

# The Burger Court Opinion Writing Database

*Citizens to Preserve Overton Park v. Volpe*  
401 U.S. 402 (1971)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

January 18, 1971

Re: No. 1066 - Citizens to Preserve Overton Park v. Volpe

Dear Thurgood:

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

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

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

Regards,

WCB

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

January 19, 1971

Re: No. 1066 - Citizens to Preserve Overton Park, Inc. v. Volpe

Dear Hugo:

Re our conversation on the basis of remand of the above, my minutes show that Marshall, White, Stewart, Harlan and I voted for remand to the District Court, rather than the Department of Transportation and also that the District Court should determine whether the action of the Secretary was arbitrary and capricious.

Regards,

W.B.B

Mr. Justice Black

I had not recorded Justice Blackman but he advised me he voted for the "arbitrary & capricious" standard.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 19, 1971

Re: No. 1066 - Citizens to Preserve Overton Park v. Volpe

Dear Thurgood:

Please join me.

Regards,



Mr. Justice Marshall

cc: The Conference

*Ron*  
*Feb 21*  
*M*

Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice White~~  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun

1st DRAFT

From: Black, J.

## SUPREME COURT OF THE UNITED STATES

Recirculated FEB 18 1971

No. 1066.—OCTOBER TERM, 1970

Recirculated:

Citizens to Preserve Overton  
Park, Inc., et al.,  
Petitioners,  
v.  
John A. Volpe, Secretary,  
Department of Transpor-  
tation, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the  
Sixth Circuit.

[February —, 1971]

## Separate opinion of MR. JUSTICE BLACK.

I agree with the Court that the judgment of the Court of Appeals is wrong and that its action should be reversed. I do not agree that the whole matter should be remanded to the District Court. I think the case should be sent back to the Secretary of Transportation. It is apparent from the Court's opinion today that the Secretary of Transportation completely failed to comply with the duty imposed upon him by Congress not to permit a federally-financed public highway to run through a public park "unless 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. . . ." 23 U. S. C. § 138; 49 U. S. C. § 1653 (f). That congressional command should not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings and policy determinations under the supervision of a Cabinet officer—the Secretary of Transportation. The Act of Congress in connection with

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

From: Black, J

~~Circulated~~

No. 1066.—OCTOBER TERM, 1970

Recirculated 4/24/97

Citizens to Preserve Overton  
Park, Inc., et al.,  
Petitioners,  
*v.*  
John A. Volpe, Secretary,  
Department of Transpor-  
tation, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the  
Sixth Circuit.

[February —, 1971]

Separate opinion of MR. JUSTICE BLACK, with whom MR. JUSTICE BRENNAN joins.

I agree with the Court that the judgment of the Court of Appeals is wrong and that its action should be reversed. I do not agree that the whole matter should be remanded to the District Court. I think the case should be sent back to the Secretary of Transportation. It is apparent from the Court's opinion today that the Secretary of Transportation completely failed to comply with the duty imposed upon him by Congress not to permit a federally-financed public highway to run through a public park "unless 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. . ." 23 U. S. C. § 138; 49 U. S. C. § 1653 (f). That congressional command should not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings and policy determinations under the supervision of a Cabinet officer--the Secretary of Transportation. The Act of Congress in connection with

November 20, 1970

CONTINUATION OF INVESTIGATION

In re: Class Action to Prevent Overton Park Tax-Exempt Status

The law which I thought applies to this case is not only in the Act cited by the parties but in the Various Public Welfare Act of 1969. Section 1, 1970, and the last order before me in this case was dated November 9, 1969. Section 16 of each more recent legislation is of much more limited application than

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Chief Justice Justice Black Justice Holmes Justice Stewart Justice White Justice Marshall

*W. O. D.*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

February 16, 1971

Dear Thurgood:

In No. 1066 - Overton  
Park v. Volpe, please note I took  
no part in the consideration or decision  
of the case.

*W. O. D.*  
W. O. D.

Mr. Justice Marshall

Supreme Court of the United States

Memorandum

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Dear Hungard

You can imagine  
what your opinion  
in Overton will be  
to this sanctuary

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in Justice  
Warhol

## Poet's Wilderness

In 1914, when he was a young reporter on The Times, Joyce Kilmer published a volume of verse, "Trees and her Poems." Its title poem has become a popular classic. Four years later, Kilmer was killed on a battlefield in France.

In 1936, the United States Government set aside the valley of the Little Santeetlah Creek in western North



Carolina as a permanent memorial to him. The walls of this lovely small valley rise steeply to ridges a mile high. Its nearly 4,000 acres are graced by many varieties of trees—dogwood, basswood, beech, hemlock, pine, red oak, white oak, holly. Many of the trees are centuries old. Some are twenty feet around the base and over

100 feet high. For a poet who loved trees, this wilderness mountain valley is a perfect memorial.

