X. JUDICIAL REVIEW—SCOPE

OVERTON PARK: A NEW MODE OF REVIEW AND ITS CONSEQUENCES

The Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*[1] provided the occasion for an expression of a new judicial attitude which may, in many instances, ultimately result in a broader role for the courts in decisions which might previously have been thought to be solely within the area of administrative discretion. The case concerned a dispute over the meaning of a provision in the Department of Transportation Act—providing that no federal highway funds may be used in construction of highways through public parks unless "no feasible and prudent alternative"[2] routes exist—and the Act's application to a particular proposed highway project. While reversing the lower court dismissal of the environmentalists' claims under the Act, and remanding the case to the district court because of the record's inadequacy, the Supreme Court went on to discuss in detail its conception of the proper mode of judicial review of administrative action, placing heavy emphasis on the precise delineation of an agency's scope of authority. In *Overton Park* the Court so strictly construed the command that no highway through a public park should be approved that the questions of the feasibility or prudence of particular alternatives became matters of law, leaving the administrator with what in most cases will be only one permissible decision.

Overton Park involved a city park located near the center of Memphis which contained one hundred and seventy acres of forest and various recreational facilities, including a zoo and a golf course. The proposed route for a six-lane, high-speed expressway would have severed the zoo from the rest of the park and destroyed twenty-six acres of parkland. This route was approved in 1956 by the Bureau of Public Roads[3] and again in 1966 by the Federal Highway Administrator. However, funding was temporarily prevented in 1966 by the passage of the Department of Transportation Act,[4] which declares that special

1. 401 U.S. 402 (1971).

2. 49 U.S.C. § 1653(f) (1970). The same phrase is used in the Federal-Aid Highway Act, 23 U.S.C. § 138 (1970).

3. The Bureau of Public Roads, at that time a part of the Department of Commerce, has since been transferred to the Department of Transportation, pursuant to the Department of Transportation Act. 49 U.S.C. §§ 1651-59 (1970).

4. *Id.*

effort should be made by federal agencies to preserve public park and recreation lands.[5] The Act prohibits the Secretary of Transportation from authorizing the use of federal funds for highways through public parks of federal, state, or local significance unless (1) there is no *feasible and prudent alternative* to the use of such land, and (2) there is included in any such program all possible planning to minimize harm to any park or recreational area used for such purposes.[6] While this provision temporarily prevented distribution of federal funds for that section of the highway designated to go through Overton Park, federal funding was available for the remainder of the project, and the state acquired a right-of-way on both sides of the park.[7] The Secretary finally announced, in November, 1969, federal approval for the project, including the routing through the park.[8] The announcement was not accompanied by factual findings or other indications as to why the Secretary believed that there were no feasible and prudent alternate routes or that design changes could not be made to reduce the harm to the park. Petitioners, private citizens as well as local and national conservation organizations, brought suit seeking a construction halt, arguing that feasible and prudent alternatives did exist. After their requests for a preliminary injunction were rebuffed by both the district court[9] and the court of appeals[10] on the grounds that what was "feasible and prudent" was a determination solely committed to agency discretion, they sought and received Supreme Court review.

5. *Id.* § 1653(f).

6. *Id.*

7. These acquisitions were approved in 1967 shortly after the effective date of the Department of Transportation Act of 1966. 401 U.S. at 407.

8. This announcement came despite reiteration by Congress in the Federal-Aid Highway Aet, 23 U.S.C. §§ 101-44 (1970), that highway construction through public parks must be restricted in a manner similar to that expressed in the Department of Transportation Act, 49 U.S.C. § 1653(f) (1970).

9. 309 F. Supp. 1189 (W.D. Tenn. 1970). Petitioners alleged, *inter alia*, that "feasible and prudent" alternative routes existed around Overton Park and that even if these alternatives were found not to be "feasible and prudent," the plan approved by the Secretary did not include all possible methods for reducing harm to the park. *Id.* at 1194. The district court construed the Secretary's discretion on the matter as being broad in scope; hence its review of the Secretary's action was necessarily limited to a determination merely of whether it was arbitrary and capricious within the meaning of the judicial review provisions of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (1970). The court granted summary judgment dismissing the action.

