. 40 above, 432 F. 2d at 1311-12. See p 38. above.

¹⁶⁸ See text at p. 29 above, 432 F.2d at 1313.

¹⁶⁹ Cf. n. 114 above; Secretary Boyd’s letter was an attachment to Smith’s affidavit.

¹⁷⁰ *Citizens to Preserve Overton Park v. Volpe*, 309 F.Supp. 1189 (WD Tenn. 1970).

¹⁷¹ *Id.* at 1195.

¹⁷² For example, plaintiffs had complained of the Department’s failure to honor an internal Policy and Procedure (continued...)

legislative history ... makes it clear that it was not the intent of Congress to prohibit the building of an expressway through a park if there was *any* alternative; rather, by providing that such should not be done if there is any feasible and prudent alternative, it was the intent of Congress to avoid the park if, after considering all relevant factors, it is preferable to do so. In short, it appears to have been the intent of Congress to point up the wisdom of conserving park lands and the lack of wisdom in routing an expressway through a park because the land is cheaper and the construction is easier.¹⁷³

Having once concluded that the statutes gave the Secretary a rather large discretion, he easily found its exercise not even arguably “arbitrary and capricious.”

We recognize that normally a motion for summary judgment should not be granted if it is made properly to appear that a determinative fact is in dispute. Here, however, we would not, at a plenary hearing, have for determination whether there is a feasible and prudent alternative to the corridor or whether there is a reasonable alternative to the design that would protect the park more. These are determinations to be made by the Secretary of Transportation, and he has decided that no such alternatives exist. We could be concerned with the question and only the question of whether or not the determinations as made were arbitrary and capricious. Our study of the affidavits and exhibits on file convince us that, from the undisputed facts, we could never find in this case that, as contended by plaintiffs, such determinations are so wrong as to be arbitrary and capricious. This being so, we conclude that defendants are entitled to summary judgment on this issue as well as the other issues in the case.¹⁷⁴

This conclusion framed the *only* issue the Sixth Circuit considered on appeal, “whether there remains a genuine issue over any material fact in dispute.”¹⁷⁵ CPOP’s attorneys would have to have been “able to show by affidavit, or other evidence, that there is at least a possibility that [they] will be able to overcome the presumption of regularity.”¹⁷⁶ For a majority of the panel, Judge Weick of the Sixth Circuit writing for himself and Judge Peck, they had been unable to accomplish this. But CPOP’s attorneys had succeeded, in the Sixth Circuit, in winning their first judicial vote. For Judge Celebrezze, dissenting, the Secretary’s failure to explain his decision had precluded effective review or enforcement of his statutory obligations to respect park values. The contending affidavits that took the place of such an explanation (an explanation Judge Celebrezze would have required) raised genuine issues of fact respecting which plaintiffs were entitled to both discovery and a trial.

Attorney Vardaman had succeeded in linking the I-40 problem to the ongoing dispute about the Three Sisters Bridge in one judicial mind; and the result would have been to open the bureaucratic decision process to examination at trial. Now he filed a petition for rehearing. In denying it, October 30, 1970, the panel majority made the stakes clear: the contending affidavits had raised triable no issue of fact, it concluded, because Arlo Smith’s “information and belief” that no finding had been made could not create a triable issue when counterposed to the contrary affidavit of a participant-

¹⁷² (...continued)

Memorandum defining the contents of the notices and of the hearing transcripts that states were to provide the public and the Department, respectively. While doubting whether the Memorandum was legally binding, the court found that in any event any errors were neither substantial nor prejudicial. 309 F.Supp. at 1191-94.

¹⁷³ *Id.* at 1194.

¹⁷⁴ *Id.* at 1195

¹⁷⁵ 432 F.2d at 1310 (1970).

¹⁷⁶ *Ibid.*

official.¹⁷⁷ And the link to the Three Sisters Bridge litigation was unavailing; here there were no such political pressures as had been alleged in that case, and the barrier to probing the mental processes of the Secretary set by such decisions as *Morgan v. United States*¹⁷⁸ had not been overcome .

In ordinary course, CPOP's attorneys would now have had ninety days to compose and file a petition for certiorari with the United States Supreme Court. But bulldozers and wrecking cranes were roaring on the verge of the park, clearing the land on both sides right up to its edge. In denying rehearing, the Sixth Circuit had also denied an application for stay pending a petition for certiorari, and Tennessee made abundantly clear that it was prepared to begin construction inside the park at once. The Highway Department opened bids for the contract October 30 and awarded it November 2, the next working day. Vardaman sought a stay from Justice Stewart, the Circuit Justice for the Sixth Circuit, November 5; Tennessee informed him that it would not await the Justice's ruling, but begin work unless affirmatively restrained. On November 6, Justice Stewart issued an order inviting replies to the stay petition and restraining Tennessee from construction activity in the meantime. Two weeks later the Court requested briefs on the stay issue, and set the matter for oral argument December 7.

