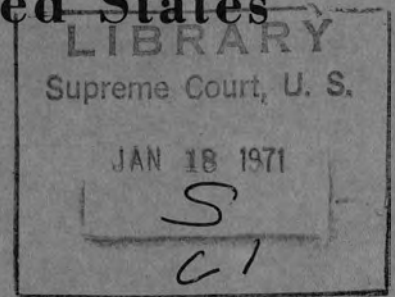


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 1066

----- X
CITIZENS TO PRESERVE OVERTON PARK,
INC., ET AL.,

Petitioners

vs.

JOHN A. VOLPE, SECRETARY, DEPARTMENT
OF TRANSPORTATION, ET AL.,

Respondents
----- X

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Place Washington, D. C.

Date January 11, 1971

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C O N T E N T S

ARGUMENT OF:

P A G E

John W. Vardaman, Jr., Esq., on
behalf of Petitioners

3

Erwin N. Griswold, Solicitor General
of the United States, on behalf
of Respondents

18

J. Alan Hanover, Esq., on behalf
of Respondents

33

REBUTTAL:

John W. Vardaman, Esq., on behalf
of Petitioners

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* * * * *

NHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

CITIZENS TO PRESERVE OVERTON PARK,
INC., ET AL.,

Petitioners,

vs

No. 1066

JOHN A. VOLPE, SECRETARY, DEPARTMENT
OF TRANSPORTATION, ET AL.,

Respondents.

The above-entitled matter came on for argument at
10:04 o'clock a.m., on Monday, January 11, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JOHN W. VARDAMAN, JR., ESQ.
Williams & Connolly
1000 Hill Building
Washington, D. C. 20006
On behalf of Petitioners

1 APPEARANCES (Cont'd)

2 ERWIN N. GRISWOLD, Solicitor General
3 of the United States
4 Department of Justice
5 Washington, D. C.
6 On behalf of Respondents

7 J. ALAN HANOVER, ESQ.
8 Special Counsel
9 219 Adams Avenue
10 Memphis, Tennessee 38103
11 On behalf of Respondents
12
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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Number 1066, Citizens to Preserve Overton Park against Volpe.

Mr. Vardaman, you may proceed whenever you are ready.

ORAL ARGUMENT BY JOHN W. VARDAMAN, JR., ESQ.

ON BEHALF OF PETITIONERS

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

This case was previously before Your Honors on December 7th, at which time the parties engaged in extensive oral argument on Petitioner's application for stay to prevent the construction of the large six-lane interstate highway through Overton Park in Memphis, Tennessee.

After hearing, the Court granted the stay, granted certiorari and set the case for argument on the merits today.

As Your Honors will recall, this case arises under a Federal statute generally referred to as Section 4(f) of the Department of Transportation Act, which provides that the Secretary of Transportation shall not approve a highway project which affects a public park such as Overton Park, unless there are no feasible and prudent alternative routes or unless the design includes all possible planning to minimize harm.

As we pointed out in the argument on December 7th,

1 there are alternative routes than that through the park. There
2 are alternative designs which would minimize harm to the park;
3 designs that may be possible in this case.

4 We have alleged and supported that the proper
5 determinations which are required by Section 4(f) of the
6 Department of Transportation Act were not made, and indeed
7 even if they were made, they were infirm or legally invalid.

8 Since this Court granted certiorari there have been
9 two important developments in this case and thereafter, the
10 Solicitor General, on behalf of the Secretary, filed a motion
11 to remand in which he conceded that the courts below had erred
12 in granting and affirming summary judgment on the basis of
13 affidavits which were characterized documents on which the
14 determinations, he said, had been made.

15 We certainly agree that the summary judgment was
16 wrong, but we are opposed to an immediate remand because of the
17 other concurrent issues which we believe should be decided in
18 this case.

19 The second important development which has occurred
20 since we were here before, occurred approximately ten minutes
21 ago. At that time the Solicitor General handed me two pieces
22 of paper which purport to be affidavits which I understand he
23 is attempting to file in this case at this time, one of which
24 says it is an affidavit of Alan S. Boyd, in which he says, as
25 a matter of fact, that he did make a determination which we

1 have alleged he did not make and which we have offered to prove
2 he did not make.

3 The second piece of paper which he has filed pur-
4 ports to be an affidavit of John Volpe that he made certain
5 determinations. I know of no precedent which permits a party
6 to file in this Court, at this stage of the proceedings,
7 affidavits. I do recall that there was a case here, I believe
8 in 1968, entitled Bumpers(?) against North Carolina in which
9 the case in which this Court granted certiorari to consider the
10 validity of a warrantless search and as I recall that case in
11 the course of oral argument the attorney for the state said
12 for the first time in the proceedings that in fact the search
13 in that case had not been without a warrant; he had found the
14 warrant after the decision below, and I believe he attempted to
15 file the warrant in this Court.

16 As I recall the opinion in that case the Court said,
17 "It's too late; you make your record in the trial court and
18 at that point you consider that's where these facts are tried
19 out."

20 Q Are you familiar with the case Downs(?)
21 against Maryland?

22 A Generally. I am not familiar with any
23 aspect of it that may bear on this point.

24 Q Well, there is a great big aspect that bears
25 very directly on this point.

1 A Perhaps if the Court would like a memorandum
2 on whether this evidence is properly before this Court at this
3 time, I'd be happy to file a memorandum. But I think that this
4 is an extraordinary effort in which to, manner in which to
5 present evidence in a case; particularly since we were not
6 committed -- in fact the Court of Appeals held that we were
7 barred by this Court's decision in Morgan, from taking a
8 deposition which we specifically offer would dispute one of
9 these affidavits.

10 If, as we submit, one of the crucial issues in this
11 case is whether the determinations under Section 4(f) of the
12 Department of Transportation Act have been made, and we think
13 that it is undisputed that that is a crucial issue in this
14 case, then that issue should be tried out in the way disputed
15 issues of fact are traditionally tried in lawsuits. We should
16 put on our evidence and they should put theirs on. Each
17 side's evidence should be subject to cross-examination. We
18 should not try it by affidavits filed in this Court.