10. 432 F.2d 1307 (6th Cir. 1970). The Sixth Circuit affirmed on substantially the same grounds as the district court, concluding, on the basis of the Secretary's litigation affidavits, that he "was fully aware of the alternative designs and chose the one now in effect. . . . ," and that he had, in fact, determined that the proposed design ineluded " 'all possible planning to minimize harm' to the Park." *Id.* at 1313.

The Supreme Court reversed and remanded the case to the district court, considering the record to be inadequate for a determination of whether the Secretary had acted in excess of his statutory authority or in abuse of his discretion.[11] The actual holding of the case is narrow, but the Court went on to describe a mode of review which, although conventional in theory, is far-reaching as applied in this situation. Under the Court's mode of review the questions to be faced are whether the agency action is reviewable at all,[12] whether the agency acted within its statutory authority or jurisdiction,[13] and whether the agency acted in an arbitrary or capricious manner.[14] After establishing that the Secretary's decision was reviewable,[15] the Court turned its attention to the second and most significant phase of its scheme—the determination of whether the agency was acting within its scope of authority.[16] The Court in fact refused to make this deter-

11. 401 U.S. at 420-21.

12. *Id.* at 410. This depends upon whether there is " 'clear and convincing evidence' of . . . legislative intent" to restrict access to judicial review, Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967), or whether the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1970). In neither of the pertinent acts, 49 U.S.C. §§ 1651-59 (1970), and 23 U.S.C. §§ 101-44 (1970), is there any indication that Congress meant to preclude judicial review. Concerning the "committed to agency discretion" exception, the Court referred to the legislative history of the Administrative Procedure Act indicating that this exception is applicable only where a statute is "drawn in such broad terms that . . . there is no law to apply." S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945), *reprinted in* SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 212 (1946). The Court found such "law to apply" here by strictly construing the statutory language to give the Secretary relatively little discretion.

13. *See, e.g.*, Citizens' Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970). In Hudson Valley it was held that the Army Corps of Engineers' issuance of a dredge and fill permit was "in excess of statutory . . . authority," since the landfill was found to fall within the scope of the statutory definition of the terms "dikc" and "causeway" in the Rivers and Harbors Act, 33 U.S.C. § 401 (1970), and such permits could lawfully issue only after the consent of Congress and the approval of the Secretary of Transportation had been obtained. *Id.* § 403; 49 U.S.C. § 1655(g)(6)(A) (1970). *See also* Guenther v. Morehead, 272 F. Supp. 721 (S.D. Iowa, 1967), where the court, citing the APA, 5 U.S.C. § 706(2)(C) (1970), held that a single transaction involving an alleged wrongful negotiation of a check was not a "practice" within the purview of the Packers and Stockyards Act, 7 U.S.C. § 213 (1970), and hence the Department of Agriculture lacked jurisdiction to render a decision in the case.

14. *See, e.g.*, NLRB v. General Stencils, Inc., 438 F.2d 894 (2d Cir. 1971); Udall v. Washington, Va. & Md. Coach Co., 398 F.2d 765 (D.C. Cir. 1968); Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960); Western Addition Community Org. v. Romney, 320 F. Supp. 308 (N.D. Cal. 1969); Price v. Udall, 280 F. Supp. 293 (D. Alas. 1968), *modified sub nom.* Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969).

15. 401 U.S. at 410.