In 1964, the Bureau of Public Roads proposed to build a portion of a highway through the Joyce Kilmer Memorial Forest. Inexplicably—and shamefully—the United States Forest Service granted its approval. Years of public controversy have followed. Citizens in North Carolina and across the nation have repeatedly protested this needless desecration.

In 1971, nearly seven years later, these two Federal agencies are still fighting a determined rear-guard action. They have just announced their reluctant decision to stay out of the Kilmer Forest, but now they are planning to move the route into an adjacent valley.

But Kilmer and its neighboring area, called Slick Rock, form an ecological unit. Except for logging on the lower slopes which ceased fifty years ago, Slick Rock is also a wilderness. In fact the Kilmer Memorial Forest and adjoining Slick Rock Creek have long been under consideration within the Forest Service as a potential unit in the National Wilderness Preservation System. If this were accomplished, these unspoiled valleys would be forever safe from the chain saw and the bulldozer.

Conservationists contend that the proposed highway can be kept entirely out of the Joyce Kilmer-Slick Rock area by constructing it south of the wilderness where a secondary road already exists. If necessary, they are prepared to go to court to save the dream of an integral Joyce Kilmer wilderness. It is ironic that private citizens have to use their own money and energy to accomplish what they pay their public servants to do.

*J. M. H.*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN M. HARLAN

February 17, 1971

Re: No. 1066 - Overton Park v. Volpe

Dear Thurgood:

I agree with and am glad to join your opinion.

Sincerely,

*J. M. H.*  
J. M. H.

Mr. Justice Marshall

CC: The Conference

Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 23, 1971

RE: No. 1066 - Citizens to Preserve Overton  
Park v. Volpe

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Dear Hugo:

Confirming what I said at Conference on Friday, will you please join me in your separate opinion in the above.

Sincerely,

  
W. J. B. Jr.

Mr. Justice Black

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 17, 1971

1066 - Citizens to Preserve Overton Park v. Volpe

Dear Thurgood,

I think your opinion for the Court in this case is an excellent one, and I expect to join it. I have some problems, however, with the last two paragraphs. It seems to me a mistake to limit the District Court to the two alternatives mentioned.

I think, for instance, the District Court should be free to remand the case to the administrative agency, and there may be other alternative procedures.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

BP  
JMA  
A copy of

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 25, 1971

1066 - Citizens to Preserve Overton Park, Inc.

Dear Thurgood,

I am glad to join your opinion for  
the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

BP

Supreme Court of the United States  
Memorandum

....., 19.....

Dear Sirs:

Please join me  
in your Due in Park  
order for the Comt.

Respectfully  
Yours

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 1066.—OCTOBER TERM, 1970

Citizens to Preserve Overton Park, Inc., et al.,  
Petitioners,  
*v.*  
John A. Volpe, Secretary,  
Department of Transportation, et al.

On Writ of Certiorari to  
the United States Court  
of Appeals for the  
Sixth Circuit.

[February —, 1971]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation <sup>1</sup> designed to curb the accelerating destruction of our country's natural beauty. We are concerned in this case with § 4 (f) Department of Transportation Act of 1966 <sup>2</sup> and § 138 of the Federal-Aid to

<sup>1</sup> See, *e. g.*, The National Environmental Policy Act, 42 U. S. C. § 4321; Environmental Education Act, 20 U. S. C. § 1531; Air Quality Act of 1967, 42 U. S. C. § 1857 *et seq.*; Clean Air Amendments of 1970, 84 Stat. 1676.

<sup>2</sup> "The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge or historic site 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, recreational area, wildlife and waterfowl refuge or historic site resulting from such use." 49 U. S. C. § 1653.

*Circulated  
2/16/71*

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

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5/12/71

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

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4th DRAFT

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[March —, 1971]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

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3/6/78/13/16/17

5th DRAFT

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Black

## SUPREME COURT OF THE UNITED STATES

No. 1066.—OCTOBER TERM, 1970

From: Marshall, J.

Circulated:

Recirculated: FEB 25

Citizens to Preserve Overton  
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243

4th DRAFT

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 1066.—OCTOBER TERM, 1970

From: Blackmun, J.

Circulated: 2/24/71

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[March —, 1971]

MR. JUSTICE BLACKMUN.

I fully join the Court in its opinion and in its judgment. I merely wish to state the obvious: (1) The case comes to this Court as the end product of more than a decade of endeavor to solve the interstate highway problem at Memphis. (2) The administrative decisions under attack here are not those of a single Secretary; some were made by the present Secretary's predecessor and, before him, by the Department of Commerce's Bureau of Public Roads. (3) The 1966 Act and the 1968 Act have cut across former methods and, here, have imposed new standards and conditions upon a situation that already was largely developed.

This undoubtedly is why the record is sketchy and less than one would expect if the project were one which had been instituted after the passage of the 1966 Act.