In many ways, the arguments over the stay seemed to set a tone for the merits. One could begin with Tennessee's decision to press forward urgently for construction, when the matter had been pending in one form or another since 1955. Its exasperation with delay is understandable; yet in acting on it Tennessee officials risked the impressions that would create. Attorney Vardaman would represent to the Court that as recently as filing of its petition for rehearing in the Sixth Circuit, Tennessee's attorneys had assured that court that no contract would be let nor work begin until the Supreme Court's processes had been exhausted.¹⁷⁹ The State's rush to moot the issue opened the door to suggestions that it (and the Secretary) might have something to hide. Vardaman filled his brief in support of CPOP's stay application with questions about the non-existent record, and asserted parallels to the problems in the Three Sisters' Bridge litigation.¹⁸⁰ Thus could questions about the record and the actual basis for the Secretary's decision be planted in the minds of Justices who were living daily, please recall, with press accounts of the I-66 imbroglio and their own possible interests in how they would be able to drive from home to work. Even as he expressed surprise that a project so long in the works needed now to be so urgently pursued, attorney Vardaman acted to meet the criticism that CPOP was seeking delay for its own sake and imposing significant costs on the state. The petition for stay, he wrote, could be treated as his petition for certiorari.¹⁸¹

When the Court set the motion for stay for oral argument Monday, December 7, it not only marked Jack Vardaman's first return to the Supreme Court since his days as Justice Black's law clerk; his boss, Edward Bennett Williams, had been scheduled for the first argument that day,¹⁸² and now – awaiting his own argument – he would be present in that imposing courtroom as a witness to his new employee's efforts. The attorney appearing for the Solicitor General's office at that argument

¹⁷⁷ 432 F.2d at 1318-19 (Per Curiam on petition for rehearing).

¹⁷⁸ See n. 157 above.

¹⁷⁹ Brief in Support of Petitioner's Application for a Stay Pending Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit 17 (filed Dec. 3, 1970).

¹⁸⁰ Perhaps the most remarkable was a footnote quoting testimony in that case by the BPR official responsible for preparing the affidavit Edgar Swick had filed in *that* case. See n. 172 above.

¹⁸¹ *Id.* at 14 n. 12.

¹⁸² *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971).

was even greener than Vardaman; William Bradford Reynolds had graduated Vanderbilt Law School just three years earlier, in 1967, and was making his first appearance at the Court¹⁸³ – a fact that suggests, as your editor can attest from his own experience, that the office did not see this assignment as a very important or demanding one. Very likely, given his habitual practice with the young attorneys in his office, Solicitor General Erwin Griswold – Dean at Harvard Law School when Vardaman was a student there – was also in the Court that day, watching *his* young attorney’s first argument. Once the importance of the case became apparent, Griswold would take the leading role, and argue on the merits.

In the Supreme Court

Among the scholarly delights of Capitol Hill are the papers of several Supreme Court Justices kept in the Library of Congress’s manuscript collections, and the complete files of briefs and oral argument transcripts maintained in the Supreme Court Library. They permit a fuller account of *Overton Park* in the Supreme Court than could otherwise be imagined.

Three attorneys appeared at oral argument on the stay; in addition to Mr. Vardaman and Mr. Reynolds, J. Alan Hanover appeared for the state of Tennessee. In opening his argument, Vardaman quickly exploited the “rush to judgment” tone Tennessee’s behavior had suggested:

If the respondents are permitted to proceed with this construction they may likely moot this case. If they do, they will have been successful without ever having filed an answer to the Petitioners’ complaint, without putting one witness on the witness stand, without having one other official subject to examination by deposition, but instead rely [sic] on a basis of out of court litigation affidavits filed in support of a motion for summary judgment.¹⁸⁴

Much of the argument, on all sides, was consumed by questions about the timing and extent of Tennessee’s preparation of the approaches to the park – whether the Court was being asked to “unring the bell” – about DOT’s actions in relation to its statutory responsibility, and about what the record was. It reflected awareness about the transitional character of the I-40 issues, in relation to changing statutory instructions, and some confusion about the timing of departmental decisions in relation to the effective dates of the new legislative instructions.¹⁸⁵ One interchange with Mr. Vardaman presumably contributed to later developments that would put the government in an unflattering light:

Q Well, would your first point be mooted if [the Secretary] presented in this Court a piece of paper that made the findings that you say are missing?

A I think that first point would be mooted. We would then proceed to whether or not the determination was infirm. ...

¹⁸³ Like Mr. Vardaman, Mr. Reynolds has become a prominent Washington attorney. Assistant Attorney General for the Justice Department’s Civil Rights Division during Ronald Reagan’s presidency and long an important figure in the Federalist Society, he is now a litigation partner in the Washington office of Howrey Simon Arnold & White.

¹⁸⁴ Transcript of oral argument on the motion for stay 5 (Dec. 7, 1970, on file in the US Supreme Court library).

¹⁸⁵ Thus, Mr. Vardaman argued consistently as if both the route and the design decisions had been made in November of 1969; Tennessee, as if the route had been established before 1968; Mr. Reynolds clearly distinguished between the April 1968 route approval, reading a letter Secretary Boyd had written CPOP at the time explaining the decision and his instructions to design the road to minimize damage to the park, and the later design approval. *Id.* at 25. This was followed by extended discussion of the documentation of the 1968 decision for the Court; the Justices asking questions appear to have been both aware of and unhappy with the limited state of the “record” before them.