19 MR. CHIEF JUSTICE BURGER: These papers will be
20 lodged and the Court will determine their posture at a later
21 date and if we need anything from you, Mr. Vardaman, we will
22 then indicate to you to direct a comment on that.

23 MR. VARDAMAN: Thank you, Your Honor.

24 I might add that my review of these documents at the
25 time before they were filed, indicates to me that they do not

1 fulfill the requirements of the Department of Transportation
2 order which was, as I understand, promulgated on October 7,
3 1970, which now requires formal findings in cases under Section
4 4(f) of the Department of Transportation Act. So, even if the
5 Court were to consider this evidence, the Secretary is still
6 not complying with that order. And I think under this Court's
7 decision in the _____ case where it states the general rule
8 that the issues presented here must be determined in accordance
9 with the law as it exists at the time of decision, even if you
10 consider these pieces of paper, it would still not be ~~compliance~~
11 compliance with that order or with the law and remand would be
12 necessary.

13 The second issue which remains in this case, aside
14 from the question of whether there was adequate compliance to
15 Section 4(f) by the Secretary's failure to render a written
16 document at the time the decisions were made, the second issue
17 which remains is whether the court below was proper in holding
18 that Petitioners were barred from deposing -- Federal Highway
19 administrative good will in order to determine whether or not
20 the decisions under this statute were made.

21 We sought to depose former Federal Highway Admini-
22 strator Bridwell because the documents in this case indicate
23 that if he wasn't the sole person who made the determinations
24 at least he was imminently involved in any determination that
25 would have been made. Indeed, the record never refers, at

1 least until these documents submitted today, there is no
2 reference in the record to a decision made by former Secretary
3 Boyd. Whenever his name appeared it appeared jointly with
4 Federal Highway Administrator Bridwell. Moreover, it was Mr.
5 Bridwell who went to Congress to testify about what occurred
6 in this case.

7 So, we noticed(?) the deposition of Mr. Bridwell
8 and we offered to prove through his deposition that no such
9 determination was made; that in fact, he merely delegated this
10 to the City Council of Memphis and left it up to them to decide.

11 The Court of Appeals said that this Court's decision
12 in Morgan against the United States prohibited any interroga-
13 tion of the Secretary to determine whether or not he made these
14 decisions. We believe that that is an erroneous extension of
15 the Morgan doctrine. While Morgan may permit inquiry as to
16 how decisions were made, it does not. And I believe this
17 Court's decisions in the authority cases show that it does not.
18 prohibit inquiry as to whether a decision which is required by
19 law to be made was, in fact, made.

20 I think the point is even sharpened more by the
21 fact that now we have an affidavit; an affidavit from a man who
22 has not been cross-examined; an affidavit which we have not
23 been permitted to impeach, which purports to prove what is a
24 disputed fact in this --

25 MR. CHIEF JUSTICE BURGER: If these two statements

1 had been part of the original record, would you think that you
2 could cross-examine the former Secretary and the present
3 Secretary on how they reached their conclusions and what --

4 MR. VARDAMAN: Well, I think that would present a
5 much more difficult issue, Your Honor, but I think we should
6 be able to interrogate them, particularly if they are not
7 operating on the basis of a temporaneous document -- in other
8 words, these are not documents that were written at the time
9 that the decision was made; these are, what I would characterize
10 litigation affidavits. These were obviously prepared with the
11 help of a lawyer with the scope of the lawsuit firmly in mind
12 and filed in the court.

13 Now, I think it would not be inappropriate in cir-
14 cumstances of that nature to ask him whether in fact he made
15 the decisions and if so, what materials he had before him. I
16 don't think it would be proper -- it may not be proper to say:
17 "Did you read every page," as I tried to do in Morgan, or did
18 you consider this factor on page 1 and that factor on page 2,
19 but I think it is fair -- I think that those attacking(?)
20 decisions must be able to ascertain what decisions were made
21 and what the basis, that is what the documents before the per-
22 son would have been in order that they can seek a review;
23 in order that they can seek a review of what he did on the
24 basis of what he purportedly acted upon.

25 Q Following the Chief Justice's question,

1 suppose the SEcretary had made formal findings of fact. You
2 certainly couldn't contend then that you could cross-examine
3 them; could you?

4 A I would say that in order to cross-examine
5 in a case such as that you would have to make a very strong
6 showing of some impropriety. There are cases, as I believe the
7 authority case there was the finding -- in the Singer Sewing
8 Machine case there was some finding where these quasi-judicial
9 bodies and members of them and people associated with them
10 were interrogated. But certainly there would be no reason if
11 we had formal findings in this case it would take a very strong
12 showing in order to interrogate him and I'm not prepared to say
13 it would even be necessary if we had the proper findings in this
14 case.

15 But, the important factor is --

16 Q Proper findings based on what?

17 A Proper findings -- of course that would be
18 a question as to whether or not were based on evidence which
19 supports him; whether or not the Secretary has considered
20 everything he ought to have considered and whether or not what
21 he did consider supports what he did.

22 I think it's not that if there is no --

23 Q That would turn on the record, though, surely
24 wouldn't it; not on cross-examination. The Secretary?

25 A I think that's correct; I think that's

1 correct. It would turn on whether he made the proper investi-
2 gation and brought before him the materials which he ought
3 to have before him before making such determination and
4 whether these materials support his determination.

5 Q When you say "depending on the record," do
6 you mean the record of evidence or something on which the
7 findings were made?

8 A Well, I don't mean in the formal record. I
9 mean --

10 Q I'm not talking about formal. Could he just
11 make a statement without any formal hearing or evidence of any
12 kind or character and would that close it up?

13 A No; I do not believe it would, Your Honor.

14 Q He would testify to the administrative
15 record; isn't that correct?

16 A Well, there is in this case no specific
17 administrative record --

18 Q But, in answer to my Brother Harlan's
19 question, if you had findings and an administrative record,
20 you would see whether or not the findings were supported by the
21 administrative record.

22 A That's --

23 Q The test, I know, of review is where some-
24 thing that's in controversy in this case, but in any event,
25 that is the way you would approach it; isn't it?

