

Supreme Court of the United States

OCTOBER TERM - 1970

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DEC 18 1970

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In the Matter of:

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

Petitioners

vs.

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

Respondents

Docket No.

[1066]

Argument ~~off~~ *on* Stay

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Place Washington, D.C.

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C O N T E N T S

ARGUMENT OF:

PAGE:

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

4

William Bradford Reynolds, Esq. pro hac
vice

2

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

35

REBUTTAL ARGUMENT

John W. Vardaman, Jr.

51

1 IN THE SUPREME COURT OF THE UNITED STATES

2 DECEMBER TERM

3 -----
4 CITIZENS TO PRESERVE OVERTON PARK, INC. :
5 ET.AL., :

6 Petitioners :

7 vs. :

NO. :

8 JOHN A. VOLPE, SECRETARY, DEPARTMENT :
9 OF TRANSPORTATION, ET.AL. :

10 Respondents :

11 Washington, D.C.

Monday, December 7, 1970

12 The above-entitled matter came on for argument at
13 10:05 a.m.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

20 APPEARANCES:

21 MR. JOHN VARDAMAN, JR., ESQ.
22 Washington, D.C.
On Behalf of Citizens to Preserve Overton Park, Inc.

23 MR. J. ALAN HANOVER, ESQ.
24 Memphis, Tennessee
25 On Behalf of Respondents

1 APPEARANCES, (Continued)

2 MR. WILLIAM BRADFORD REYNOLDS, ESQ.
3 Office of the Solicitor General
4 Department of Justice
5 Washington, D.C.
6 Pro Hac Vice
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1 MR. CHIEF JUSTICE BURGER: We'll hear argument in No.
2 , Citizens to Preserve Overton Park against Secretary John
3 Volpe. Mr. Vardaman, you may proceed whenever you're ready.

4 ARGUMENT OF MR. JOHN W. VARDAMAN, JR. ESQ.

5 ON BEHALF OF PETITIONERS

6 MR. VARDAMAN: Mr. Chief Justice, and may it please the
7 Court. This case is here today on application for study pend-
8 ing the filing of a petition for writ of certiorari.

9 We seek an application to stay the respondents in this
10 case. The Secretary of Transportation and the Commissioner for
11 the Department of Highways for the State of Tennessee, from
12 authorizing the beginning of construction of a six lane inter-
13 state highway which will pass through Overton Park, a large,
14 public park located in Memphis, Tennessee.

15 If this stay is not granted, the respondents will auth-
16 orize construction and that construction will proceed before
17 this Court has an opportunity to act on a Petition for Writ of
18 Certiorari.

19 That construction will inflict grave and irreparable
20 damage to the park.

21 Q. --- the latest date for issuance of Writ of Cer-
22 tiorari?

23 A Your Honor, I think we have until January 28th.
24 I believe, towards the end of January. However, as we suggested
25 in the brief which we filed, we are willing to have the Court

1 act upon these papers as a Petition for Writ of Certiorari
2 we can meet the formal requirements by filing a petition with
3 the clerk. We are ready to proceed immediately. We have not
4 filed a petition thusfar because there is the threat if stay
5 is not granted portions of the case may be ---.

6 But we are willing to proceed immediately with the fil-
7 ing of---

8 Q --- to cooperate with any expedited schedule of the-

9 A Certainly---

10 Q That we're discussing.

11 A That's correct.

12 If the respondents are permitted to proceed with this con-
13 struction they may likely meet this case. If they do, they
14 will have been successful without ever having filed an answer
15 to the Petitioners complaint, without putting one witness on
16 the witness stand, without having one other official subject to
17 examination by deposition, but instead rely on a basis of out
18 of court litigation affidavits filed in support of a motion for
19 summary judgement.

20 That's the record in this case. So, the decision below
21 was based soley on affidavits. The District Court granted sum-
22 mary judgement, it was affirmed by the Court of Appeals.

23 This case arises under a statute passed in 1966, which
24 articulates a national policy of preserving park plans, recre-
25 ation areas, historic sites, water fowl, and wildlife refuges.

1 That statute provides that the Secretary of Transportation
2 shall not approve any project which affects a parkland or a
3 recreation area unless there are no feasible alternatives, or
4 unless the design of the project includes all possible planning
5 to minimize harm.

6 The park which is involved in this case, is a large,
7 342 acre public park located in Memphis, Tennessee. It has
8 within it approximately 170 acres of woodland forest, as of
9 1965 this constituted one half of the city of Memphis.
10 Memphis is woodland forest. If this highway goes through that
11 part of the park, according to Department of Interior officials
12 who oppose this project there will be very little left of the
13 woodland forest.

14 Q Could I interrupt you a moment and go back to the
15 question that Justice Stewart asked? As far as you're concerned
16 are you willing to treat this argument as an argument on the
17 merits as distinguished from application per se?

18 A Your Honor we're willing to treat this argument as
19 an argument on the merits as well---

20 Q That's the way I read your papers---

21 A Yes, if the Court would like to consider this as
22 an argument on the merits, we're willing to have it treated
23 that way.

24 This highway project involves a construction of a six
25 lane interstate highway with the right of way between 250 feet

1 and 450 feet wide. As it proceeds through the wooded area, of
2 the park if it's constructed as is presently planned, it will
3 take a swath of 450 feet out of the wooded section they will
4 pass through a small picturesque lake, in the park. It will
5 pass immediately adjacent to the zoo, it will be a little
6 barrier to either side of the park. It will literally cut this
7 park in two.

8 Q Is this 450 feet, that's 150 yards if my mathematics
9 is correct ?

10 A Yes, it is Your Honor. I think that's an undisputed
11 fact on this record.

12 Q And is it undisputed that to depress this highway
13 was going to cost some 20 million dollars just to --- depress
14 it as distinguished from tunnelling it.

15 A No. Your Honor, the figures in this record are for
16 tunneling and they suggest two types of tunnels. They would
17 cost, they estimate, they don't have any calculations, just
18 estimates, would cost up to 40 million dollars.

19 There is, however, a suggestion that was made by Depart-
20 ment of Interior officials, for a fully depressed route, which
21 would not be a tunnel, and the real cost figures on that
22 design---

23 Q I thought someone tossed in a figure of 20 million
24 dollars in relation to that.

25 A I think there is an estimate of 40 million dollars,

1 but that involves fully depressing and then totally covering
2 it. What is now, as I understand as a cut and cover tunnel.
3 If you simply depressed it all the way through the park, that
4 would minimize harm to the forest, but there are no cost figures
5 on that.

6 I might point out, incidentally, that they have raised an
7 objection that this would create certain drainage problems,
8 there's a small creek that runs through the forest and they
9 maintain that they can't go past that creek with a depressed
10 route.

11 There are affidavits on trial, in this case, that suggest
12 that that difficulty can be overcome by standard engineering
13 techniques which are in use in the interstate system just today,
14 have been in use in the interstate system for some time.

15 Yet they refuse to use them on this case.

16 Q What is the acreage of the park?

17 A The acreage of the park, Your Honor is 342 acres.

18 Q How much would be taken?

19 A Twenty six centrally located acres will be taken.

20 Q If I have the figures, I think that the plans are
21 to depress the highway, except where it crosses the stream.

22 A That's correct---

23 Q They say it has to cross a grade in order to elimi-
24 nate a drainage problem.

25 A That's correct, Your Honor, but---

1 the problem with that is that the stream is only slightly west
2 of the center of the park and they actually go above grade at
3 that point, so , although they depress it in the eastern part
4 of the park as it rises to that portion of it above grade a
5 substantial part of it is at grade---

6 Q It's an east-west highway, is it?

7 A That's correct. This is part of a transcontinental
8 east-west interstate---

9 Q And the park lies in the westward part of Memphis?

10 A The park lies practically in the middle of the city.
11 If you look at a map of Memphis---

12 Q West of Memphis is the Mississippi River.

13 A That's correct. This park is practically in the mid-
14 dle of the city.

15 Q That's where the zoo is.

16 A That's correct. This highway will run adjacent to the
17 southern boundary of the zoo right now.

18 This highway was approved in November of 1969. This action
19 was filed immediately thereafter. Prior to the time this high-
20 way was approved there was a study of several alternative routes
21 One which would swing immediately to the north of the park, and
22 one which would swing immediately south of the park, and it's
23 my understanding that Mr. Reynolds will bring a map into
24 Court during his argument. He'll show you, with bands on the
25 map, where these alternatives would go.