The second point which could possibly also be mooted if he gave a satisfactory written determination, although I wouldn't concede that it would be mooted, is that the Court below [found], even though the Secretary made no documentation of his finding[,] that this Court's decision in *United States against Morgan* prohibited any inquiry of the Secretary as to whether he did make the finding.¹⁸⁶ And the difficulty which is presented to anyone seeking review under the statute ... is that first the secretary is not required to record the fact that he made the determination ... and [second] those seeking review aren't entitled to ask him whether he made it.¹⁸⁷

Tennessee's argument, in any event, could hardly have helped respondents; the state took the position that all that was involved was the possibility of 90% federal subvention of the \$2 million section through the park proper, and that it could and would proceed on its own if that support was not available. Where Mr. Reynolds' argument addressed the merits, the importance of the case for grant or not of the writ of certiorari, Tennessee could have been seen to have thumbed its nose at the Court.

The Court met in conference immediately following the day's arguments; Justice Blackmun's notes of its discussion¹⁸⁸ and the Court's subsequent order granting a stay and providing for expedited briefing and argument are both also dated December 7, 1970. This was an unusual step for a Court usually conferring on Fridays, doubtless reflecting the waiting bulldozers. Justice Blackmun's notes reveal a Court closely divided whether the motion for stay and petition for certiorari (as it was agreed the Justices would treat the motion) should be granted. The Justices do not seem to have doubted that the Secretary had made a decision, and the Government's opposition to the motion for stay had informed them that he had instructed his staff to develop findings in all future such cases.¹⁸⁹ Seeing a statutory regime in transition, a commitment to future regularity, and the likelihood that future proceedings would produce no change in outcome, the Chief Justice and Justices White, Stewart and Blackmun were opposed taking up the case; impressed by the forcefulness of Congress's instructions and the sloppiness with which the case had apparently been handled in the Department, Justices Black, Brennan and Harlan supported the motion. Justice Douglas had withdrawn from the case. Justice Blackmun's notes show that Justice Marshall (ultimately the opinion writer) first voted for, then against, and finally for grant; he predicted that "if we remand, all we get is a sno job." Justice Marshall's files say nothing that directly explains his ultimate decision in petitioners' favor. Possibly, however, he was influenced by the simultaneous pendency of a motion for stay in litigation involving Breckinridge Park in San Antonio, the very dispute that had catalyzed enactment of the statutes in question. That stay would also be granted December 7, although in this case with an invitation to petition for certiorari on an accelerated basis, and he would (unsuccessfully) support its continuance.¹⁹⁰ Among Breckinridge Park, I-66 in Washington, D.C., and now Memphis, it would

¹⁸⁶ [Ed.] See n. 158 above.

¹⁸⁷ Transcript, n. 189 above, 14-15; this last remark resonates strongly with what had emerged in the Three Sisters' Bridge litigation, see p. 38 above, related to the Court in Petitioners' brief in support of their motion for stay.

¹⁸⁸ These and all subsequent materials drawing on Justice Blackmun's papers are drawn from the file for Overton Park, OT 1970-1066, in the manuscript collection at the Library of Congress.

¹⁸⁹ *United States Opposition to the Motion for Stay 9 (1970)*.

¹⁹⁰ *San Antonio Conservation Soc. v. Texas Highway Comm'n*, 400 U.S. 939 (1970). This case was compromised in a number of respects: certiorari was being sought in advance of judgment in the Fifth Circuit; party status was unclear; the litigation concerned decisions respecting the approaches to the park, and not the use of parkland itself. Whatever its weaknesses, it could hardly have been lost on Mr. Vardaman, who subsequently became associated with that litigation, how useful it would be for the Justices to have this second highway-and-parkland dispute under their gaze at this important juncture. The stay was vacated December 20, 1970 with Justices Douglas, Black, Brennan and Marshall
(continued...)

have been apparent that large issues were involved.

The Court's December 7 order accommodated Tennessee's impatience by placing the attorneys under unusual time pressures. Customarily, petitioners have 90 and respondents then 60 days to brief their cases in the Court once certiorari has been granted, with argument following within a few weeks. The Court's order provided two weeks briefing time to each side followed one week later by argument. Petitioners' brief, then, was due December 21. For the respondent state and federal governments, the two weeks in question, were Monday, December 21, 1970 to Monday, January 4, 1971 – the winter holiday season.

On the heels of the December 7 order, the Solicitor General complicated matters for attorney Vardaman (and also ultimately for the government). He filed a motion suggesting remand to the district court to permit the Secretary to introduce "the entire administrative record on which his decisions were based." In the world of hardball litigation tactics, you might be tempted to understand such a motion might as a questionable device to bleed time from what was already a pressured preparation. Yet the motion can be understood as responsive to by-play with Mr. Vardaman in oral argument on the stay,¹⁹¹ as well as to the general concerns the Justices evidenced then about the state of the record. Nor was it unambiguously advantageous to its maker; it both seemed to acknowledge weakness in the case, and infuriated Memphians favoring construction of the road by conceding the appropriateness of a further, indefinite stay during the requested remand. Petitioners as well as Tennessee opposed the motion, on the ground that much remained for the Court to decide¹⁹² and that the result could be unnecessary time and expense. At the same December 17 conference as the Court decided to vacate its stay of construction in Breckinridge Park and to deny certiorari in that litigation, the Court denied the motion.¹⁹³ Little appears in the available papers to suggest why.