1 A I don't think that we would be limited to
2 administrative records. Certainly if we could show that his
3 findings were not supported by characterizing the administra-
4 tive record we would be entitled to relief. But I think that
5 we should be able to show we would also be entitled to relief
6 if he didn't prepare a proper record, but furthermore if he
7 has considered matters which those attacking his decision have
8 not had an opportunity to rebut, I think that we would be en-
9 titled to rebut that evidence in some way and if we can cast
10 some doubt on the credibility or the substantiality of his
11 findings based on some evidence which we submitted, I think we
12 would be entitled to relief --

13 Q Well, that answer suggest to me that you
14 consider this an adversary action and almost a full-scale
15 lawsuit between you and your client on the one hand and the
16 Secretary on the other. Is that the way you visualize this
17 proceeding?

18 A Well, I think unless we are given a right to
19 rebut evidence which we have not been apprised of which he
20 relied on and evidence which we heretofore had not --

21 Q What gives your client standing to become
22 an adversary and enter into litigation with the Secretary
23 under the statute?

24 A I think that the question of our standing, I
25 think has not been opposed at this point. We do have standing

1 and I believe --

2 Q The question is: standing to do what?

3 A That's correct, Your Honor; yes, sir. But
4 I think we have standing, we certainly have standing to
5 present during the course of the administrative process at the
6 public hearing and elsewhere, we have standing to present
7 evidence to the --

8 Q Well, there was a public hearing and they
9 met with City Council --

10 A That's correct and there are --

11 Q And I suppose your people were heard from;
12 were they not?

13 A They certainly were and -- but now the
14 Secretary offers in evidence -- if I could give Your Honor one
15 example I think we could point out the necessity for this.

16 They said we couldn't -- and apparently they
17 document this in their affidavits -- that we couldn't make
18 it a depressed route through this park because this would re-
19 quire use of a particular type of pump and this is unsafe in
20 highway projects of this nature.

21 Now, if we are not permitted to rebut that in any
22 way we would not be able to show that the Department of Trans-
23 portation has authorized for use in the interstate highway the
24 same type of pump in other areas. And that casts such strong
25 doubt as to either the investigation which was made for the

1 safety in this case or as to the credibility of this explana-
2 tion that we -- that it's evidence, I submit, is relevant for
3 consideration by the trial court. But more so, it may be
4 relevant to whether or not he has made the proper investiga-
5 tion for making his determination, but it's evidence of that
6 nature -- in fact there has been no objection heretofore
7 to introducing such evidence. The Secretary has never objec-
8 ted to the introduction of evidence of that nature. We have
9 introduced affidavits which documented the use of a siphon in
10 the Department of Interior projects. We have introduced
11 affidavits of the use of this type of pump that would be re-
12 quired here. We have introduced affidavits as to the type of
13 use of tunnels in the interstate system. They have not here-
14 tofore objected to that type of evidence.

15 I don't think that this would -- this would not be a
16 de novo adversary proceeding in which we try every fact; it
17 would only be in case we were able to present some evidence
18 which created some dispute over what the Secretary found on the
19 basis of the administrative record.

20 Q I'm not quite sure, Mr. Vardaman, in response
21 to questions -- I'd like to try again on this matter of cross-
22 examination of the Secretary. If he made the finding and then
23 said: "On the basis of these findings I have concluded that
24 this project is desirable and in conformance with the statutory
25 requirements and it is hereby approved."

1 In that circumstance with those formal findings, I
2 don't quite understand whether you say you can cross-examine
3 them a little bit or not at all.

4 A I wouldn't say we could cross-examine him a
5 little bit, but we would not, I think, be permitted to cross-
6 examine him unless we were to meet the strong burden in the
7 trial court that suggested some impropriety in what he did.
8 For instance, and I don't mean to suggest that this would be
9 true in this case whatsoever, but as a hypothetical example:
10 if there was some evidence to indicate fraud or bribery it
11 might be that type of attack on the findings, I believe would
12 be proper and I think you could cross-examine.

13 In the Accardi case there was an allegation
14 that the Board of Immigration Appeals acted solely on the basis
15 of the Attorney General's list that had been published and
16 there the Court held it was proper to cross-examine. But, only
17 after we had met the very strong burden of demonstrating that
18 there was some impropriety. But I think it would shift the
19 burden to us and would place a very heavy burden on us.

20 But, in the general case, in the usual case, I would
21 suggest that we would not cross-examine in those circumstances.
22 But, in this particular case where you have this affidavit of
23 Secretary -- former Secretary Boyd we do have evidence which
24 will dispute this. And I'm not so concerned about cross-
25 examining Secretary Boyd as I am about presenting our evidence.

1 And it's interesting that the reason it hasn't been presented
2 heretofore is because former highway administrator Bridwell
3 said he didn't think it was proper when I talked to him to
4 present this by affidavit. He thought it was better if he
5 wouldn't take sides; if he would testify in court and let both
6 sides have a shot at him. We weren't permitted to put him on
7 the stand to have him testify.

8 Q Do you think he's the appropriate person to
9 make that decision?

10 A No, I don't, but I'm simply explaining why we
11 don't have an affidavit of the same nature that they did here
12 today.

13 Q Are these statements here -- do they show
14 when the decision was made if a decision was made?

15 A Well, the certificate of Alan Boyd says that
16 in April of 1968 he made a decision that there was no feasible
17 and prudent alternative to a highway generally along the bus
18 route --

19 Q That was three years ago. Was there any-
20 thing else shown except this evidence?

21 A Not in this affidavit.

22 Q Was there any record that you claim will
23 show that they did have an investigation and did make a find-
24 ing as to what route was feasible?

25 A Well, there are varied allegations in the

1 affidavit that in 1968 Secretary Boyd and former Federal
2 Highway Administrator Bridwell reaffirmed a previous decision
3 and that's the extent of the documentation --

4 Q '68 said it affirmed the previous one?

5 A That is correct.

6 Q Well, when was the previous one?

7 A Well, they claim it was made in 1956 but
8 there is other evidence in the record which --

9 Q Is there anything in the record that they
10 have that shows it except this affidavit that was filed three
11 or four days ago?

12 A Not that shows that these decisions were
13 made; not that says these decisions were made. In fact the
14 record indicated -- the affidavit of Volpe refers to another
15 determination in 1969. The record is equally unclear on that
16 point.