1 Now in the Department of Transportation, in the Secretarys
2 papers, which are on file, these maintain that those alternati-
3 ves were rejected because of large displacement of persons and
4 businesses. And in his affidavit he gives you some statistics
5 as to the number of people which would be displaced by the
6 route which goes to the north, and that which goes to the
7 south. What he doesn't give you in the affidavit is the num-
8 ber of people who would be adversely affected, not only in the
9 use of the park, but in their homes and businesses by the route
10 which uses the park.

11 And when you search the record further and find those
12 statistics that demonstrate that the alternative to the north
13 of the park which he rejected actually neither displaces
14 more people from their homes or adversely affects them in their
15 businesses or schools. So the test which he asserts he's app-
16 lied in this case, was misapplied if the test is the number of
17 people which would be adversely affected or the number of
18 people who would be displaced from their homes.

19 The route to the north according to their own calculations
20 will either displace or adversely affect 2,386 people, the
21 route through the park, according to their own figures will
22 adversely affect or displace 2,607 people. Actually more
23 people than the route to the north.

24 And this is the case even though in their calculations
25 they made no allowance for the people, they have not counted

1 as adversely affected, people who use the park. For instance,
2 over a million people a year use this zoo, and they haven't
3 calculated the affect on those people.

4 Q How would you calculate that, Mr. Vardaman?

5 A Your Honor---

6 Q They won't stop using the park, will they?

7 A Some of them may stop using the park, some of them
8 may not. But one of the problems in trying to use mathematical
9 formulas in a dispute of this kind is that it's difficult to
10 quantify the values of a parkland. And that's what one of the
11 reasons this statute was passed -- decisions have been made
12 on locating highways on the basis of cost, and residencies
13 dislocated and where you have decisions made that way, the
14 values of the parkland, the aesthetic values, the recreational
15 values, were often overlooked.

16 And that was one of the motivating forces for the passage
17 of this act.

18 Q Approximately when was all the clearance to the
19 approaches completed? A year ago, two years ago, how long?

20 A The record shows that that construction began in 1967.
21 They authorized acquisition of the right of way, they began to
22 acquire it parcel by parcel, by 1968 the record shows that
23 much of it had been acquired.

24 Q Well, at that time, it was reasonably clear that
25 they were going through the park.

1 A. No. Your Honor. At that time, the Secretary of
2 Transportation in a letter to Citizens to Preserve Overton
3 Park, stated that the Federal Highway Administration had told
4 the Memphis City Council in April of 1968, the Department of
5 Transportation had no final decision on the location of this
6 highway.

7 Q When was it clear that the route would go through
8 the park, approximately?

9 A That's one of the difficulties of this case. The
10 final decision was made in 1969, November of 1969. A previous
11 decision, and whether that was the type of decision that could
12 not have been changed, is simply not clear.

13 Q At that stage, in 1969, in November, would a declar-
14 atory judgement, an injunction, have been a remedy, in
15 your view?

16 A It certainly would have. That's exactly what we
17 sought. A declaratory judgement, or an injunction.

18 I understand that Your Honor is troubled by the point
19 of granting an injunction against this highway where there
20 has been clearing of this right of way through the park, but
21 I think it's important to bear in mind the sequence of events
22 here.

23 They began clearing that right of way fully two years
24 before any final decision was made and much of it was acquired
25 at the time the Department of Transportation was saying we

1 have no final decision on this matter.

2 Now, if the Secretary is to be allowed to thwart any
3 review of his decisions by this piecemeal acquisition of right
4 of way right up to the park, then the administration, the
5 effectiveness of this statute is whittled away.

6 Because, every time he has a controversial project it
7 would be possible to box himself in, and to box the Court in
8 and to present you with a fait accompli simply by acquiring
9 the right of way right up to the park before he approves the
10 part which involves the park.

11 And, can I point out that it's only once he approves that
12 part that the citizens have a cause of action under the stat-
13 ute, under which this action was brought. In other words, there
14 has to be a final agency action involving the park before we
15 can bring the suit and obtain review.

16 Q That's a suit under the act?

17 A That's correct. And therefore our cause of action
18 did not accrue until November 1969. And we then met with the
19 defense, well, we acquired this right of way before approving
20 t which includes the park.

21 Q Mr. Varadachari, what are the issues you're presenting
22 to us? Is the first one whether he's made the required stat-
23 utory finding?

24 A That's correct, Your Honor.

25 Q And even if he had, your second issue is that his

1 findings are infirm.

2 A That's correct.

3 The first issue, we have maintained throughout, is a
4 disputed issue of fact, but we've framed it in presenting it
5 to this Court, we've framed it a little differently.

6 It's undisputed that at the time he made these decisions
7 there was no contemporaneous documentation. He never made
8 a record, and we maintain that even if he made a mental
9 finding, simply decided in his own mind, that that's inadequate
10 here. We also maintain that he never made such a---

11 Q Well, could your first point be mooted if he pre-
12 sented in this Court a piece of paper that made the findings
13 that you say are missing?

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

16 Q Well, his brief pretty well makes that, doesn't it?

17 A I don't think it does, Your HOnor. Let me point
18 out that there is one contemporaneous document which he
19 produced for YOur Honor, and that's a press release.

20 We litigated this case in the District Court---

21 Q But nevertheless, it would moot the point now if
22 he presents the piece of paper now if he hasn't already done
23 so?

24 A That's correct. And he hasn't done so, not in the
25 explicit terms which I think this Court should demand, in

1 order to review what he did.

2 But I want to go back to one point involving the press
3 release. He seemed to take the position that he felt the
4 route had been determined, and as to whether he made any de-
5 cision as to alternative routes, I think is open to question.

6 Q And your second point is what? Is it that his de-
7 cision was wrong?

8 A That is an additional point.

9 The second point which could possibly also be mooted if
10 he gave a satisfactory written determination, although I
11 wouldn't concede that it would be mooted, is that the Court
12 below, even though the Secretary made no documentation of
13 his finding that this Courts decision in Untied States against
14 Morgan prohibited any inquiry of the secretary as to whether
15 he did make the finding.

16 And the difficulty which is presented to anyone seeking
17 review under the statute, seeking enforcement under the statute
18 unde the holdings below, is that first the secretary is not
19 required to record the fact that he made the determination
20 to require that statute, and those seeking review aren't en-
21 titled to ask him whether he made it.

22 The court below simply doesn't answer the question of
23 how those who seek review are to ever to be able to deter-
24 mine whether---

25 Q He presented an affidavit saying that he had made

1 them.

2 A The affadavit has been construed that way. It is
3 much less than clear from that affadavit that he made these
4 decisions. And we have contended throughout that there is
5 a dispute on that issue.

6 Now, the affadavit is set out partly in the briefs and
7 it's in the record, I won't go through it word by word, but
8 rather than saying the secretary made the decision that there
9 are no feasible improvenemt altermatizes, which he could have
10 said, had he made the determination, the affadavit is very,
11 very vague.

12 Q Assuming you didn't get by, you didn't prevail on
13 those two points, what standard--assume the secretary had made
14 the findings and you're challenging the sufficiency, what
15 standard are you urging the Courts must use in reviewing the
16 administrative decision?

17 A I think the proper standard in this case is that
18 suggested by Judge Celebrezze below whether it's supported by
19 substantial evidence. The substantial evidence test under the
20 administrative procedure act is required where there has been
21 a hearing required by statute and there are hearings in this
22 case which are required by---

23 Q Yes, but not by him.

24 A Not by him, that's correct, but there are statute---

25 Q He doesn't have to give notices (inaudible) go to the

1 hearings and takes the evidence, under the statute.

2 A He doesn't, but the transcripts of the hearings have
3 to be forwarded to him. And if the standard is not the sub-
4 stantial evidence, it would be entirely possible that the
5 secretary might simply disregard the evidence in one of those
6 hearings.

7 If it's merely an arbitrary and capricious standard, and
8 the Court looked only to that evidence which supported his
9 decision, as opposed to the entire record, and gave some con-
10 sideration to that which detracted from it, the Court --
11 the secretary might disregard the evidence in those hearings
12 and the Court would not be required to review it.