As the remand would eventually show, the suggestion instinct in the Solicitor General's motion, that there *was* a record in the case, was itself mischievous. Note how the compression of time to develop argument in the Court may have compromised the SG's ability to inform himself on this question. An informal and largely bureaucratic action such as this continuing course of route and design negotiation and approval generates no record in the judicial sense – indeed, at one point in its opinion the Court recognizes that the agency process "is not designed to produce a record that is to be the basis of agency action – the basic requirement for substantial evidence review." Nonetheless, the Court was persuaded that "there is an administrative record that allows the full, prompt review of the Secretary's action that is sought without the additional delay which would result from having a remand to the Secretary." Unsurprisingly, the remand proved that no such record existed. Time to develop the appeal would have avoided the error – indeed, by focusing the Court's attention on the difficulties of reviewing the factual and judgmental bases of informal agency action, it might have led to a rather different result.

The briefs were timely filed on all sides. Influenced by what had gone before, as well as by the strategic sense that arose from the Three Sisters' Bridge controversies, petitioner's brief tended to emphasize two arguments – first, that the new statutes imposed an obligation that could be satisfied

¹⁹⁰ (...continued)

dissenting, 400 U.S. 961, and certiorari was denied the following Monday (December 21, 1970), Justices Douglas, Black and Brennan dissenting. 400 U.S. 968.

¹⁹¹ See n. 190 above

¹⁹² Whether the statute required contemporaneous written findings, conceded not to have been made; whether petitioners were entitled to depose the Secretary and FHA Administrator (the Three Sisters' Bridge connection); and what was the proper standard of review.

¹⁹³ See n. 195 above.

only by written findings, and that at the least, in the absence of written findings, *Morgan* should be understood to permit an inquiry into *whether* the Secretary had made the statutorily required decisions (as distinct from how they were made, which petitioners conceded to be an improper inquiry); second, that any review should use the substantial evidence test, under which one would find questions of fact precluding summary judgment. Implicit in the first argument was a relatively absolutist take on the requirements imposed by §138 and §4(f); petitioners also argued that the findings policy the Secretary had subsequently adopted should be applied in this case; and that the SG's motion to remand implicitly conceded the need for submission of the administrative record, rather than Swicker's litigation affidavit. The Three Sisters' Bridge litigation was extensively invoked to suggest a rotten smell from the Department.¹⁹⁴ Implicit in the second was a concession that "arbitrary and capricious" review would not amount to much; petitioners did *not* significantly address its meaning. The SG's brief was responsive. Agreeing that the Secretary must address parkland values and protect them, it argued that this had to occur in the context of a "delicate task of balancing," inter alia, the possibly harsh impact of alternatives on other values.¹⁹⁵ This of course suggested that it would be useful to know whether such balancing had in fact occurred, but the SG argued that here there was no indication of the bad faith claimed in *Morgan* and shown in the Three Sisters' Bridge litigation. The statute imposed no findings requirement, the Secretary's new policy was discretionary (i.e., not an action recognizing legally binding requirements) and should not be applied to processes that had reached administrative finality before its announcement; inquiry into the Secretary's decision process would be improper. He argued, as well, that under the APA the only available standard of review was to determine whether the Secretary's judgment had been "arbitrary and capricious." Again, there was *no* argument about the meaning of that standard; both sides seem to have assumed that (as any lawyer would have advised before the decision in *Overton Park*) "arbitrary and capricious" review would prove highly deferential. But, consistent with the motion to remand the SG had filed, the government's brief conceded that if the Court concluded either that the statutes required findings or that petitioners had successfully raised genuine questions of fact about whether the Secretary's judgment had been "arbitrary and capricious," then a remand to permit introduction of the entire administrative record would be appropriate.¹⁹⁶

What had actually happened? How could a court know this? Had the Secretary correctly understood the new requirements imposed by the statutes under which he was acting? These had emerged as central questions in the litigation, and the SG's course of conduct tended to underscore them. Now, minutes before oral argument was to begin, he took a step that drove this perspective home. Attorney Vardaman wrote a friend a few weeks after the argument,

As I was sitting at counsel table at 9:55 a.m. ... my former Dean, now Solicitor General, decked out in full regalia [came] over to me and handed me two pieces of paper. He said they were affidavits of Secretary Volpe and former Secretary Boyd in which they swore that they had made the decisions required by statute. Conjuring up my best expression of disbelief, I inquired as to whether I correctly understood that he was attempting to file those as evidence in the case about to be argued. He replied that he was filing them for whatever they were worth.¹⁹⁷

The two certificates were each two pages long. Secretary Boyd:

¹⁹⁴ E.g., Brief for Petitioners, pp. 24-26.

¹⁹⁵ Brief for the Secretary Volpe, pp. 19-22.

¹⁹⁶ Tennessee also filed a brief, of course, but it is of limited significance for this discussion.

¹⁹⁷ CPOP correspondence files, letter dated March 18, 1971.