17 The third point which we submit should be resolved
18 by this Court before any remand which the Solicitor General, as
19 I understand, is conceding is necessary in this case, will be
20 the appropriate standard of review. The Court of Appeals said
21 that the only standard of review was the arbitrary and
22 capricious standard, but the Administrative Procedure Act im-
23 poses that as the minimum constitutional requirement, so the
24 legislative history said.

25 And the act, we believe, requires the court to go

7
forward and even if the finding was not arbitrary and capricious, requires a review of the evidence to support it, either under the substantial evidence standard or the unwarranted by the facts standard. And we believe the court below was in error in limiting its review to the arbitrary and capricious standard.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Vardaman.

ORAL ARGUMENT BY ERWIN N. GRISWOLD,
SOLICITOR GENERAL OF THE UNITED STATES.

ON BEHALF OF RESPONDENTS

MR. GRISWOLD: I have a map coming in, Your Honor. It's the same one that was here before and while it's coming I will refer to the facts of the case to which Mr. Vardaman has not made much reference this morning.

The park which is involved here, Overton Park in Memphis, is about eight-tenths of a mile across. At one place in the record it says 4800 feet; another place it seems to indicate it's 4100 feet and I take an intermediate place and call it eight-tenths of a mile.

Q Is that from east to west?

A From east to west.

Q Which is the direction --

A Which is the direction that the highway comes.

The record is clear that the location of the road

1 through the park was approved by the Bureau of Public Roads in
2 1956, 15 years ago now. It is true, as Mr. Vardaman says, that
3 at later times there have been suggestions that it might be
4 subject to reconsideration. That that would be adequate
5 petition for rehearing, that does not negative the fact that it
6 was approved in 1956.

7 It was reaffirmed by the Federal Highway Administra-
8 tor Whitten in January 1966, five years ago, and both of these
9 were before there was any statutory provision of these parks.

10 Section 4(f) of the Department of Transportation
11 Act was enacted in October 1966 and effective April 9, 1967.
12 The approval of the route was reconfirmed by the Department of
13 Transportation Secretary Boyd on April 19. In 1968 the
14 Section 4(f) was amended and Section 148 of the Federal Aid
15 Highway Act was enacted and effective in August 1968 and the
16 design, only the design, because Secretary Volpe made no
17 consideration to the location, that had been determined in
18 1956, 1966 and reconfirmed by Secretary Boyd in 1968. The
19 design was approved by Secretary Volpe on November 5, 1969.

20 I would like to recall ~~the~~ fact that the statute
21 provides that, and I quote: "To the greatest extent possible"
22 the states shall select the routes of their highways and this
23 route has been approved by the state, the city and by the
24 Memphis Park Board.

25 The Tennessee Highway Department was authorized to

1 proceed with the purchase of the right-of-way on May 29, 1967,
2 nearly four years ago, and commenced doing so in the areas not
3 immediately adjacent to the path.

4 At the present time, and this is true with one or
5 two exceptions at the time the suit was started, all of the
6 land has been acquired to and through the park. Ninety-nine
7 of the nearly 2,000 people living there have been displaced
8 and 75 percent of the business has been demolished. Some of
9 the land has been graded.

10 Now, the red line (pointing) from east to west is
11 the approved route of the park. Now, that which has the green
12 dashed lines beside it is land where the right-of-way was
13 cleared prior to April 1968, the date of Secretary Boyd's
14 approval. All of this was cleared by August 1966, before the
15 effective date of either of the statutes involved here.

16 The land with the yellow along the red (indicating)
17 is land which was cleared after April 1968, after the date of
18 Secretary Boyd's approval.

19 Q Was that in the park? That land you referred
20 to. Was that in the park?

21 A The park is this area, Mr. Justice (indica-
22 ting): from there to there and that is all that we are con-
23 cerned with here.

24 What I am trying to point out is that the land up
25 to the park on both sides was cleared after April 1968 and

1 substantially all cleared by January 1969 when Secretary Volpe
2 took office, and all cleared by November 1969 when he approved
3 the design.

4 Now, here is one of the alternates which was
5 considered (indicating); here is another alternate that was
6 considered. This triangular line is an alternate which is
7 suggested in one of the affidavits filed by the Petitioners in
8 this case.

9 This is a pedestrian bridge(indicating) for
10 access to the zoo; this also is a pedestrian bridge for access
11 to the zoo, and this is a cross-street which is left open.

12 The state has bought the 26 acres through the park
13 (that's this strip) for \$2,200,000 and the City has already
14 expended a million dollars for a 168-park with a golf course
15 and has spent \$200,000 on improvements to the zoo and is ob-
16 ligated to expend the remaining million dollars for additional
17 park land, and thus the park resources of Memphis will be in-
18 creased by some 320 acres on account of the loss of 26 acres
19 in Overton Park.

20 Q Of course acreage is important, but even
21 more important in parks, with respect to parks, is their
22 location. One of the few things that I learned as a member
23 of the City Council of Cincinnati that where the parks are is
24 of the greatest importance.

25 A I understand, Mr. Justice and I'm a little

1 bit inhibited because there is nothing in the record about
2 where the parks are. I have made inquiries and as far as I am
3 concerned, the parks are a substantial improvement to the park
4 facilities of Memphis, in terms of location as well as area --

5 Q But how about the accessibility of the people
6 who need the parks?

7 A I am so advised and Mr. Hanover can tell you
8 more about that. The location of the new parks does not appear
9 in the record.

10 Our brief answers the arguments made by the
11 Petitioners and I believe that we had an answer to each
12 argument and we rely on that brief. In the brief time avail-
13 able to me for oral argument I can't deal with all of the
14 arguments here but I will confine my consideration to four
15 points.

16 There are special circumstances here which make this
17 a suitable place to put this road and which support the
18 determination of the Secretary's that there is no other feasible
19 and prudent -- and I emphasize the fact that the statute says,
20 "and prudent" alternative to this route.

21 Overton Park has always been divided. There is, in
22 fact, the park and the zoo and for 75 years or so they have
23 been separated.

24 This is the zoo (indicating); the zoo has been ex-
25 tended into this area and this, although it appears to be

1 trees, is trees, has parking space under it. The park is
2 south of the road.