13 So we suggest the substantial evidence test.

14 Q Your first part, on the absence of formal findings
15 as I read the government papers at least so far as the future
16 is concerned, they've corrected that by regulation, now, to
17 provide for formal findings, is that right?

18 A If I recall the governments brief, I think that's
19 a policy which has been adopted which has been changed once
20 we don't know whether it will be changed again, we don't know
21 whether it will be waived in particular cases, there is some
22 effort along this line, as I understand it, but I don't think
23 that that is any reason that this Court shouldn't consider
24 that issue.

25 I think that if we assert these findings required for

1 judicial review, in order to make sure that we have these
2 findings in every case, I think this Court should so hold.

3 Q But that is a factor that would be a legitimate one,
4 in the rules of our Court in deciding whether or not to grant
5 a Petition for Certiorari. You would agree with that, wouldn't
6 you?

7 A I would agree with Your HOnor that it's something
8 to be considered, but I would note that this policy has been
9 amended once, and there is , I believe, a Department of Trans-
10 portation memorandum, which is not cited in the briefs, I
11 could provide you with the citation, whcih states that no poli-
12 cy memoranda or no regulations are intended to create any
13 rights in private parties, and I think the intent of that is
14 to say we may have a policy such as this but if we don't obey
15 it in any particular place, you citizens don't have any re-
16 view.

17 And unless this Court holds differently, more courts are
18 undoubtedly going to follow the Sixth Circuits desision that
19 he need make no formal findings.

20 Furthermore, I think it's important that another important
21 issue in this case is a question of whether we can obtain a
22 summary judgement soley on the basis of affadavits instead of
23 submitting to the court on motion for summary judgement, the
24 record on which he acted. Instead he submits affadavits which
25 charagterize that record and we think that---

1 Q Is that affidavit part of the record for us?

2 A Yes, it is, Your Honor. That's the affidavit of
3 Mr. Edgar Swick.

4 I would suggest to Your Honors that because of the nar-
5 row, constrictive judicial review which the Sixth Circuit
6 dictates in cases of this nature that if that decision is not
7 reversed it practically precludes any effective judicial re-
8 view, under the statutes on which we rely.

9 For that reason I suggest that this is a case of extreme
10 federal importance in the emerging federal effort to protect
11 the environment, as worthy of consideration by this Court.

12 Thank you.

13 Q This statute was rather recently enacted?

14 A 1966, yes.

15 Q Yes, and then amended in 1968 or 1969, I think.

16 A Yes

17 Q Now theres some indication in the record that basic
18 decision was made back in the 1950's.

19 A That is correct.

20 Q If that's true, then I suppose the statute wouldn't
21 be applicable at all, would it?

22 A Let me explain what else is in the record.

23 Q All right.

24 A The record does say the decision was made in 1956.
25 However, its clear that with respect to the alternatives that

1 will be shown to you on this map that's brought in , the one
2 immediately north and the one immediately south of the park
3 those weren't even studied until 1965 and the federal high-
4 way administratio was still suggesting to the city council
5 his alternatives in 1968.

6 And that there is, in the record in this case, a document
7 a letter from the Secretary of Transportation which indicates
8 in 1968 we had no final decision on this route.

9 So although some preliminary decision may have been made
10 in 1956, and we don't know the nature of that preliminary
11 decision, it's clear that the Secretary of Transportation
12 was exploring alternatives in 1968 and rejected those
13 alternatives. Thank you.

14 Q Could I ask you one more question? Now, suppose that
15 you prevail, we couldn't interfere with the state going
16 ahead and doing what it wished if it used its own park facility.

17 A Dependant on what project the state wished to use
18 its own funds for. If the state wishes to build a highway in
19 this park with its own funds, to interstate specifications,
20 to be linked with an interstate highway on the west of the
21 park and on the east of the park and to provide the missing
22 link of Interstate 40, I think that the state would be acting
23 in concert with and as an agent of the federal government and
24 would be susceptible to equity powers of this court. I think
25 it would be a blatant effort to avoid the requirements of this

1 statute, the participation in a federal enterprise, and I
2 think that any effort to circumvent this statute in that man-
3 ner would certainly be correctible by this Court and by any
4 federal court.

5 Q This property does now belong to the state, its been
6 conveyed by the city, hasn't it?

7 t A That's correct, Your Honor.

8 Q This acreage.

9 A That's correct.

10 Q And the city has already expended the proceeds, or
11 half of the proceeds for considerably more recreation -- a
12 public golf course, has another substantial part of the
13 proceeds which has been specifically earmarked under local law
14 for the acquisition of park property?

15 A That's correct, Your Honor. We think it's highly
16 appropriate that the city should buy more parkland but we
17 hardly think that the way to raise money for that parkland is
18 selling that which they already have.

19 Q Well, the city will end up with considerably increa-
20 sed park acreage.

21 A That's correct.

22 Q Of course, it might be, you might submit that the
23 parks are in the wrong place.

24 A The quality of the parks. the accessibility of the
25 parks the location of the parks, all of those are important.

1 This park has been described as one of the most beautiful,
2 scenic parks in the country, and I think that that should be
3 sufficient to invoke this statute. Thank you.

4 Q Thank you, Mr. Vardaman. Mr. Reynolds?

5 ARGUMENT OF MR. WILLIAM BRADFORD REYNOLDS, ESQ.

6 PRO HAC VICE

7 A Mr. Chief Justice, and may it please the Court.

8 Secretary of Transportation opposes this stay essentially
9 because the issues to be presented are not of sufficient
10 importance to warrant a grant of Certiorari.

11 I will confine my remarks to this aspect of the case.
12 Mr. Hanover, Counsel for Commissioner Spite, will then discuss
13 the effect such a stay will have on the respondents.

14 Interstate I 40, we've been told,---

15 Q If we can confidently predict that Certiorari would
16 not be granted in this case, even though the majority of the
17 Court might think that the Sixth Circuit was wrong, but if we
18 can confidently predict that Certiorari would not be granted
19 then, then we must vacate the temporary stay and not grant a
20 permanent stay, even though the decision for the Court of
21 Appeals for the Sixth Circuit might be wrong. Does that follow,
22 is that correct?

23 A We would take---

24 Q I think that if we're going to deny certiorari, then
25 we're going to -- it follows that the Court of Appeals decision
is g

1 is going to be left undisturbed even though wrong. Correct?

2 A. Not necessarily, Your Honor. There is involved in
3 the stay application the question of whether the determination
4 by the Court of Appeals as to whether there were no undisputed
5 facts here, and therefore the supporting summary judgement,
6 whether that was a correct determination.

7 And there is---

8 Q. That arises only if and when we've granted certiorari.
9 Is that true?

10 A. That question will arise---

11 Q. Only if certiorari is granted.

12 A. That's correct. That question may be considered by
13 this Court, though,---

14 Q. The question now is the likelihood of granting cer-
15 tiorari, isn't it?

16 A. That's correct, yes, Your Honor.

17 Interstate I 40 will cut Overton Park in half, we're told.
18 I would like to add a few pertinent facts with regard to that
19 contention. This map shows, and there is marked on the map
20 only the portion of the highway that we're now considering.
21 It does extend on out at the present time, to the ends of this
22 map.

23 The route will run along what is now an existing non-
24 access bus road, which including the cleared right of way on
25 either side is presently 40 to 50 feet wide. Along the north

1 edge of the road, from west to east, for about two-thirds the
2 distance of the bus route is a 6-8 foot chain link fence, pre-
3 sently separating the zoo from the rest of the park. The zoo
4 is up in the north area and at the present time the city is
5 expanding the zoo facility eastward.

6 In the northeast corner are the parking lots for the zoo,
7 which the city anticipates to expand and improve. Thus essentially
8 Overton Park is south of the bus road. That's where the lake
9 is, that's where the golf course is, that's where the picnic
10 areas are, the outdoor theatre, the art galleries, and most
11 of the woodland. And that remains untouched.

12 Now the highway itself will take 26 acres of the 342 acre
13 park, and it will involve cutting down 12 acres of trees as
14 opposed to leaving approximately 175 acres untouched.