... In view of the mandate of section 4(f) ... and protests received concerning the routing of Interstate Highway 40 through Memphis, Tennessee, I decided to have this routing studied to see that it conformed to that provision of law. Alternative routes were examined, and local government officials and local groups, such as Citizens to Preserve Overton Park, were consulted on this matter. ... I determined and found as a fact that there was no feasible and prudent alternative to routing this highway generally along the bus roadway through Overton Park ... Because section 4(f) required that the project must include all possible planning to minimize harm to the park, I insisted upon a rigorous investigation of measures which might be taken to minimize adverse impact. ...

And Secretary Volpe:

... At the time I took office, my predecessor had made his determination that there was no feasible and prudent alternative to the route location of I-40 in Memphis Tennessee. During the [subsequent months] ... work proceeded on those sections of I-40 leading to the park. I therefore made a determination that there was no feasible and prudent alternative to the location ... it was my responsibility to decide whether the project included all possible planning to minimize harm to the park ... After personally reviewing the results of studies of suggested design alternatives in October and November, 1969, I determined and found as a fact that the “depressed” highway design is the one which would include all possible planning to minimize harm to the park if certain modifications were adopted. I therefore granted my approval subject to the acceptance by the Tennessee Highway Department of certain conditions ... subject to my continuing review.

As with the motion to remand, one might fear that submitting these certificates on the very day of argument was a litigation tactic calculated to distract a young and relatively inexperienced adversary. Yet one might also understand it more innocently, as directly responsive to the invitation implicit in the Q & A with Vardaman at the argument over the stay.¹⁹⁸ If one took that byplay seriously, the government – after giving the Court an opportunity to send the case back – had now supplied what the record lacked: personal attestations by the responsible Secretaries that they had made the relevant decisions in awareness of the governing law. Given how one might reasonably have understood the meaning of “arbitrary and capricious” at the time – and if *Morgan* had successfully been invoked and the Three Sisters Bridge imbroglio distinguished – the government might be home free.

Still, on the very cusp of argument? Perhaps the lateness of this filing was the product not of scheming for litigation advantage, but of the holiday season, and resulting difficulty in finding Secretaries Boyd and Volpe and creating the necessary papers.¹⁹⁹ The Solicitor General is an institutional litigator, appearing before the Court dozens of times each Term. This was no longer a

¹⁹⁸ Recall the question asked of Vardaman, “Well, would your first point be mooted if [the Secretary] presented in this Court a piece of paper that made the findings that you say are missing?” See p. 44 above. When his turn came at oral argument on the merits, the Solicitor General would twice refer to the submissions as stemming from the “suggestion” made in the “previous oral argument.” Tr. of oral argument, No. 1066, OT 1970, Jan. 11, at p. 25. The two certificates supplied, over secretarial oath, the missing findings. Note, however, that while they invoked the language of the statute, “feasible and prudent” and “all possible planning,” they gave *no* indication what the Secretary had understood that language to mean. The certificates averred conclusions; they did not provide explanations.

¹⁹⁹ This was the explanation Solicitor General Griswold offered the Court. “We recognize that the presentation of these documents is unusual. We submit them for what effect they can properly be given. ... We had them nicely printed up, but Secretary Volpe has been out of town. His affidavit [sic] was cleared with him by telephone; it was to be signed this morning and when he came to sign it he wanted to change it and of course it’s his certificate, and so he changed it and the result is that we have withdrawn the printed copies which we had prepared in advance and have submitted the original of the certificates to the Clerk and have provided these Xerox copies to our counsel and to the Court.” Id. at 25-26.

fledgling attorney; the Solicitor General himself was acting. While the familiarity of the SG and the Court might breed a certain insouciance about providing supplementary materials,²⁰⁰ it also creates a certain sensitivity to signals like the one apparently given at the oral argument on the stay. And it entails an institutional reputation quite transcending issues of victory and loss in any individual case, an institutional reputation that any Solicitor General would be assiduous to protect. It seems unlikely that any SG would act to secure an immediate litigating “advantage,” if indeed he could think that apparent unfairness to an adversary would benefit his argument, at cost to that reputation. Nor did any of the Justices abrade him about the filing.

Still, you might put yourself in the shoes of attorney Vardaman, surprised in this way just as he was composing himself for his thirty minutes of oral argument about to begin. How would you respond?

Shortly into my oral argument I called attention to the fact approximately five minutes before argument had begun I had seen these “too-late formulations”²⁰¹ for the first time and suggested that if the Solicitor General wished to supplement his record with the testimony of additional witnesses, the proper place to do that was in district court where the plaintiffs would have the full right of cross-examination.²⁰²

Vardaman’s basic approach was to seek to persuade the Court that it was in no position to know what had happened in the Department; that the Solicitor General’s intervention – both the motion to remand and now these certificates – essentially conceded as much; and that given the chance, he could prove that the averments of at least Secretary Boyd’s certificate, that he had made a decision in April 1968, were false. No prior document had connected the Secretary, rather than Administrator Bridwell, to the April decision; and Administrator Bridwell had testified to Congress and would state on the record if permitted to that he had made no *independent* findings himself, but had left matters in the hands of the Memphis City Council. The certificates essentially made Vardaman’s point about the one-sidedness of the materials before the Court:

I think that this is an extraordinary effort in which to, manner in which to present evidence in a case; particularly since we were not permitted – in fact the Court of Appeals held that we were barred by this Court’s decision in *Morgan*, from taking a deposition [of Administrator Bridwell] which we specifically offer would dispute one of these affidavits.²⁰³

The bulk of his oral argument (and rebuttal) then explored just what propositions of fact he thought he should be entitled to inquire into. Vardaman knew that he would not get past *Morgan*; he denied again and again that he was interested in exploring the details of the Secretary’s (or Bridwell’s) decision process if in fact the Secretary (or Bridwell) had made a decision; but that what he thought he could show was that these individuals had not in fact decided matters, but had in effect unlawfully delegated decision to the Memphis City Council.