3 First there was a narrow gauge railway across the
4 land at this point; then trolley tracks and for the past 30
5 years or so the trolley tracks have been replaced by a paved
6 bus route. This right-of-way is 40 or 50 feet wide and it has
7 city bus traffic with no protection, and that has been there
8 for 60 or 70 years in one form or another.

9 There is, however, and always has been, limited
10 access to the zoo and that's what they want. Along the bus
11 route at the south side of the zoo there is a chain-link fence
12 six or seven feet high, except at the east end where the park-
13 ing lot to the zoo is located and will continue to be located.

14 The bus route already occupies four or five acres
15 which, of course, has no trees on it, so we are talking about
16 21 to 22 acres. The park now contains 150 acres of unimproved
17 woodlands. This can be seen here (indicating) in --

18 So that the statement made in one of the letters
19 in the record and relied on in Petitioner's brief that there
20 won't be much in the way of a wooded park left in Overton Park
21 after an interstate highway is routed through it, is obviously
22 a greatly overly-exaggerated statement. There will be at least
23 130 acres of wooded parkland in Overton Park.

24 Q What's the Climax Forest; do you have any
25 idea?

1 A No, Mr. Justice; I have some recollection
2 that I read about it once many years ago, but I can't --

3 Q I read about it in the Petitioner's brief,
4 and I perhaps should have looked it up in the dictionary, but
5 I just wondered if you knew what a climax forest is.

6 A Well, perhaps Petitioners could enlighten
7 you. I could have looked into it. It is a tree term, but I
8 don't know it.

9 With respect to the design, much of the highway is
10 to be depressed so as to minimize the noise and interference
11 with view. Secretary Volpe took great pains with respect to
12 that.

13 The place where the highway would be above grade is
14 to enable it to cross a creek which is here (indicating), where
15 engineering difficulties would be considerable and continuing
16 if the highway were depressed.

17 The statute does not say "no other possible alter-
18 native." It does not even say "no other feasible alternative."
19 What it says here is "no other feasible and prudent alterna-
20 tive," in the conjunctive. . There must be no other route that
21 is prudent as well as feasible. According to my dictionary
22 "prudent" means wise in handling practical matters, exercising
23 good judgment or common sense.

24 The legislative history shows that it was intended
25 that the Secretary should make this judgment. We submit that

1 it is clear on this record that both Secretaries have adequate
2 support for their conclusion that there is no feasible and
3 prudent alternative to the use of this land and that all
4 possible planning to minimize harm to the park has been done.

5 Now I turn to the question of findings. The
6 statute does not require findings or a trial type hearing by
7 the Secretary, and it would be a mistake for this Court to
8 conclude, we respectfully submit, that findings by the
9 Secretary are required or that he should be required to con-
10 duct a trial-type hearing.

11 Now, following a suggestion which was made in the
12 previous oral argument in this case, we have obtained from
13 both Secretaries involved, certificates stating their findings.
14 Now, these are referred to by Mr. Vardaman, understandably, as
15 affidavits but they are not so denominated themselves; they
16 are certificates made by high government officers with respect
17 to actions which they took and they do, we submit, serve to
18 clarify any ambiguity which may lie in the record by reason
19 of the fact that they did not make formal findings which I
20 again submit the statute does not require them to do.

21 We recognize that the presentation of these
22 documents is unusual. We submit them for what effect they can
23 properly be given. I repeat, the suggestion came from the
24 previous oral argument in the Court. We had them nicely
25 printed up but Secretary Volpe has been out of town. His

1 affidavit was cleared with him by telephone; it was to be
2 signed this morning and when he came to sign it he wanted to
3 change it and of course it's his certificate, and so he
4 changed it and the result is that we have withdrawn the printed
5 copies which we had prepared in advance and have submitted the
6 original of the certificates to the Clerk and have provided
7 these Xerox copies to our counsel and to the Court.

8 Q Mr. Solicitor General, may I ask you, in view
9 of your statement that no formal findings are required. What
10 kind would you say would be required to take care of the pre-
11 cautionary actions which the Congress has prescribed?

12 A Yes, Mr. Justice. I think that it should
13 appear in some appropriate way and I hope that these certifi-
14 cates are a, shall I say, a last resort, appropriately, that
15 the Secretaries did, in fact, recognize and take into account
16 and undertake to operate under the statutory requirements
17 clearly and validly made by Congress. We think that even
18 without these formal certificates from the Secretary there is
19 sufficient in the record to show that they did proceed on that
20 basis.

21 But what the statute says is: that the Secretary can-
22 not approve any program or project involving parklands unless,
23 one: there is no feasible and prudent alternative for the use
24 of such land and two: such possible findings to minimize harm
25 to such park resulting from such use. It does not even say

1 "unless the Secretary finds that there is no such alternative,"
2 and I suspect that that is because Congress deliberately
3 wanted to avoid the Secretary having to hold a hearing and take
4 evidence and balance the evidence and get then in the way that
5 a court does after a trial-type hearing, make a finding of
6 fact.

7 Q Is there anything in the Congressional
8 hearings or record to support that viewpoint?

9 A Yes, Mr. Justice; the legislative history is
10 we feel, both in the appendix to Petitioners' brief and in our
11 brief, particularly on page 21, are statements of our brief.
12 There are statements in the report of the Senate Public Works
13 Committee and in the report of the House Committee on Public
14 Works. "The Committee is extremely concerned that the highway
15 program be carried out in such a manner as to reduce in all
16 instances, the harsh impact on people that results in the dis-
17 location and displacement by reason of highway construction.
18 Therefore, the use of parkland is properly protected and the
19 damage minimized by the most sophisticated construction tech-
20 niques is to be preferred to the movement of large numbers of
21 people."

22 And there is a colloquy in the Senate to which
23 reference is made in the appendix to the Petitioners' brief
24 which he seems to say leads to the conclusion that the Secre-
25 tary has no discretion but which we read in exactly the

1 opposite way. We read it to say that if the local people say
2 that these parks can't be used then the Secretary has no dis-
3 cretion, but that if they say they can be used it still re-
4 mains a matter for the Secretary's judgment as to whether
5 there is a feasible and prudent alternative.

