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## "Supreme Court Orders Review of Overton Park Expressway"

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## Special Issue—Government and Preservation



Arlo I. Smith

The giraffe in the Overton Park zoo appears unaware that the right-of-way for the planned interstate expressway comes right up to the fence in the foreground.

### Supreme Court Orders Review Of Overton Park Expressway

DIANE MADDEX

(See also "The Highway Juggernaut," page 9.)

Just one day after a bomb was exploded inside the U. S. Capitol, the Supreme Court of the United States lit a match under all those involved with planning the nation's maze of highways. On March 2 the Court unanimously ordered a review of the decision approving federal funds for a six-lane interstate expressway through the heart of Overton Park in Memphis, Tenn. This represents a significant—however temporary—victory for the preservation of Overton Park, and possibly a broader one for the cause of conservation nationwide.

#### Park Protection Paramount

Only in the most unusual situations, stressed the Court, is parkland to be taken for construction of federally aided highways.

This decision marks the first time the high court has interpreted the environmental provisions of the two major federal highway statutes.

The Supreme Court directed the Federal District Court in Memphis to conduct "a substantial inquiry" to determine whether the two Transportation Secretaries involved in the case had acted within the scope of their authority under the law, or whether their decision had been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

This decision reversed those of the District Court and the Court of Appeals. See Supreme Court Orders, page 9, col. 1

## Supreme Court Orders Overton Park Inquiry

Continued from page 1

which held that affidavits submitted at the time of trial were sufficient to evaluate the propriety of the Secretary's decisions in the absence of a more complete record.

It is expected that the District Court will conduct its review no later than mid-summer.

The suit against the present Transportation Secretary, John A. Volpe, was brought by Citizens to Preserve Overton Park, the Sierra Club and the National Audubon Society. Also named during the litigation was Alan S. Boyd, the first Secretary of Transportation.

The high court heard the case on an expedited schedule, after having previously granted a stay against construction (see PN, January 1971).

### Green Haven

Overton Park is a 342-acre city park near the center of Memphis. It contains a zoo, a golf course, an outdoor theater, nature trails, a bridle path, picnic areas and 170 acres of untouched forest. The proposed high-speed expressway would sever the zoo from the rest of the park and require the taking of 26 acres of land.

The route through the park was originally approved by the Bureau of Public Roads in 1956.

With the enactment of the Transportation Act of 1966 and the Federal Aid Highway Act of 1968, however, the decision on the allocation of federal funds for the segment through Overton Park was held up until late 1969. Those acts declare that the Secretary of Transportation may not authorize use of federal funds to finance construction of highways through public parks if a "feasible and prudent" alternate route exists. If no such route is available, he may approve construction only if there has been "all possible planning to minimize harm" to the park.

### 'Explicit Bar'

"This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted," said the Court's decision, which was written by Justice Marshall.

"It is obvious," continued the decision, "that in most cases considerations of cost, directness of route and community disruption will indicate that parkland should be used for highway construction wherever possible. . . .

[T]here will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land. . . . And since people do not live or work in parks, if a

highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction.

"Thus if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes. . . .

### 'Not to be Lost'

"But the very existence of the statutes," emphasized the Court, "indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems."

Petitioners in the case contended that the Secretary should have made public his findings and stated his reason for allowing the highway to be built through the park.

The Court held that, while formal findings were not required under the applicable laws, the Secretary's actions are not to be shielded "from a thorough,

probing, in-depth review." This does not require remanding the case to the Secretary, said the Court, but when the District Court conducts its review, it may require the officials involved to give testimony explaining their actions or require the Secretary to make formal findings.

### 'No Finger Raised'

In a separate opinion, Justice Black, joined by Justice Brennan, indicated that he believed the case should be sent back to the Secretary for failure to comply with a Congressionally imposed duty.

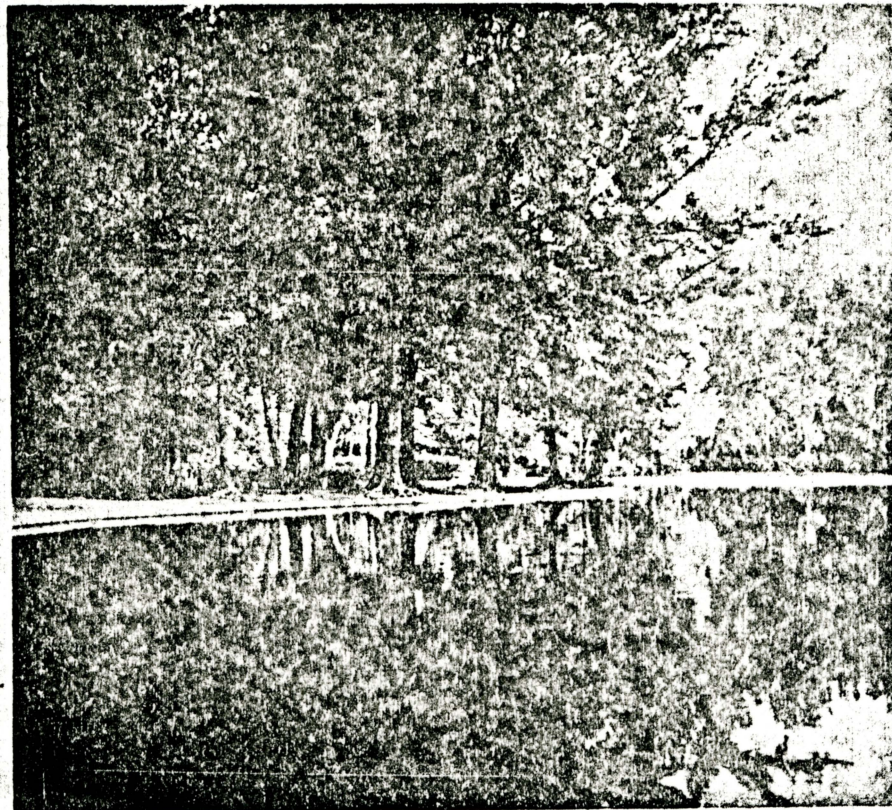
"This record contains not one word to indicate that the Secretary raised even a finger to comply with the command of Congress," he said.

Justice Blackmun issued a separate opinion concurring with the Court's decision. Justice Douglas, a noted conservationist, took no part in the consideration or decision of the case.

If the District Court, after its review, upholds the appropriateness of the Secretary's decision, Overton Park's determined preservers say they will renew their already long battle in the courts.

The National Trust has assisted in this effort by awarding two professional consultant services grants to Citizens to Preserve Overton Park.

This award-winning photograph shows the presently serene setting of Rainbow Lake in Overton Park. Bill Williams photo



Earth Day was a remarkable event that marked a changing point in the politics of the country. A new issue has been born, and it is here to stay.—Sen. Gaylord Nelson