[T]hose attacking decisions must be able to ascertain what decisions were made and what the basis, that is what the documents before the person would have been in order that they can seek a review ... of what he did on the basis of what he purportedly acted upon.²⁰⁴

²⁰⁰ One to which your editor occasionally fell prey when preparing himself for argument.

²⁰¹ The quoted phrase is from Justice Black’s separate opinion.

²⁰² See n. ? above.

²⁰³ Tr. at 6. See also *id.* at 16.

²⁰⁴ *Id.* at 9.

Whether the statute required formal findings, an important element of petitioner’s brief, hardly figured in the oral argument; whether review should be under a “substantial evidence” or “arbitrary and capricious” standard was mentioned only in the last fifteen or so seconds of the argument; what the content of the “arbitrary and capricious” standard might be – that is, what you have probably read the case to learn – was not discussed at all.

The Solicitor General’s argument was a good deal calmer than Mr. Vardaman’s. The first half of it dealt essentially with the geography of the park and the highway through it – how little land would be taken (and how considerately, given the existing bus road configuration), and that Memphis had now used the funds it had received for the 26 acres to acquire more than twelve times as many acres of new parklands to replace them. Then turning to the question whether findings were required, he explained the submissions he had made²⁰⁵ and reasserted the government’s reading of the statute, that – as the legislative history established – it entailed delicate secretarial balancing of competing considerations. Review, he asserted, should be under the “arbitrary or capricious” standard – but he, too, did not explore what that might be, nor did any Justice seem to be interested in that question. But, in a way confirming Vardaman’s reading of the government’s behavior as a soft confession of error, he argued

If the Court feels that the question of arbitrary and capricious cannot be determined on this record, and we felt that there was some indication of that in the previous argument, then we rely on our motion to remand for the purpose of allowing the admission of the administrative record in the District Court.

We do not think there should be a remand for a full trial unless the District Court finds after examining the administrative record that it cannot decide the issue of arbitrary and capricious action without a further trial. We filed the motion of remand not for the purpose of conceding error, as Mr. Vardaman says, but for the purpose of narrowing the scope of any remand ...²⁰⁶

Then echoing Justice Marshall’s remarks in the first conference,²⁰⁷ he suggested that a remand would prove

a triumph of formalism. With the benefit of hindsight, this record is not all that I might like to have. ... It would be better if we didn’t have to piece out the essence of their determinations from other actions which they took like press releases and resolutions and letters and affidavits ... [but] remand for further proceedings would, I think, be a kind of mechanical jurisprudence more fitting for a Baron Park than for the final third of the 20th century.²⁰⁸

These words evoked some rather querulous questioning by at least one Justice. Do you think the SG’s peroration, following, any more likely to have been successful, however well it may have invoked what proved to be the stakes?

The fundamental question here [is] one of the separation of powers, of the proper allocation of function to courts, legislatures and the executive branch, in the important and complex task of carrying on government. Two things are clear: one is that Congress has legislated certain specific requirements with respect to the use of parklands and the other is that it has allocated the administration of that provision to the executive branch, specifically

²⁰⁵ Id. at 25. See p. 47 above.

²⁰⁶ Id. at 29.

²⁰⁷ See p. 45 above

²⁰⁸ Tr. at 30-31.

to the Secretary of Transportation.

This does not mean that there is no role for the courts, for the Secretary should be held in check if he ignores the legislative requirements. But it does mean that the proper role of the courts is a narrow and limited one and it is important, I submit, both for the administration of the government and for the court that the limited nature of that role be recognized and observed. It is not good government to have all governmental decisions decided by courts, or even to have a situation where, as a matter of routine, all questions arising in the administration of the government are habitually referred to courts.²⁰⁹

In recent years more and more governmental decisions are being made by courts. The recent broadening or near elimination of concepts of standing and the limitations on sovereign immunity as a defense have contributed to this result.

Of course, courts should see that the Constitution is complied with when the statutory rules are followed, but is it wise that the substance of all administrative action should be subject to reevaluation in the courts?

What the two Secretaries have done here, they have acted; what they have done is rational; and it complies with the directive given to them by Congress; the decision was for them. It should be upheld and the judgment below should be affirmed.

Mr. Vardaman's final words would invoke "the battle to preserve this nation's environment against projects such as that involved here."²¹⁰

Justice Blackmun wrote a memo to himself, reflecting again a view that "this is a great tempest without much outrageous substance." *Morgan* should preclude inquiry into the Secretaries' thinking, but the record is "fuzzy," and "what we may get down to is whether the case should be remanded for adherence to some of the formalities. The ultimate result is perfectly clear ... As Justice Marshall pointed out in conference, if we remand we will get only a snow job and nothing more. The practicalities of the situation argue against the remand. On the other side is the fact that this is good discipline for the agency and it may well satisfy the objectors." His notes of the ensuing conference suggest that the dividing line between majority and dissent reflected feelings about the importance of the case. The remand to the district court was to a significant degree the product of what was understood as the SG's acceptance if not urging of that outcome, and was not expected to produce change; Justices Black and Brennan, initially joined by Justice Harlan, felt much more strongly that substance was at stake.