6 Q Am I right in thinking that your current
7 departmental regulations do provide for --

8 A Yes, Mr. Justice, the Department is up-
9 grading the procedures here and I think that's sound but I know
10 of no reason why that should be applied retroactively to pro-
11 ceedings which were already far along by the time that was
12 adopted and I don't read the court case on which the
13 Petitioners rely as leading to any such conclusion.

14 The fact of the matter --

15 Q Do you think there is --

16 A It is clear here that both Secretaries
17 understood the requirements of the statute and they have now
18 both certified that they did understand it and that they com-
19 plied with it.

20 This Court has often held that formal findings
21 should not be insisted on when they are not legislatively
22 commended.

23 The standard of review should be whether the action
24 of the Secretary was arbitrary and capricious. We think that
25 the Petitioners are far from having sustained their burden of

1 proof that there was such arbitrary and capricious action here.

2 We think that this record contains ample material
3 to show that both Secretaries acted carefully, thoughtfully,
4 deliberately and with full awareness of their obligation under
5 the statute, but it was their decision and they knew it. The
6 task is one of great responsibility and they should be upheld.

7 The Administrative Procedure Act does not apply to
8 this because it's a grant-making matter which is expressly ex-
9 cluded from the Act. But if it does apply it would lead to the
10 same results.

11 Q Could I ask you a question?

12 MR. CHIEF JUSTICE BURGER: Mr. Solicitor --

13 Q My recollection is that intermediate to the
14 earlier argument on the stay and today's argument the Govern-
15 ment made a suggestion that this case should be remanded --

16 A Yes, Mr. Justice, I am just turning to that.

17 Q Oh, I'm sorry.

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

24 We do not think that there should be a remand for
25 a full trial unless the District Court finds after examining

1 the administrative record that it cannot decide the issue of
2 arbitrary and capricious action without a further trial. We
3 file the motion of remand not for the purpose of conceding
4 error here, as Mr. Vardaman says, but for the purpose of narrow-
5 ing the scope of any remand and for the purpose of negating
6 any suggestion that there should not be such a limited remand
7 because we have not asked for such a limitation.

8 Now, I see that my time has virtually expired. I
9 will have to summarize my remaining point.

10 The third one I wanted to make was that a remand
11 here would, it seems to me, be a triumph of formalism. With
12 the benefit of hindsight, this record is not all that I might
13 like to have. It would be nicer if the Secretaries had made
14 formal findings at the time they made their determinations,
15 though they have made such findings now.

16 It would be better if we didn't have to piece out
17 the essence of their determinations from other actions which
18 they took like press releases and resolutions and letters and
19 affidavits and it is for this reason that we move for the
20 introduction of the remand for the introduction of the admini-
21 strative record.

22 But this is not really an exercise in futility.
23 Would it not be a triumph of formalism over substance, or in
24 Mr. Justice Frankfurter's well-known words: "A case of marching
25 the King's men up the hill and then marching them down again."

1 The remand for further proceedings, would, I think,
2 be a kind of mechanical jurisprudence more fitting for a
3 barren park(?) than for the final third of the 20th Century.

4 Q I don't quite understand that, Mr. Solicitor
5 General. Congress has passed an act which seems to attach
6 great importance on not going through parks if it's not shown
7 to be -- if they can't show it's feasible and prudent and you
8 mean that it would be like Barron Park(?) to insist that something
9 be put in the record to show that?

10 A Well, Mr. Justice, my point is that I think
11 that there is ample and adequate in the record now to make it
12 plain that if this is remanded a great deal of motion will be
13 generated and when we get through the motion there will then be
14 a nice new record which will have adequate material to show that
15 the route is not --

16 Q That assumes there will be a record which
17 does not now appear.

18 A Mr. Justice, we think there isn't -- if the
19 test of review is whether the Secretary acted in an arbitrary
20 and capricious manner, which we think is the test, we think it
21 is apparent from this record that neither Secretary acted in an
22 arbitrary or capricious manner, ignoring the requirements of the
23 statute.

24 If that does not adequately appear then we think
25 the case should be remanded so that the administrative record

1 can be seen by the District Court and that question determined
2 on the administrative record.

3 What we think should not be done here is: anything
4 which requires a trial-type hearing before the Secretary or
5 anything which leads to what amounts to a trial de novo before
6 the District Court and a decision of this question in effect
7 by the District Court rather than by the Secretary.

8 Because, that is my final point: the fundamental
9 question here, one of the separation of powers of the proper
10 allocation of function to courts, legislatures and the execu-
11 tive branch, and the important and complex task of carrying on
12 government, two things are clear: one is that Congress has
13 legislated certain specific requirements with respect to the
14 use of parklands and the other is that it has allocated the
15 administration of that provision to the executive branch,
16 specifically to the Secretary of Transportation.

17 This does not mean that there is no role for the
18 courts, for the Secretary should be held in check if he ignores
19 the legislative requirements. But it does mean that the proper
20 role of the courts is a narrow and limited one and it is impor-
21 tant, I submit, both for the administration of the government
22 and for the court that the limited nature of that role be
23 recognized and observed. It is not good government to have all
24 governmental decisions decided by courts, or even to have a
25 situation where, as a matter of routine all questions arising

1 in the administration of the Government are habitually referred
2 to courts.

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

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

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

16 Mr. Chief Justice I'm afraid I have trespassed some
17 on Mr. Hanover's time and I hope that he can have some of his
18 time.

19 MR. CHIEF JUSTICE BURGER: We'll work it out
20 reasonably, Mr. Solicitor General.

21 Mr. Hanover, you may proceed.

22 ORAL ARGUMENT BY J. ALAN HANOVER, ESQ.

23 ON BEHALF OF RESPONDENTS

24 MR. HANOVER: Mr. Chief Justice and may it please
25 the Court:

1 I will not at this time attempt to restate the
2 facts or use any time for that purpose because I think that the
3 Solicitor General has stated them quite well to the Court.
4 I, being the only attorney at the bar today who has played in
5 this park I do feel that I probably know more of the details
6 than either of my colleagues and would be, of course, happy to
7 answer questions in that vein, but I would pass from the facts
8 to take up what I feel are the issues that affect this case
9 and affect my client: the State of Tennessee.