15 Turning to the determination. Secretary Boyds approval in
16 1968 of the route---

17 Q May I interrupt you, Mr. Reynolds? Could you have
18 your colleague find out for me just to clarify, the outer boun-
19 daries of the park, as the park now exists. I think I under-
20 stand it but I'm not sure.

21 A that would be the western boundary, and that would
22 be the eastern boundary. This is the south, and that's the
23 north.

24 Q I have the---thank you.

25 A Now Secretary Boyd approved the route of this road

1 in 1968. This was the first approval after enactment of sec-
2 tion 4F of Department of Transportation Act which has the spec-
3 ific language that is at issue here.

4 At the time that he approved the route, he wrote a letter
5 to the Chairman of Citizens to Preserve Overton Park. He
6 explained the considerations and study that went into the
7 alternate routes at length. And then he concluded that letter
8 with this statement. And I quote: "Now that the decision has
9 been made on the specific alignment of the route, I have asked
10 Mr. Bridwell, who is the Federal Highway Administrator, to
11 develop a number of specific design alternatives in order to
12 minimize damage to the park and its facilities."

13 There was no objection at that time by Petitioners. No
14 suit was commenced and there was no request for injunctive
15 relief.

16 Q. What year was that?

17 A. That was in 1968, April of 1968.

18 Now between April of 1968 and November of 1969, the state
19 purchased the right of way from a point where the alternates
20 diverge from the main route on the map, up to the edge of the
21 park, on both sides and they cleared that right of way.

22 In addition the state purchased from the city the 26 acre
23 strip for 2 million dollars, and in addition state highway
24 officials held design hearings as to what the proper design
25 should be of the highway through the park.

1 In November, on November 5, 1969, after enactment of sec-
2 tion 138, in the Federal Aid Highway Act, Secretary Volpe an-
3 nounced, and I quote, "The hold on the project has been lifted,
4 after the state agreed to adjust the grade line of the depressed
5 freeway to a point as low as possible." And that press release
6 further stated, and I quote, "The state has also agreed to take
7 all steps possible to minimize the harm to the park resulting
8 from the highway".

9 Q Where does all this appear, in the (inaudible) affa-
10 davit?

11 A Your HOnor, the press announcements are attachments
12 to the Swick affidavit. The letter to the Chairman of the
13 Citizens to Preserve Overton Park is an attachment to the
14 Chairmans affidavit which was put in in this case.

15 Q Nowhere could I find, maybe just because I didn't
16 lood hard enough, but nowhere have I found so far, any state-
17 ment in the language of the statute whether in a press release
18 or otherwise, that there is no feasible and prudent alternative
19 to putting the highway through the park. Have I just not looked
20 hard enough?

21 A Your Honor, there is not in the press release that
22 specific language.

23 Q And the press release is what's relied on for the
24 finding, isn't it?

25 A If I may, Secretary Boyd, in his 1968 press release,

1 announced that he had approved the route following the resol-
2 ution of the Memphis city Council. That Resolution reads, and
3 I quote in pertinent part, "Whereas, representatives of the
4 Federal Government have furnished the Council with considerable
5 information and data, to the effect that no other feasible and
6 prudent route is available, now therefore, be it resolved by
7 the Council that the Council finds the route presently desig-
8 nated by the Federal Government through Overton Park as the
9 feasible and prudent location for said route." And Secretary
10 Boyd in his press announcement said that he was approving the
11 route on, following that announcement.

12 Q That doesn't quite add up to the statutory language,
13 does it? They approved it as the feasible and prudent---

14 A The Memphis Council approved it---

15 Q Now that's not a finding that there's no alternative
16 feasible and prudent route, is it?

17 A Your Honor, they approved it as the feasible and
18 prudent alternative, but they stated that whereas they had
19 been shown by the federal Government that there were no other
20 feasible and prudent alternatives available.

21 The Federal Government went down to the Memphis City Coun-
22 cil, they explained to them for over 3 and one half hours,
23 indeed Mr. Bridwell did, the different alternative routes that
24 were considered as possibly prudent and feasible, and discussed
25 with the Memphis City Council the determination as to the

1 prudent and feasible routes.

2 And I add that there was---

3 Q What was the standard they used in determining whether
4 a route was feasible and prudent?

5 A The determination itself, Your Honor?

6 Q What I'm interested in is what they based that--
7 if they had made a finding what would the standard be that
8 they followed?

9 A The determination itself was based on these factors.
10 Now the routes we showed here, the alternate routes, are the
11 ones that have been most predominantly mentioned throughout
12 the deliberations of this project.

13 Q Now would you indicate, when you say "the" alternatives
14 would you have your colleague indicate them on the map?

15 A Yes, Your Honor.

16 The one to the south is marked No. 2, the one immediately
17 north is No. 3, and the third alternative is the one that
18 runs in a triangular shape.

19 As to the route directly north, it was determined that
20 that would involve taking three schools, involving Southwestern
21 University, and the largest high school in Memphis. It would
22 involve taking several churches, attended by some 4,000 per-
23 sons. It would involve taking a number of residential units,
24 of more than 1500 persons. The

25 The route to the south of the park---

1 Q Well, the only reason I presume that this didn't
2 involve taking such buildings is because it's in a park and
3 they didn't have such buildings.

4 A The reason that it was not---

5 Q Yes, that's the reason it didn't involve a lot of
6 buildings,---

7 A That's correct, Your Honor---

8 Q Are you taking the position that the cost of these
9 schools and churches should have been considered enough to
10 let them put it in the park?

11 A No, Your Honor, I'm suggesting that you have to
12 weigh the social values that are inherent in the disruption and
13 dislocation of individuals and industries when you consider
14 whether to put a road through a park or to put a road in an
15 alternate route.

16 On page 15 of our brief we set forth the Senate Committee
17 report which is part of the legislative history and it states
18 specifically, and I quote, that "there are other high priority
19 items which must be weighed in the balance. The Committee is
20 extremely concerned that the highway program be carried out
21 in such a manner as to reduce in all instances the harsh impact
22 on people which results from the dislocation and displacement
23 by reason of highway construction".

24 Q What did it say about the displacement of parks?

25 A go on to say that the use of parklands

1 properly protected with damage minimized with the most sophis-
2 ticated construction techniques is to be preferred to the
3 movement of large numbers of people.

4 That was the intent of Congress in the legislative his-
5 tory of the act.

6 Q Does anything in the act indicate that?

7 A In the act itself?

8 Q Indicates that standard?

9 A Well, the Congress indicated it in the legislative
10 history , Your Honor. The specific language says that they
11 shall not approve a park route unless there are no other pru-
12 dent and feasible alternatives.

13 And the question before this Court is whether that was
14 considered. Whether the determination was made. And we submit
15 that it's undisputed on this record that the determination---

16 Q Was it made and supported, or just made?

17 A Well, Your Honor, that goes to the arbitrary and
18 capricious standard, or the standard of review, that is to be
19 exercised in determining the Secretarys determination.

20 Our position is that it is the Secretarys form to make
21 the determination and this Court is to then decide whether that
22 was arbitrary and capricious.

23 Q Can we do that without the record? The records from
24 the transportation?

25 A Without the administrative record?

1 Q Yes.

2 A Your Honor, I believe that on a summary judgement
3 motion if there are no facts submitted to dispute or to indicate
4 a dispusive expression that it is proper to determine that the
5 Secretaty did not violate that reviewing standard.

6 That is all that is required in a summary judgement mo-
7 tion.

8 Q Suppose we found that we needed it, could we get it?

9 A The administrative record is not part of the record
10 in this case, No. Your Honor.

11 Q Well, is it available?

12 A Well, it is available, it was in the Department of
13 Transportation, it was shown to Petitioners Counsel and he
14 examined the administrative record and saw the entire record
15 on which the Secretary based his opinion.

16 Now, there is an allegation made that there were additional
17 documents, in Tennessee. And that is very well true, but they
18 did not, they were not considered by the Secretary and theyre
19 not formed part of the administrative record on which the Sec-
20 retary based his decision.

21 Q All you have on that is the statement of the Secre-
22 tary.

23 A You have the statement of the Secretary that the
24 determinations were indeed made and you have the affadavits show-
25 ingg the different reasons why altermate routes were rejected.

1 Q Well, again, is there any reason why the record is
2 not in the record?

3 A The reason, Your Honor, is that it was decided below
4 on summary judgement motion on the basis of the affidavits and
5 no undisputed facts were introduced.