The Chief Justice assigned Justice Marshall the opinion, asking him to give it priority;²¹¹ it would

²⁰⁹ Id at 32-33.

²¹⁰ Id. at 44.

²¹¹ The opinion assignment to Justice Marshall, contained in his papers in the Library of Congress, OT 1970 1066, stated

Dear Thurgood:

I have not completed assignment on last week's argued cases, but the Overton case should have a priority.

Since you were one of five voting for remand to the District Court to decide whether the statutory determination was in fact made as claimed, will you undertake an opinion?

The five voting to remand to the District Court also voted that the standard of "arbitrary and capricious" was the appropriate yardstick.

Regards,

(continued...)

be issued a mere six weeks after argument. He would, as you know, write extensively and influentially about the meaning of “arbitrary and capricious” review – a question that although essentially unbriefed would be the enduring contribution of the case. The records at the Library of Congress suggest little appreciation that this would be the case’s future import, or difficulty among the Justices with what he had written.

Epilogue

Victory came both as vindication and as challenge. The young lawyers who had been pursuing and coordinating the growing body of highway litigation – not just Vardaman, Norton, and Newton, but Anthony Kline in California, Al Butzel in New York – were having a remarkable impact.

“We were the masters of this subject; to be only thirty and know you know more about an important set of issues than anyone else, that is a remarkable place to be at the beginning of a professional career.”²¹²

Yet, promising further proceedings, victory also underscored significant personal and professional issues. Although settings in which a young lawyer could take responsibilities unusual for his newness to the profession and grow considerably in skill and reputation, these lawsuits were not valuable business opportunities for the lawyer or, particularly, his firm. Vardaman was fortunate as a young lawyer developing a career to have an employer who understood the long-term benefits for his firm of the experience he was getting; Edward Bennett Williams, who had started his own career in not dissimilar ways, continued to pay his salary and provide a year-end bonus, But it hardly had to be that way. Vardaman’s correspondence files show continuing struggles to have even out-of-pocket expenses paid; one letter written shortly after victory in the Supreme Court remarked that he and Charles Newman had been paid a fee of \$4000 – \$4/hour – for an estimated 1000 “billable hours” through the Supreme Court decision.²¹³ Now he would have to prepare for an extended trial, with depositions, transcripts and other expenses as well as his own commitments of time. Shortly after the Supreme Court’s decision, Vardaman’s correspondence estimated the post-decision trial expenses at \$17,000; he asked as well for some compensation – but he was clear from the outset that he would not insist on the latter, and that he had set that request “considerably below our normal hourly rates.”²¹⁴ Much of his correspondence files in the wake of victory are taken up with efforts to get reimbursement, including CPOP’s reports of appeals both to foundations and national organizations that might prove willing to help and to their neighbors. A momentous victory had to be nailed down, and that would not come cheap. CPOP was struggling with a treasury balance under \$1500;²¹⁵ a few weeks later, one of its members reported to Vardaman that she had “contributed a bronze vase which brought us \$75 ... placed contribution can and collected funds at neighboring store.”²¹⁶ It is unlikely

²¹¹ (...continued)

WEB

²¹² Conversation with John Vardaman, December 16, 2004.

²¹³ *Id.*, letter of March 18, 1971.

²¹⁴ *Id.*, letter of March 16, 1971.

²¹⁵ CPOP correspondence files, letter of March 20, 1971.

²¹⁶ *Id.*, letter of June 17, 1971. CPOP’s members support included the use of a room over a garage for living, the loan of a car for transportation, and home-cooked meals. Conversation with John Vardaman, Dec. 16, 2004.

these sums compensated the firms even for secretarial time; and then there was always the chance that other firm clients would fail to appreciate what the law suits were accomplishing.

The events following Vardaman's estimates – 25 days of trial before Judge Brown and a 6500-page record seeking to reconstruct what the administration knew or should have known on the questions of prudence and feasibility, numerous administrative proceedings and appeals – would make them risibly low.²¹⁷ On January 5, 1972, Judge Brown ordered the case remanded to the Secretary to decide the matter in accordance with the statute as the Supreme Court had interpreted it. The Department's prior action had not been based on a correct understanding of the statute, he found; but Judge Brown's opinion also strongly signalled a substantial willingness to uphold whatever decision the Secretary might reach.²¹⁸ Now, however, Secretary Volpe found himself obliged to apply the National Environmental Policy Act of 1969,²¹⁹ in January of 1973, after further hearings in Memphis, he found – without specifying what it would be – that there was at least one "feasible and prudent alternative" to the route through the park.²²⁰ Judge Brown would have required him to specify that alternative, but in April 1974, the Sixth Circuit upheld the Secretary's judgment; the statute required him only to find that at least one such alternative existed, and he need not specify what it was.²²¹

This stage of the litigation held out some possibility of financial relief – if attorney Vardaman was able to persuade the courts that his services fell within the "private attorney general" rationale that had recently acquired substantial currency in the courts, and that the Eleventh Amendment did not preclude applying that line of cases to a state, he might be able to recover compensation for his services that CPOP had proved unable to provide. The Sixth Circuit had found the Eleventh Amendment precluded recovery, and on this issue alone Vardaman once again filed a petition for certiorari in the Supreme Court.²²² The Court had already granted certiorari in *Alyeska Pipeline Service Co. v. The Wilderness Society*, and with its decision in that case repudiating the private attorney general rationale,²²³ any such possibility disappeared. Whatever the rewards of this representation, they were not going to be financial.