10 I think the best place to start any argument is at
11 the beginning and I think it would be helpful to the Court if
12 I went back to the beginning of this case as it will help you
13 to understand all five issues in this case.

14 The beginning of this case, as is the beginning of
15 any case is the pleadings and the complaint filed by the
16 Petitioners in this case sets up the case; it sets up the
17 standard of judicial review and it sets up what type of
18 judicial review should be had in this case.

19 In Petitioners' original complaint they charge that
20 the Secretary did not make findings. That is really the only
21 basic issue in the lawsuit. Actually, although I was glad to
22 see this morning the affidavits that were filed by the Solicitor
23 General and of course the other affidavits in the record as to
24 approval of the reaffirmation. Actually, on a motion for summary
25 judgment that was before the District Court and the Court of

1 Appeals and is before this Court, none of those affidavits
2 were actually necessary.

3 The complaint filed by Mr. Vardaman states all of
4 the necessary facts for this determination. He states that
5 Secretary Boyd approved the route and of course the word
6 "approved" is the key word in the statute. There is no dispute
7 concerning the approval; there is no dispute concerning the
8 final approval of the route design in November of 1969, since
9 the complaint filed by the Petitioners states all those facts
10 and therefore they are admitted. He raises the issue as to
11 whether or not findings as such were acquired under the park
12 lands statute and in the record in the appendix you will see,
13 as cited in our brief, the colloquy that occurred between Mr.
14 Vardaman and District Judge Brown on this very point as to what
15 the issues were and what he was contending.

16 I think it's quite clear that the issue was whether
17 or not specific findings are necessary under the act, and that
18 is of course, I think, the main problem that this Court has to
19 face. If this Court believes as I do, and as the Solicitor
20 General does that this is a discretionary statute; that Congress
21 gave the Secretary of Transportation the discretion to make
22 this decision and that the findings as such are not required by
23 the statute or by the, either the application or nonapplication
24 of the Administrative Procedure Act, I feel I have discussed
25 quite fully in my brief that it does not apply to a discretionary

1 decision of this type that the Court can reach its conclusion
2 and end this case one way or the other on that point alone.

3 Q What do you mean by "discretionary?"

4 A As contrasted, Mr. Justice Black, to ad-
5 ministerial duties. He has to exercise judgment; he has to
6 exercise his judgment rather than the judgment of Mr. Vardaman
7 or the Solicitor General or myself or any of the protagonists
8 in this case.

9 Q You mean nonreviewable?

10 A No, sir. I will take that point up right
11 now.

12 I tend to agree, to a certain extent with the
13 Solicitor General, although we do disagree on one or two other
14 points in this case regarding administrative record, that the
15 Administrative Procedure Act does not apply, but it really
16 doesn't make any difference whether it does or not, the result
17 in the case is the same.

18 Now, the question of review, as I stated earlier,
19 the complaint filed by Mr. Vardaman does not charge Secretary
20 Volpe with any misconduct. It has always been my understanding
21 of the law that when you challenge the actions of an administra-
22 tor and you want to have a review on the question of whether he
23 was arbitrary or capricious, you must allege some facts to
24 bring it before the court and have a trial on the merits, which
25 is what Mr. Vardaman ultimately wants.

1 They didn't say -- as a matter of fact, they didn't
2 even make a conclusory allegation that Secretary Volpe was
3 arbitrary and capricious. They just said he didn't make any
4 findings. Now, if this Court holds that findings he must make
5 that's the end of that issue. If the Court holds that findings
6 he need not make, that again is dispositive of the issue.

7 Now, it's not that he's precluded from judicial
8 review or that this Court is precluded from reviewing the case,
9 it's because he did not allege facts that warrant judicial
10 review beyond what he has here today. If he had said that
11 Secretary Volpe laid this route out because he had a relative
12 near by who would profit from the sale of his land or the
13 enhancement of its value or that he deliberately refused to
14 consider evidence or that he deliberately chose engineers to
15 advise him who he knew were not properly trained, that may be
16 the basis for a review beyond the scope that we have here on
17 the question of summary judgment.

18 But he did not; he just simply said he made no
19 findings although he admittedly admits that he approved the
20 land.

21 Now, going from that there are many cases that have
22 been before this Court and the lower Federal Courts to the
23 effect that with those allegations you can go forward and you
24 can question the Secretary. I would think that if he had
25 charged Secretary Volpe with some improper conduct he would

1 have a right to examine him on that point.

2 Q Where did he fall short of that?

3 A He just didn't allege it.

4 Q What did he allege?

5 A He only alleged, may it please Your Honor,
6 that these various routes had been approved; the designs had
7 been approved and that the Secretary had failed to make find-
8 ings. Now, we quoted that extensively in our brief to call it
9 to the attention of the Court.

10 I see that my time has expired. In conclusion I
11 again ask the Court to, before determining the standard of
12 judicial review, the question of whether the Secretary or
13 Federal Administrator Bridwell should have been deposed; to
14 carefully examine the issues to determine what the issues are.

15 I think that all the other issues fall into place
16 after you see what the Petitioners are actually claiming in
17 this case.

18 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hanover.
19 Mr. Vardaman.

20 REBUTTAL ARGUMENT BY JOHN W. VARDAMAN, ESQ.

21 ON BEHALF OF PETITIONERS

22 MR. VARDAMAN: Mr. Chief Justice: Respondents in
23 this case traditionally start each argument with the statement
24 that this highway will run along a bus route through the park.
25 And the implication being it will have practically no effect on

1 this park.

2 Well, this bus route displayed here is a narrow
3 facility some 25 feet wide in which buses run through about
4 once an hour; in fact it's so narrow that the trees from the
5 wooded part of the park hang over the bus route freely crossed
6 by pedestrians.

7 Q Will it be for passengers only?

8 A The bus route is only used for about one bus
9 an hour; no cars; no other factors.

10 Q Is the road to be used for passengers only
11 or for passengers and freight?

12 A Oh, for commercial and passenger vehicles.

13 Q Freight?

14 A Freight; trucks.

15 The statement which they claim is unwarranted, the
16 statement which says there won't be much of a wooded area left
17 in the park, that's not a statement we made; that's a statement
18 that an official of the Department of Interior made, a depart-
19 ment which the Secretary is statute-bound to consult with in
20 projects of this nature. It is a document fully a part of the
21 administrative record. They don't seek to dispute that with
22 any other evidence; they simply say it can't be right.