6 Q It was never more than just a report for the Court?

7 A I beg your pardon.

8 Q The administrative record was never presented in the
9 Court, was it?

10 A No, sir, it was not. But there was full access to it
11 for Petitioners Counsel had he wished to present it in order
12 to show in any way that the determination was not made pro-
13 perly.

14 Q Well, Mr. Reynolds, how can I find out the exact
15 time that the red stripe with the two yellow stripes on both
16 sides? When was that decided upon?

17 A That was decided upon in 1968, April of 68 and that
18 is in the record, Your Honor. And the Petitioners recieved a
19 letter from the Secretary himself, which I quoted in part,
20 telling them at that time that the determination had made that
21 the route would run through Overton Park.

22 Q And by the time that the land was cleared, the only
23 feasible route was through the park?

24 A In November of 1969, when the design was approved,
25 that is correct. The land had been cleared to the edge of the

1 park on both sides.

2 Q And so that's the end.

3 A I beg your pardon.

4 Q That's the end?

5 A Of what? The route was established in 1968.

6 Q But what's the feasible route on that map? As it now
7 stands, other than to go through the park?

8 A There is no feasible and prudent route. Other than
9 to go through the park.

10 Q So then, in that case, the moving party here has no
11 possibility of redress.

12 A The moving party here, Your Honor, has not suggested
13 any issue here which would warrant a grant of Certiorari by
14 this Court.

15 Q When were the contracts, or have the contracts for
16 this construction been let?

17 A Well, Your HONor, bids have been entered on this job.

18 Q And accepted.

19 A Yes, and the low bid has been accepted. That is in
20 the ---

21 Q The contract has been let, hasn't it?

22 A That is correct, Your Honor.

23 Q When was that?

24 A That was in the, November of 1969, I believe. Of
25 1967.

1 Q This last month. You went ahead very very rapidly,
2 as I read the records. Is that it?

3 A I beg your pardon.

4 Q It was last month that the contract was let, wasn't
5 it?

6 A Yes, sir, the contract was let.

7 Q Rather precipitously, if I may use the word.

8 A But the clearing had taken place between 1968 and 1969.

9 Q I thought the contract was let before the (inaudible)
10 moved into action. Is that right?

11 A I believe that's right, yes, that's what I say.

12 Q So all we can do now is unring the bell.

13 A I beg your pardon.

14 Q All we can do now is to unring the bell. Is that right?

15 A Well, Your Honor, I don't believe the question be-
16 fore this Court is to decide what might be a prudent and feas-
17 ible alternative route or a possible better design, but rather
18 just to determine whether or not there are any issues in this
19 case that should be determined by this Court, to warrant a
20 grant of Certiorari.

21 Q How many other parks are there in Memphis?

22 A In Memphis at the time being?

23 Q Yes.

24 A There are a number, I don't know the exact number.

25 The city has purchased a hundred and sixty acre park which has

1 a golf course on it with the money that they recieved from the
2 state, and they have in addition, they expect to purchase an-
3 other 140 acres in and around Memphis, with this money.

4 Q Thank You, Mr. Reynolds. Mr. Hanover?

5 ARGUMENT OF MR. J. ALAN HANOVER, ESQ.

6 ON BEHALF OF RESPONDENTS

7 MR. HANOVER: Mr. Chief Justice, and may it please the
8 Court.

9 On behalf of the state of Tennessee I think that I might
10 for a momend digress and help answer some factual questions,
11 that members of the Court have asked, which are very difficult
12 for Mr. Reynolds to answer, he not having had an opportunity
13 to see the park.

14 In answer to the question a moment ago as to how many
15 parks are in Memphis, the record shows that the city of Memphis
16 at the present time has some 4700 acres of parks within its
17 borders. We are talking, of course, about 26 acres out of a
18 340 or 50 acre park. It should be pointed out to the Court
19 that the zoo has always been a separate entity from the park
20 itself.

21 Q Mr. Hanover, don't get tooofar away from making
22 your point.

23 A Yes, sir. If I may have the pointer, I might possibly
24 do both at the same time.

25 Now the zoo has always been a separate entity from the

1 Aarl. It has always been severed historically for over 50 or
2 60 years by this bus route which many years ago was a street
3 carrroute and formerly a little narrow gauge railroad.

4 The only entrance to the zoo from the south has always
5 been at this point and will be continued by means of a pedes-
6 trian walkway over the depressed area of the expressway.

7 Basically, the position of the state of Tennessee is
8 that we should not be stayed, not by any reason of any eleventh
9 amendment issue which we have not raised and did not intend to
10 claim sovereignty immunity. I feel in Mr. Vardamans brief he
11 possibly misunderstood something I said in my brief.

12 The state feels it has a vital interest in this case, not
13 only from a cost standpoint, but from a duty to its citizens
14 delay future safety maintenance of this road. The state does
15 not feel that it should be stayed, for the reason that there
16 are no constitutional issues in this case. The state of Tennes-
17 see in thisscase has not been accused of violating anyones
18 constitutional rights and the statute itself does not ruin to
19 the state of Tennessee.

20 It only places a burden on the Secretary of Transportation
21 the reason that we feel that way is because the state has ex-
22 pended and paid for the land in question and all of the land
23 to each side of the park, and that connection, I should point
24 out to the Court, that this east-west expressway is approximat-
25 ely twelve miles long. It extends from the eastern edge of the

1 city to the Mississippi River which has been correctly stated
2 as being the western boundary of the town.

3 Q You mean twelve miles through the city?

4 A Yes, sir. It is the only present planned method of
5 bringing traffic from our downtown area, which is on the west-
6 ern edge rather than is centrally located as in most cities,
7 to the eastern heavy residential areas.

8 Now. The state has purchased this and it's our belief that
9 the state should be the master of its own destiny in a Federal
10 aid situation that if the route should ever be changed, if
11 changes should be made which either caused delay or cost which
12 the state may not wish to participate in, it's going to be left
13 with this two million dollar expenditure, which we may or may
14 not get back from the Department of Transportation.

15 Q Mr. Hanover---

16 A Yes, sir.

17 Q ---as you (inaudible) this act which was passed, when
18 was it in 1969?

19 A In 1968.

20 Q In 1968? Prior to that time, the route had already
21 been selected through the park?

22 A Yes, sir,---

23 Q Under prior laws?

24 A Yes, sir.

25 Q And had the state, prior to the passage of the new

1 law, acquired right of way?

2 A Had acquired right of way, Your Honor, on the eastern
3 and western edged leading up to this. These last two segments
4 were the last bringing it to---

5 Q And had they acquired the route through the park, the
6 right of way through the park? Prior to the passage of the new
7 act?

8 A No. That was acquired after Mr. Burrows letter, which
9 Mr. Reynolds read, I acquired that myself in negotiations with
10 the city of Memphis---

11 Q But all the right of way outside the park had been---

12 A Practically. At the time this lawsuit was filed one
13 year ago all but two parcels in this twelve mile stretch had
14 been acquired. Since that then, all has been acquired.

15 Q Had there been clearing of the right of way?

16 A Yes, sir.

17 Q ---prior to the passage of the new act?

18 A Yes, sir, and construction in various segments on
19 each side.

20 Q How close to the park had clearing or construction
21 taken place?

22 A Clearing or construction, Your Honor prior to this
23 case had occurred in this general area within, I would estimate
24 a half mile or less of the park on each side.

25 Q But all the right of way had been acquired?

1 A. Yes, at the time this case was filed there were only
2 one or two minor easements out of some 1700 parcels, the park
3 being one, that had not been acquired.

4 Q. But we're speaking of the time as of the passage of
5 the new act.

6 A. I would estimate at that time, Your Honor, that that
7 part is not in the record, from either side, I would estimate
8 based on personal experience that I would say two thirds to three
9 fourths had been acquired by 1968.

10 Q. You think the act applies?

11 A. I think the act applies, Your Honor, in this sit-
12 uation, only to the question as to whether all possible things
13 had been done to minimize harm to the park.

14 I think the route question was settled by the passage of
15 the act.

16 Q. You raise any question as to the constitutionality
17 of the act?

18 A. No, sir.

19 Q. You agree that Congress has the power in passing on
20 these things to pass a law which says city parks are not to
21 be taken except under certain standards?

