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Recent Case: Environmental Law - Highway Construction through Public Parks - Judicial Review [*Citizens to Preserve Overton Partk, Inc. v. Volpe* 401 U.S. 401 (1970)]

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ENVIRONMENTAL LAW — HIGHWAY CONSTRUCTION THROUGH PUBLIC PARKS — JUDICIAL REVIEW

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1970).

Petitioners sought an injunction in a federal district court to prevent the Secretary of Transportation from releasing federal funds for a segment of an interstate highway which would pass through a city park in Memphis, Tennessee.[1] The district court granted respondents' motion for summary judgment after considering affidavits and arguments from both parties. The Court of Appeals for the Sixth Circuit affirmed.[2] Certiorari was granted by the Supreme Court, and in *Citizens To Preserve Overton Park, Inc. v. Volpe*,[3] the Court found that the Secretary of Transportation's decision was subject to judicial review, but reversed and remanded the case to the district court because the litigation affidavits upon which the lower court based its decision did not constitute the whole record and were an inadequate basis for judicial review.

Mr. Justice Marshall, writing for the Court, initially dealt with the judiciary's authority to review the Secretary's decision. The Court found authority to review based on section 701 of the Administrative Procedure Act (APA).[4] This Act allows judicial review except where "statutes preclude judicial review" or "agency action is committed to agency discretion by law."[5] The Court found no statutory prohibition[6] and stated that there was no agency action "committed to agency discretion" because there were applicable legal standards to be followed by the Secretary in making his decision. These standards are found in section 4(f) of the Department of

[1] The district court found that petitioners had standing to maintain this suit because of their active involvement in the administrative proceedings to select a path and design for the expressway. Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189, 1191 (W.D. Tenn.), *aff'd*, 432 F.2d 1307 (6th Cir. 1970), *rev'd*, 401 U.S. 402 (1971).

[2] Citizens to Preserve Overton Park, Inc. v. Volpe, 432 F.2d 1307 (6th Cir. 1970), *rev'd*, 401 U.S. 402 (1971).

[3] 401 U.S. 402 (1971).

[4] 5 U.S.C. § 701 (Supp. V, 1970).

[5] *Id.* §§ 701(a)(1), (2).

[6] The Court has held that "silence" by Congress does not infer nonreviewability but rather will raise a presumption of reviewability unless there is "clear and convincing evidence" to the contrary. Rusk v. Cort, 369 U.S. 367, 379-80 (1962). *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Brownell v. Tom We Shung, 352 U.S. 180 (1956). *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336-63 (1965).

Transportation Act of 1966[7] and section 18(a) of the Federal-Aid Highway Act of 1968,[8] each of which specifies that the Secretary "shall not approve any program or project" where public parklands are used "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ." The Court interpreted these statutory provisions to be an explicit bar to the use of federal funds for the construction of highways through parks unless alternative routes present unique problems.

The Court next turned to the issue of what standards should have been applied by the district court in reviewing the Secretary's decision. It properly rejected the petitioner's argument that the standard to be applied by the district court should be that the agency action must be set aside if not supported by "substantial evidence"[9] or, alternatively, that the court is to engage in a de novo review of the action and set it aside if "unwarranted by the facts."[10] But it did decide that the generally applicable standards of section 706 of the APA[11] required that the reviewing court engage in a substantial inquiry into the Secretary's decision, more so than had been done by the district court. By substantial inquiry the Court meant an examination of (1) whether the Secretary acted within his scope of authority,[12] (2) whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[13] and (3) whether the necessary procedural requirements were followed.[14]

The Court observed that the only procedural error alleged in this case was the Secretary's failure to make any formal findings in support of his decision. But despite the Court's substantial inquiry directive to the district court, which would be facilitated by the availability of formal findings, it ruled that formal findings were not required in this instance because of a lack of any statutory require-

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[7] 49 U.S.C. § 1653(f) (Supp. V, 1970).

[8] 23 U.S.C. § 138 (Supp. V, 1970).

[9] 5 U.S.C. § 706(2)(E) (Supp. V, 1970). The Court held that this standard is applicable only when the agency action is subject to a public adjudicatory hearing. *See* 5 U.S.C. §§ 556-57 (Supp. V, 1970). The hearing in this case was nonadjudicatory.

[10] 5 U.S.C. § 706(2)(F) (Supp. V, 1970). The Court stated that de novo review is only "authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate" or "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." 401 U.S. at 415.

[11] 5 U.S.C. § 706(2) (Supp. V, 1970).

[12] *Id.* § 706(2)(C).

[13] *Id.* § 706(2)(A).