23 We submit that the Department of Interior --

24 Q I don't know whether it's relevant or not, but
25 looking at the map from where I'm sitting it could not

1 conceivably be right.

2 A I think what the official had in mind, not
3 that the major part of the woodland would be taken, there would
4 be a 450-foot right-of-way through that area, but what he
5 meant was not only the take of 450 feet, but you really destroy
6 the rest of the park, because immediately you don't have a
7 woodlands park immediately adjacent to the highway if you've
8 got a six-lane interstate highway going. You have the sight,
9 the sound, the general pollution associated with highways
10 which spreads further than the right-of-way.

11 Q How wide would you say it is?

12 A 450 feet in the wooded area of the park, and
13 I think anyone who has ever stood anywhere close to an inter-
14 state highway of this nature knows that the effects don't stop
15 at the edge of the pavement. And I think, Your Honor, that's
16 what the Department of Interior official --

17 Q Well, 400 -- the outer edges of the 450 feet
18 are not paved, I am sure; are they?

19 A Well, there is a very -- it's not clear, but
20 I think that --

21 Q This really hasn't got much to do with the
22 case, but I think you will find that the 450 feet is the
23 entire right-of-way and the pavement doesn't extend nearly to
24 the edge of the --

25 Q But the shoulders, I think in this case are

1 very narrow. That's one of the points they have made also,
2 that they didn't take very much.

3 The second point which they raise is that the
4 right-of-way for this route was acquired long -- it was
5 acquired after the decisions were made. In fact, the Depart-
6 ment of Transportation authorized the acquisition for the
7 right-of-way of this project before they ever made any effort to
8 comply with this statute.

9 Even if we assume what the Solicitor General says
10 is correct, and even if we assume what they state in their
11 certificates are right, the Department of Transportation told
12 the state to go ahead and acquire the land for this project in
13 May of 1967, a month after the statute was effective, and 11
14 months before any effort was made to comply with it. And I
15 submit that right-of-way acquired under that authorization was
16 acquired illegally and should not prejudice the Petitioners'
17 position --

18 Q Could you indicate briefly what it is
19 exactly that you expect to be able to show if this case is
20 remanded?

21 A I would be able to show, Your Honor, that
22 in my -- my evidence would show that the officials of the
23 Department of Transportation left this decision solely to the
24 City Council of Memphis. They went down and made explanations
25 and they, although they pointed out alternatives, both to the

1 north and south of the park, they never decided one way or the
2 other in the Department of Transportation that these alterna-
3 tives -- whether these alternatives were prudent and feasible.
4 They attempted to delegate to the City Council and once the
5 City Council made up its mind they simply rubber-stamped that
6 and approved the highway without ever making its own independent
7 judgment as to whether there were feasible and prudent alter-
8 natives.

9 Q Are you going to do that without cross-
10 examining Mr. Boyd and Mr. Volpe?

11 A Well, that's what Mr. Bridwell would testify
12 to. I think it's also supported by the evidence of his
13 testimony before the Congress, which is an exhibit in this
14 case. But, that's what Secretary Bridwell will testify to.

15 I think that in footnote 25 of the Solicitor
16 General's brief you can see that the statute imposes an
17 obligation on the Secretary of Transportation to make an in-
18 dependent determination and we will show that determination was
19 never made here.

20 Q Apart from the technical question of --
21 about these certificates, you are in effect saying that these
22 certificates should not be taken at face value?

23 A That's correct, Your Honor, because we have
24 evidence which would dispute it.

25 Q I gather you claim they not only did not

1 make the so-called formal findings, but they made no findings
2 at all?

3 A That's correct; didn't even make a minimal
4 determination.

5 Further, with respect to the design, we would show
6 that the designs which they reject as impossible, are in fact,
7 designs which are clearly possible. They are the types of
8 designs that are used throughout the interstate highway system
9 and are clearly possible here. And I don't know on what
10 basis they could possibly say that they were impossible, in
11 terms of the statute, but we will prove that they certainly
12 were possible. In fact --

13 Q Mr. Vardaman, you don't question that these
14 are the signatures of Secretary Volpe and Secretary Boyd; do
15 you?

16 A Oh, no. I have no grounds on which to
17 question that. No; I think that --

18 Q These certificates are proper and so on.
19 These are genuine --

20 A Oh, I don't doubt the authenticity of these
21 pieces of paper. I merely say I think that we have evidence
22 to contradict them.

23 Furthermore, there is reference made to the legis-
24 lative history. I think that that's a misnomer, but the
25 legislative materials to which the Solicitor General referred

1 are not history at all. Those are materials that were created
2 or put in the Congressional record over a year after this
3 statute was passed. This statute was passed, I believe, by
4 the 89th Congress in 1966 and all of the materials to which he
5 referred are materials taken from the 90th Congress in 1968;
6 hardly, we submit, legislative history.

7 Q Well, in a developing field, do you suggest
8 that what they said two years later is not relevant?

9 A I suggest that it is not relevant, Your
10 Honor, because, I think, as we point out in our brief, that
11 those statements were made generally, by people who opposed
12 this statute in the beginning; who tried to amend it, to
13 weaken the statute; in fact the Secretary of Transportation
14 opposed any amendment.

15 So, there were, in effect, efforts to cut down the
16 force of the statute on the Floor of the Congress. We submit
17 that the statute is clear on its face and ought to be inter-
18 preted by looking at the statute.

19 Finally, I would say, Your Honors, that this case is
20 not only important to my clients, the Petitioners in this case,
21 but the people of Memphis. This case has great importance to
22 the people of this nation. The importance of this statute is
23 one which will drastically affect the battle to preserve this
24 nation's environment against projects such as that involved
25 here.

1 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
2 Vardaman, Mr. Solicitor General and Mr. Hanover. The case is
3 submitted.

4 (Whereupon, at 11:10 o'clock a.m., the argument in
5 the above-entitled matter was concluded)

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