22 A. Yes, sir. I agree with that. I just don't think
23 this particular act applies to the state of Tennessee. I think
24 it only applies to the Secretary of Transportation.

25 Q. Well do you think it applies to this highway?

1 A I do.

2 Q Well, what difference does it make if it applies to
3 the state of Tennessee if it applies to the highway?

4 A Well, I think that the difference is, Your HOnor,
5 that it affects whether or not the Secretary can grant federal
6 aid. I don't think it affects a states right to build a high-
7 way which it feels it needs through a park without federal
8 aid.

9 Q Going back to a question that was put earlier to
10 someone. Would you say that if the state of Tennessee were
11 building this entire highway that there would be any federal
12 jurisdiction, at all?

13 A You mean, the entire I 40?

14 Q All of it.

15 A I would say that there would not be. The point is,
16 Your Honor, that it's done and approved in sections. The state
17 never knows until its completed whether or not the federal
18 aid will be forthcoming. It's more in the nature of a unilateral
19 contract, which the federal government ways if you build this
20 road in a certain way, we will pay our portion. There's no
21 requirement that the state build it, the federal government
22 cannot make them build it, and when you get through they may
23 say you haven'r complied with our standard, we won;t pay you.

24 Q Is it 90% coverage?

25 A Yes, sir.

1 Q Well, what if you lost this case, would you say that
2 the federal government would only be prevented from contributing
3 to the construction of the highway through the park?

4 A That's correct. That's our position, YOur Honor,
5 that the state should then have the right to---

6 Q Just through the park.

7 A To evaluate his position. It may wish to do that
8 anyway, it's always been the states position even before the
9 road~~s~~ reached the end that that was the only prudent and feas-
10 ible alternative for the city of Memphis. It's traffic patterns
11 and various other things that should be considered in the build-
12 ing of this road.

13 Q On the map, is the top part north, and the bottom
14 part south?

15 A Yes, sir.

16 Q Right west and left east.

17 A Yes sir. This is east.

18 Q What is the width of the city there? From the place
19 where the road enters to the place where---

20 A The width of the city at this point?

21 Q Yes.

22 A I would estimate, Your Honor, that that's about 4
23 to 5 miles to the center of the city.

24 Q And of course, I'm not talking about what's feasible,
25 I don;t know what's a feasible alternative---

1 Q ---but I presume that that place is like many others
2 could be entered either from the northern part or the southern
3 part and go around the edges and not interfere at all with
4 all these churches.

5 A Well, the only problem with that, Your Honor, is that
6 on three sides of the park, where I'm pointing are three of the
7 largest thoroughfares in the city, which of course handle
8 great volumes of traffic---

9 Q But they're already there. There's no problem with
10 them.

11 A No sir, and the point is that it would affect I'm
12 sure engineering wise, the use of the expressway if you did
13 away with some other thoroughfare in the building of it. You
14 would just be cancelling out what you're doing.

15 Q I would assume that the highway built across the
16 northern part or built across the southern part as far a time
17 is concerned, there would be no advantage to putting it through
18 the park, would there?

19 A Well, I don't think it would take any longer to con-
20 struct, the problem is that all of these people are already
21 moved and the houses are already torn down and the state owns
22 all of this right of way. The only other point that we wish to
23 call the Courts attention is that in the event that this Court
24 does feel that a stay is proper, the state feels that it is a
25 proper case for some security. We realize, of course, that sec-

1 urity is a matter of discretion with this Court, but the state
2 has been stayed off and on in this matter for over a year.

3 They originally had a letting plan last November of 1969,
4 and because of a stay order issued by the District Court, the
5 state has not been able to do anything until the Sixth Circuit
6 Court of Appeals released the injunction. At that time the
7 state did move ahead promptly, in view of the fact that this
8 road has been in progress for almost 15 years, and did let a
9 contract.

10 We gave that information to the Court so the Court could
11 see how rising costs have affected the State. I do not agree
12 with the arguments presented that it would hurt the Petitioners
13 or deny them any rights.

14 Q Do you agree with their position or do you consent
15 to their position? That if the Court takes the case that it
16 should decide it on this argument, that there's enough evidence
17 to decide it?

18 A We do not object to that, Your HONor. I would feed,
19 on behalf of the state, that we should be given the opportunity
20 to file some additional briefs within a very short period of
21 time. If the Court chose to do that, since we did not cover
22 all of those issues---

23 Q That would be better, you think, to let it take its
24 natural course?

25 A Well, Your Honor, naturally a delay is something that

1 we've been fighting for some time, or that I've been fighting
2 for some time, and we do want to expedite it, although we do
3 feel that the state is entitled, and the Commissioner, too,
4 I mean, they could be damaged heavily without security.

5 Q What kind of security do you think you'd want?

6 A I think they should post a bond, Your Honor.

7 Q How much?

8 A I would estimate, again Your Honor, this is based
9 on knowledge that I'm not fully aware of on time, as to how
10 long it would take, but I would estimate a bond from anywhere
11 in the neighborhood of 250,000 dollars to 500,000 dollars
12 would be sufficient, rather than a multi-million dollar bond
13 that Counsel for the Petitioner seems to think we're requiring.

14 Q What kind of loss would you suffer?

15 A We will suffer, as we already have in the past year,
16 the bid, the proposed bid by the same low bidder a year ago
17 was 613,000 dollars less than it is today. So in the last year
18 costs for building this identical engineering design have risen
19 613,000 dollars.

20 Q It's not based on the fact that you bought this land,
21 is it? I would assume that in the middle of Memphis, if that
22 is in the middle of Memphis, the land would be worth just as
23 much if not more than it is now when they get through with it.

24 A I don't know what the state could do with it, Your
25 Honor. The city has already spent most of the money---

1 Q They could sell the land, couldn't they---

2 A Well, we might, I hate to be facetious, but I don't
3 know what the city could do with this 26 acre strip of land
4 in the park. I'm sure we couldn't get the money back from the
5 city.

6 Q That's right in the park---

7 Q A Yes sir.

8 Q I was talking about the approaches to the park.

9 A Well, the approaches---

10 Q The houses and so on.

11 A The houses are gone. They've all been--that land has
12 all been leveled, and is ready for construction.

13 Q You're reminded of the affidavit of Mr. J.B. Michael
14 Jr.

15 A Yes sir. He is the low bidder who---

16 Q He's the low bidder.

17 A Who was awarded the contract.

18 Q Assuming that there is a stay granted, doesn't the
19 annual construction cost go up? Doesn't the federal government
20 have to foot the bill?

21 A The federal governmentr---

22 Q Ninety percent of it?

23 A Yes, sir. I think the bond should run to both, and I
24 think both parties need being protected, not just the state.

25 Q The federal government hasn't asked for that.

1 A Of course we have no guarantee either, Your Honor,
2 that when it's over with that for some other reason they may
3 deny federal---

4 Q They may what?

5 A We have no reason to know at this time when the road
6 is completed this way that for some other reason the Department
7 may say we're not going to pay federal aid. They may feel that
8 we have not handled something else in a proper manner. Which
9 often happens.

10 They have that right to withhold that aid until the state
11 has completed the project and expended their funds and has
12 shown the Department that they have done everything to the
13 requirements.

14 Q You would agree, I suppose that so far as the Con-
15 gress is concerned, there is no doubt they have attempted to
16 put a considerable burden on somebody before they
17 destroy a cities' public park? (inaudible)

18 A A I think that Congress, and rightly so, has required
19 the Department of Transportation and the Secretary to be very
20 careful before the roads are put through the parks and that
21 should not be done except frankly situations of this nature
22 where damage to the park is rather infinitesimal. No facility
23 whatsoever of this park will be hampered.

24 Q Parks, as I understand them, are not altogether
25 governed in their values by facilities.

1 A. A. I agree---

2 Q. I thought the mere fact that it was a park is what
3 gave it its greatest value to the people.

4 A. I agree, Your Honor, but this will still be a park,
5 just as it is when this road is completed.

6 Q. A smaller park---

7 A. A slightly smaller--slightly---

8 Q. With a road through it.

9 A. Slightly smaller.

10 Q. Is the road now running through the park?

11 A. The city of Memphis now maintains a non-access
12 concrete diesel bus route, which runs roughly, Your Honor, from
13 the center of where this right of way is now going, It's now---
14 the pavement itself is 25 - 30 feet wide and has a cleared
15 right of way of, say, 40 - 50 feet wide. And the route pro-
16 poses to stay on that. That's the reason that this jog was
17 made instead of coming straight across in the first place,
18 was to stay on the natural separation that the park has always
19 had and to avoid any damage to the park proper. That's the
20 very reason it was designed to follow this very slightly raised
21 route as it came forth through the park, to stay with that
22 historical division.