Vardaman continued to hear about Overton Park from time to time, as DOT officials would seek to include him in their discussions of the issue. Under continuing pressure from the state, the Department kept studying how I-40 might be completed; while alternative routes were apparently considered, serious discussion focussed only on alternative designs for a road going through the park,

²¹⁷ Vardaman would tell the Supreme Court in his petition for certiorari, n. ? below, that "counsel for the petitioners had spent approximately 2700 hours on this litigation between the filing of the complaint and the notice of appeal."

²¹⁸ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 335 F.2d 873 (W.D. Tenn. 1972). In particular, the trial judge indicated his skepticism about the principal alternative route that had been argued for on remand, following creekbeds and railroad tracks north of the park -- a route that threatened racially integrated neighborhoods, water supplies, and several small parks. *Id.*; see also *Memphis Press-Scimitar*, Oct. 7, 1971, at 1.

²¹⁹ 3 *Env.L.Rep.* 20423

²²⁰ He reached this judgment despite a finding from the FHWA that no feasible and prudent alternative to the park route did exist. Highway proponents, recalling that at the time his nomination to be Ambassador to the Vatican was pending, are as willing to speculate about the politics of *this* judgments as highway opponents had been about earlier federal judgments.

²²¹ *Citizens to Preserve Overton Park, Inc. v. Brinegar*, 494 F.2d 1212 (6th Cir. 1974), *rev'g*, 357 F. Supp. 846 (W.D. Tenn. 1973), *cert. denied sub nom. Citizens to Preserve Overton Park v. Smith*, 421 U.S. 991 (1975).

²²² October Term 1974, No. 74-757, filed December 1974.

²²³ 421 U.S. 240 (1975).

in apparent recognition of the disruption otherwise likely to be caused. In September 1974, Tennessee submitted a new proposal opting for an open cut design through the park. Secretary Brinegar instructed the FHWA in January of the following year that an open cut design could not be approved under §4(f) and asked for an evaluation of tunneling alternatives. In April 1975, President Ford's then Secretary of Transportation, William Coleman, announced his provisional judgment that the road should be built as a two-tier tunnel under the Park;²²⁴ even apart from the initial outlay, the expense of maintaining such a tunnel – not then payable from the federal Highway Trust Fund – made that alternative unacceptable to the state. A study of a single level tunnel was completed in March 1976, and Tennessee held further hearings in Memphis in August. The Deputy Secretary of Transportation scheduled a hearing in Memphis for November 1976, but canceled it once Jimmy Carter had been elected, in response to a request from Tennessee officials who evidently expected to find the new administration more cooperative.²²⁵ The state then proposed a design that would be partially tunneled, partly depressed, and in October 1977 the Department rejected it;²²⁶ within weeks a new design for more, but still not complete, tunneling had been presented and, again, rejected.²²⁷ The State threw in the towel in the waning moments of the Carter administration and asked that the segment through Memphis be dropped from the interstate system;²²⁸ about \$300 million in federal funds committed to building the road then began to be released to Memphis for other transportation purposes,²²⁹ and in 1987 Tennessee returned the parkland to the city. The possibility of an east-west expressway, now outside I-40, lives yet in the minds of some Memphians.

²²⁴ Coleman's Park X-Way Ruling Received Coldly By Both Sides, Memphis Press-Scimitar, Apr. 22, 1975.

²²⁵ Ford Staff Passes Problem of Park Route to Democrats, Com. Appeal, Nov. 19, 1976, at 3.

²²⁶ Cunningham, "We Are Through With Overton Park," Officials Say, Ending Decades of Delay, Com. Appeal, Oct. 1, 1977, at 1, 3.

²²⁷ Cunningham, It's a Tunnel or Nothing, State Told, Com. Appeal, Nov. 18, 1977, at 1.

²²⁸ "Windfall Needs Vision," The Commercial Appeal, Monday, Jan. 19, 1981, p. 4 remarked

Opponents of the route were sometimes criticized as busybodies and obstructionists. Events have proved, however, that they were the ones with vision. Protection of the park became, in their lengthy battle through the courts, a symbol not only of environmental quality but also of larger concerns about what kind of a city Memphis should try to become ...

²²⁹ In 1990 the Memphis Business Journal reported that \$100,000,000 of these funds remained unexpended. "\$17 Million Raleigh-Millington Project Moving Forward," Vol. 12, No. 17, Sec. 1 p. 3. Projected cost of the roadway portion through the park, in the 1960's, was variously estimated between \$2,000,000 and \$16,000,000, with still higher estimates if a tunnel design was to be used.