[14] *Id.* § 706(2)(D).

ments therefor and the existence of an administrative record from which a full, prompt review could be made. The Court emphasized, nevertheless, that on remand the district court's review must be based on the full administrative record available to the Secretary at the time of his decision. And the Court stated that because the bare record might not disclose the factors considered by the Secretary, or his construction of the evidence, the district court might find it necessary to call administrative officials who participated in the decision to give testimony concerning the reasons behind their actions.

Mr. Justice Black, joined by Mr. Justice Brennan, filed a separate opinion. He agreed that the court of appeals decision should be reversed, but stated that the case should be remanded to the Secretary of Transportation rather than to the district court. Mr. Justice Black determined that in order to comply with the standards set up in section 4(f) of the Department of Transportation Act of 1966 and section 18(a) of the Federal-Aid Highway Act of 1968, the Secretary was required to hold hearings that would provide a factual basis for his decision and for later court review. Because the Secretary failed to comply with these requirements, Mr. Justice Black felt the case should be remanded directly to the Secretary, who should give the matter a full hearing.

The Supreme Court's decision in *Overton Park* typifies the trend in recent federal court cases[15] to review more administrative decisions by liberalizing the concept of standing to include conservational as well as economic interests.[16] Of further significance is the Court's interpretation of the language of section 4(f) of the Department of Transportation Act of 1966 and section 18(a) of the Federal-Aid Highway Act of 1968 to be an explicit bar to the use of federal funds to build highways through parks except in unusual situations.[17] Because of this interpretation, conservationists will no longer have the burden of showing that the decision of the Secretary, after balancing the conservation of the parkland against such other factors as cost, safety, and community disruption resulting from the use

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[15] *See, e.g.*, Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *But see* Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom.* Sierra Club v. Morton, 401 U.S. 907 (1971).

[16] *See* note 1 *supra*. The Supreme Court recognized this fact in Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1971), where it stated in dictum that a plaintiff's interest "may reflect 'aesthetic, conservational, and recreational' as well as economic values." *Id.* at 154.

[17] *See* text accompanying notes 7-9 *supra*.

of an alternative route, was plainly wrong or arbitrary.[18] Rather, in order to overcome the plaintiff's charge that his decision was arbitrary, the Secretary will have to show that he gave paramount importance to the protection of the parkland, but that nevertheless, other factors presented such unique problems that an alternate route was not justified.

The major significance of this decision may ultimately be the Court's failure to discuss the issue of sovereign immunity. Sovereign immunity is the right of the government to be free from suit when it or its agents act in a governmental capacity, unless it consents to the suit. In *Overton*, the Court granted the plaintiffs a stay pending appeal that halted construction of the highway.[19] This decision carries the inference that the Court no longer views sovereign immunity as an absolute defense.[20] Discussion of this issue, however, is beyond the scope of this comment. But hopefully the Supreme Court will soon act to remove some of the confusion in the sovereign immunity area created by its decision in *Overton*.

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[18] For example, in Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967), the plaintiffs sought to review and to have set aside a determination by the Federal Highway Administrator to build part of an interstate highway through a wild life sanctuary. This decision was made before the effective date of the Department of Transportation Act of 1966, 49 U.S.C. §§ 1651-59 (Supp. V, 1970). The district court referred to the new Act to support its determination that the Administrator's decision was subject to judicial review, but it allowed the decision to stand because the route through the sanctuary was not, upon consideration of such other factors as conservation, so "plainly wrong" that it should be set aside. The court did not feel that the conservation factor or any other factor was of paramount importance, but rather thought the ultimate question was "whether the overall decision, reviewed in the light of all the competing factors, was arbitrary." 270 F. Supp. at 663.

[19] Citizens to Preserve Overton Park, Inc. v. Volpe, 400 U.S. 939 (1970); *see* 401 U.S. at 406. The Court treated the plaintiff's application for a stay as a petition for a writ of certiorari.

[20] The Court did not mention the landmark case of Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1948), in which a private corporation sought an injunction prohibiting a government administrator from selling certain surplus coal which the corporation claimed it had purchased. The Court held that in a suit against the United States, the district court was without jurisdiction unless the government consented to being sued. *See* Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962). *See also* D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 267-301 (1970).

In a case decided since *Overton Park*, United States *ex rel.* Sierra Club v. Hickel, No. C70-971 (N.D. Ohio 1971), the plaintiffs sought to void a land exchange between two utility companies and the Department of the Interior. The utility companies wanted the land as a site for a nuclear power plant, but the plaintiffs objected because the land was an important stop-over for migratory waterfowl. The district court cited *Overton Park*, but not for the proposition that sovereign immunity is no longer an absolute defense. Rather, the court dismissed the plaintiff's action under the traditional rule set forth in *Larson*.