23 Q. Thank you, Mr. Hanover. Mr. Vardaman, you have
24 about five minutes left.

1 FURTHER ARGUMENT OF JOHN W. VARDAMAN, JR.ESQ.

2 ON BEHALF OF PETITIONERS

3 MR. VARDAMAN: Yes, Your Honor, just a few---

4 Q. Excuse me, Mr. Vardaman, excuse me---Justice Harlan---

5 Q. I wanted to supplement the question that has been
6 asked by Mr. Justice Black. Have you any objection to having
7 this case decided on the merits of these papers? Do you
8 need to put in further stuff that you want?

9 A. By the merits, you mean decide the petition question?

10 Q. Yes.

11 A. Let me just say I do not have any problem on that Your
12 Honor, however, the application for stay did not raise as one
13 of the issues to be presented to this Court the question as
14 to whether the arbitrary and capricious standars should be ap-
15 plied. Or the substantial evidence standard should be applied.
16 And that issue was briefed in their brief which we did not
17 have the benefit of seeing before we submitted our brief. I
18 believe that we would like, if the Court feels that that might
19 be one of the issues that they would want to grant the Certio-
20 rial on, I believe we would like to have an opportunity to
21 brief that point.

22 Unless I could speak to it now.

23 Q. At the moment we're two steps prior to whether it
24 would be decided on the merits. We have before us now an appli-
25 cation for a stay---

1 A Yes, Your Honor---

2 Q Pending the filing of and action upon a Petition for
3 Certiorari. And the granting of a Petition for Certiorari is
4 not yet a decision on the merits of the case, that comes only
5 if or when such a petition would be granted. Now in your
6 answer to my brother Harlans question do you concede that you
7 would be willing to telescope the whole business and assume
8 that Certiorari has been granted in this case, and have---

9 A No, Your Honor---

10 Q And have the merits of the case be decided on, as
11 it has been filed so far?

12 A No. Your Honor, I did not understand the question. I
13 thought that---

14 Q I didn't think you did---

15 A ---he would be willing to have---

16 Q My question was intended to be.

17 A I'm sorry. I thought you meant would we be willing
18 to have our brief treated as in opposition to what is proposed
19 I believe is a Petition for Certiorari, and that is their brief
20 and my answer to that question is the one I gave. Right. I
21 son't believe we would be willing to do the other.

22 Q Not willing. You answer his question "no".

23 A His question as to the brief on the merits, yes, Your
24 Honor. That answer is no. We would be willing to have it treated
25 as in opposition to a Petition for Certiorari. Except with the

1 one reservation that I mentioned.

2 If that is decided---

3 Q You say we could treat this as a Petition for Cer-
4 tiorari. If we granted it, I take it from your answer that you
5 would prefer the briefing and arguments and delay to an immed-
6 iate decision on the merits now.

7 If we granted it, there would probably be a stay.

8 A If it were granted, Your Honor---

9 Q You'd rather have the grant and the stay and the op-
10 portunity to argue than the decision now?

11 A If it were granted and there were a stay, I would pre-
12 fer to have an opportunity to brief the merits. I would agree
13 to an expedited schedule in accordance with the suggestion of
14 this Court, but I do believe that if we get to that stage that
15 at that point we would want an opportunity to brief the merits.

16 Q Oh, yes, yes, but you don't think you'd brief the
17 merits, sufficiently for your purposes at this point?

18 A We have introduced ourselves only to the question
19 of whether this Court should grant Certiorari.

20 Q So your answer is that you have some ticks you want to
21 get in before the Court decides the merits?

22 A I may well, Your Honor. I would like to have time
23 to consider the question as to the , what additional information
24 on the merits and I would agree to an expedited briefing sched-
25 ule if it would get to that stage, but I believe at the present

1 time that we would be willing to have our brief treated as an
2 opposition to a Petition for Certiorari.

3 Q Thank you, Mr. Reynolds. Mr. Vardaman you may con-
4 tinue.

5 A Mr. Chief Justice, and may it please the Court.

6 Mr. Hanovers discussion of the time frame of the acqui-
7 sition of the right of way seems to be based upon the premise
8 that this act was passed in 1968, and it was done before it
9 was passed, but that's incorrect.

10 The statute was first passed in 1966, and the right of
11 way acquisition began in 1967. So the acquisition of the right o
12 of way began after the statute was passed.

13 Further, in the press release that was put out in 1968,
14 it contains the following statement; "Much of the right of way
15 leading up to the park already has been purchased."

16 Q What was the date of the enactment of the provision
17 that required the Secretary to make this specific finding that
18 you're arguing about?

19 A The provision was enacted in 1966. Section 4F of the
20 Department of Transportation.

21 Q Which says that, and since 1966 he's had to make this
22 finding?

23 A Now the statute doesn't say specifically he shall
24 make the finding. It says he shall not approve the project
25 unless there's no prudent

1 Q And that law has been on the books since 1966?

2 A Yes, Your Honor.

3 And they say now that the route was approved in 1968, but
4 the right of way acquisition began in 1967 and by 1968 much
5 of it had been acquired. So they acquired the right of way
6 before they approved the project and we shouldn't be made to
7 bear the burden of that rather precipitous action. Instead
8 we suggest that what they have done by purchasing that right of
9 way before making the decision is to present themselves and the
10 Court with a fait accompli which shouldn't be permitted.

11 The Court should review his decision.

12 Q Excuse me. What are your ideas about unringing the
13 bell?

14 A Your Honor, we're concerned about unringing the bell,
15 and in our concern---

16 Q Well can you?

17 A Yes, we can. And this record supports it.

18 Q How?

19 A We have on trial in this case an affidavit of an ex-
20 pert transportation planner who has gone out and who has ex-
21 amined the present state of right of way acquisition, he has
22 examined alternatives, he has examined the studies of this.

23 Q But what will you do? Would you agree that those lines
24 have been bulldozed out all the way up to the park?

25 A No, Your Honor, they haven't been bulldozed all the way

1 up to the park. The houses have been torn down, but there's no
2 clearing up to the park. The clearing---

3 Q The houses have been torn down.

4 A Yes. That land would be redeveloped. It could be
5 resold and redeveloped---

6 Q All right---

7 A And what we would suggest would be to go back to a
8 point in the route to where clearing or construction is, we
9 could use all the park---

10 Q Approximately how long would this redevelopment take?

11 A In the affidavit which was filed by our expert, he
12 suggested that these alternatives could be explored, and ex-
13 plored in a proper manner on the basis of the information al-
14 ready assembled within 60 to 90 days.

15 This affidavit---

16 Q And could be rebuilt in how many days?

17 A Well, Your Honor, I assume that houses would be sold
18 and lots would be resold and be rebuilt according to the
19 purchasers desires.

20 Q All the way back to where that line is?

21 A I'm not clear, Your Honor. This map, of course is
22 not part of the record in this case, and I'm not sure what
23 these various lines are, but we would go back to approximately
24 I think the houses have been torn down all the way up to the
25 park but we could, I suppose that part which would be redevelop-

1 ed would be in the area of about 1.7 miles. Something in that
2 order.

3 Q One point seven miles?

4 A One point seven miles, I believe. But the reason
5 those houses are torn down is because all of this activity took
6 place before they made the final decision on this project and
7 before the statutes on which we rely were actually pulled into
8 play, because you had to have a final decision from the seg-
9 ment involving the park before these statutes came into play
10 before we had a cause of action.

11 We filed this lawsuit within a month after that final
12 decision.

13 Q What kind of houses are these that have been torn
14 down? What kind of community? Residence?

15 A Yes, sir , this area through here was a road of mid-
16 dle class residents.

17 Q What kind of residents?

18 A I would say low to middle class residential area.
19 On the other side of the park they were very expensive homes
20 that were torn down.

21 Q Do you know the total cost to the city in acquiring
22 that right of way?

23 A No---

24 Q Is it in the record?

25 A I don't believe that's in the record, but the cost

1 of acquiring the right of way in the park is in the record,
2 and I think that's 2.2 million dollars, but I don't think
3 it's in the record what it cost to acquire what's outside the
4 park---

5 Q Two million is what the state paid the city?

6 A That's correct, and I don't---

7 Q That would be a reimbursement from the federal gov-
8 ernment---

9 A Yes, sir, that's correct.

10 Q Were you given access to the administrative record,
11 the administrative files, Mr. Vardaman, as the government claims?

12 A Not to my understanding, Your Honor. I was led to
13 believe that based on a representation of a document of a mo-
14 tion for change of venue filed in the United States District
15 Court in the District of Columbia that the bulk of the rele-
16 vant documents were in Tennessee. That's why the government
17 sought to change venue. I

18 I was, on an afternoon, two days before a preliminary
19 injunction motion allowed to examine the file, in preparation
20 for that preliminary injunction motion which I understood did
21 not constitute anywhere near the number of relevant documents
22 in this case.

23 At no time, to my recollection, was I told that this was
24 the administrative record on which the Secretary acted. I
25 think, furthermore, the question of what the administrative

1 record is is a legal question but I was at no time told that
2 this was the record on which he acted.

3 Q This is the controversy surrounding page 13 of the
4 government ---

5 A That's correct.

6 Q brief?

7 A That's correct. And I might add that the document which
8 we did take from that file and put in the record in this case
9 is a document which had not been submitted by Mr. Sweight.

10 That's the document which shows that the alternative to
11 the north actually takes more residencies, displaces, or ad-
12 versely affects more people than the route which goes through
13 the park.

14 And they characterize that route as taking Southwestern
15 University. As you can see from here it goes past what looks
16 to be a grand front lawn of Southwestern.

17 Q Suppose you prevail in getting your stay and also in
18 having your writ granted. What ultimate relief do you ultimately
19 conceive this Court that you'd be entitled to from this Court?

20 A Your Honor, I think that the appropriate relief would
21 be that suggested by Judge Celebrezze. That this should be re-
22 manded to the District Court to be treated as a mandamus action
23 and remanded to the Secretary to have him make a formal state-
24 ment on the record as to what decisions he made and why which
25 the District Court could then review. That's one alternative,

1 otherwise the Court could simply reverse and enter an injunction
2 and I assume that if the Secretary wanted to he could come back
3 and---

4 Q But you dont contemplate a reopening of the proceedings
5 for the introduction of new evidence?

6 A Oh, I certainly would Your Honor. I would suggest that
7 if we were back that the summary judgement would be reversed
8 and when we were back in the District Court we would be entitled
9 to whatever type of a trial that we were entitled to initially.

10 Q Would it be a trial in which alternatives other than
11 those marked on there could be considered, in your judgement?

12 A Yes, I think it should be, Your Honor.

13 Q Do you think this hypothetical process is complicated
14 by the fact that the Secretary who made these decisions is no
15 longer the Secretary?

16 A Your Honor, it is undoubtedly complicated somewhat by
17 that but that is one of the reasons that it is necessary to
18 impose upon you. The people who make these decisions, the re-
19 quirement that they be incorporated in some type of written or-
20 der so that as the administrations change whatever was decided
21 will be recorded there.

22 Q Congress could easily have provided that, could they
23 not? As they do in many other situations? Administrative sit-
24 uations?

25 A They certainly could have.

1 Q Q But they didn't.

2 A However, the fact that they didn't I think should
3 not be regarded, that the silence of Congress should be regarded
4 as permission not to do it. Particularly where Congress has
5 made these actions specifically rebuttable, by the Courts
6 under the administrative procedure.

7 I would note that the people who did make the original
8 decisions, or the decisions in 1968 are available to testify
9 and they are willing to testify that under the decision below
10 we are not permitted to ask them what decisions they made.

11 That's another reason we suggest the decision below---

12 Q Mr. Vardaman, there's a section that you've been
13 arguing about. The Federal Aid Highway Act. It says after the
14 effective date of the Federal Aid Highway Act of 1968 the
15 Secretary shall not approve any programs.

16 A That's a correct statement of section 138 of the
17 Federal Aid Highway Act. Now if Your Honor would examine what
18 section 4F of the Department of Transportation Act, not as it
19 presently appears, as it appeared when enacted in 1966.

20 The operative provisions are verbatim for the---

21 Q You cant say after the effective date of the Fed-
22 eral Aid Highway Act?

23 A No. I think that the provisions which we're discussing
24 shall not approve unless there are no feasible---

25 Q Shall not approve what, highways---

1 A Shall not approve a project or program I believe
2 is the statutory language.

3 Q Well, do you think that if the Federal Aid Highway
4 Act had never been passed you would still be here on the same
5 case?

6 A Under the Department of Transportation Act.

7 Q And you don't think the Federal Aid Highway Act
8 superceded that and gave a new date for---

9 A No, Your Honor. Let me explain just briefly the
10 way the act was passed.

11 There was at one time, when the Department of Transpor-
12 tation Act was passed, section 4F was repealed. And it said
13 the Secretary shall not approve any project unless there are
14 no feasible and prudent alternatives.

15 Unless the design includes all possible design and planning
16 to minimize harm. There was at that time a section 138 in the
17 Federal Aid Highway Act that was slightly different.

18 In 1968 it was decided to make those identical, and there
19 was an amendment in 1968 but the requirements concerning feas-
20 ible and prudent alternatives, and the requirements concerning
21 all possible planning in the 1966 act were applicable to this
22 case and indeed the Department of Transportation considered
23 them applicable to this case.

24 Mr. Bridwell testified before Congress on one occassion
25 concerning differnet aspects of this case and he said section

1 4F came into play. So it was the Departments interpretation of
2 the Act as well as ours.

3 Q Does this highway connect, or run through the city?
4 Connect on the east end with a through highway and a cross
5 country highway---

6 A Yes, Your Honor.

7 Q What number is that?

8 A This is I 40. It's a transcontinental highway and
9 as I understand it goes---

10 Q As far as that highway is concerned it's a question
11 of how long does it take to get through the city, isn't it,
12 and not how to get there.

13 A Well, I'm not even sure that that's the question in
14 that particular case, Your Honor, because there are people trav-
15 eling on an interstate who are traveling interstate. They don't
16 have to go on this highway. There's under construction now a
17 circumferential which will go--

18 Q Such as we have here.

19 A I think it's located closer in, but basically the idea
20 is the same. So that those who are traveling through would be
21 able to go on the circumferential and avoid going downtown.

22 I think that's the way those people---

23 Q Who started, who offered this bill, this amendment
24 that provides for this---

25 A Senator Yarborough from Texas did. This---

1 Q Was any movement, any widespread movement behind it?
2 Or do you know?

3 A At that time, I think this was one of the first bills
4 which was passed to articulate a purpose and to begin a pro-
5 gram of environmental protection. That movement has been building
6 up over the years since 1966 and now there is wide support for
7 this bill and every other type of bill. Practically every
8 other type.

9 Q To protect the parks?

10 A To protect the parks, to protect recreation areas,
11 to protect out natural resources.

12 Q Did I understand you to say, in answer to a question
13 by Mr. Justice Black that if you prevail in this case and the
14 summary judgement is set aside and the case is remanded to the
15 District Court then it will be up to the District Court to con-
16 sider and weigh the various alternative routes?

17 A No. I didn't mean to say that. What I meant to say is
18 that in passing on the Secretarys judgement the District Court
19 may determine whether he applied the statute incorrectly in
20 not choosing other alternatives.

21 Q In other words the question will be whether or not the
22 Secretary complied with the statute?

23 A That's correct.

24 Q That's not up to the District Courts surely---

25 A Oh, no, I agree with Your Honor. No, it's not up to

1 the District Courts.

2 Q I wanted to be sure I understood you.

3 A No. The question will be whether he complied with the
4 statute. Thank you.

5 Q Thank you, Mr. Vardaman, Mr. Reynolds, Mr. Hanover.
6 The case is submitted.

7 (Whereupon at 11:25 o'clock a.m. argument in the
8 above entitled matter was concluded.)
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