16. *Id.* at 415-16. *See* 5 U.S.C. § 706(2)(C) (1970).

mination, considering the record to be inadequate, and remanded the case to the district court. The Government contended that the Secretary had wide discretion to determine whether there existed "feasible and prudent" alternatives. With particular emphasis on the "prudent" aspect, the Government argued that the Secretary should "engage in a wide-ranging balancing of competing interests,"[17] which necessarily would involve a considerable amount of leeway. Seeing a "plain and explicit bar to the use of federal funds for construction of highways through parks,"[18] the Court disagreed, reasoning that the wide-ranging balancing on the part of the agency was simply not intended by Congress in its passage of the statutes. Because construction of highways through parkland will almost always be less costly and disruptive than other alternatives, such an approach would result in the use of parkland in the vast majority of instances. As a consequence, preservation of such land is to be given not equivalent, but "paramount" importance.[19]

An examination of legislative history reveals that the Court chose a more restrictive interpretation of the phrase "feasible and prudent"[20] than was intended by the Congress. The language first appeared in the Department of Transportation Act of 1966.[21] The original bill as drafted by the Department of Transportation contained no provision concerning preservation of parklands.[22] The Senate Com-

17. 401 U.S. at 411.

18. *Id.* The Court admitted, however, that some very unusual situations might be exempt from that bar.

19. 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. . . . [T]he Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems. *Id.* at 413.

The pertinent Acts state that "[i]t is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. § 1653(f) (1970); 23 U.S.C. § 138 (1970). The Court has taken the phrase "special effort" quite seriously, and in conjunction with the "shall not approve" language of the provisions, has forged a potent weapon designed to insure full agency consideration of environmental factors. *Cf.* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), where the D.C. Circuit did much the same thing with the significantly broader policy provisions of the National Environmental Policy Act. 42 U.S.C. § 4321 (1970).

20. Department of Transportation Act, 49 U.S.C. § 1653(f) (1970); Federal-Aid Highway Act, 23 U.S.C. § 138 (1970).

21. 49 U.S.C. § 1653(f) (1970).

22. *See* H.R. 15963, 89th Cong., 2d Sess. (1966), *reprinted in* 112 CONG. REC. 20953 (1966).

mittee on Government Operations inserted a provision which would have forbidden the Secretary from approving a highway through a park if he found that a "feasible" alternative existed.[23] The House Conference Report added the words "and prudent" to the section in order to assure that the Secretary would have more discretion.[24] Hence in the original version of the provision in 1966 it appears that the Secretary was given a considerable amount of leeway in his decision making. This compromise position was reaffirmed in 1968 when an attempt was made to replace, in the pending Federal-Aid Highway Act,[25] the "feasible and prudent" language, copied from the Department of Transportation Act, with phraseology even more ambiguous and discretionary.[26] In conference, the Senate conferees successfully opposed those provisions[27] and the language in both acts retained the "feasible and prudent" phraseology.[28] Thus the overall intent of Congress in enacting these bills appears to rest on a middle ground between the Senate's proposals severely limiting discretion and the extremely flexible approach supported by the House.[29]

The effect of narrowly construing the agency's statutory authority in *Overton Park* is essentially to eliminate the power of the agency to exercise discretion whenever a decision must be made concerning the construction of a highway through a park. Although the Secretary is

23. S. Res. 3010, 89th Cong., 2d Sess., *reprinted in* 112 CONG. REC. 24309-10 (1966).

24. CONF. REP. NO. 2236, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2450. Statements were made on the floor of the House prior to the passage of the final bill, making it clear that the section was intended only to establish guidelines for the Secretary and not to eliminate his discretion: "[Preservation of parkland is important] but not to the total exclusion of other considerations [which] . . . include the integrity of neighborhoods, the displacement of people and businesses, and the protection of schools, and churches and the myriad of other social and human values we find in our communities." 112 CONG. REC. 26651 (1966) (comments of Rep. Kluczynski). "I would want the Secretary to weigh his decision carefully, and not feel he was forced by the provision of the bill to disrupt the lives of hundreds of human beings." *Id.* at 26652 (comments of Rep. Rostenkowski).

25. 23 U.S.C. §§ 101-44 (1970).

26. The amendment would have forbidden the expenditure of federal funds for construction through a park unless:

> such program or project includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. H.R. 17134, 90th Cong., 2d Sess. (1968), *reprinted in* 114 CONG. REC. 19749 (1968).

27. 114 CONG. REC. 24025-26 (1968) (comments of Sen. Young); *id.* at 24029 (comments of Sen. Randolph).

28. 49 U.S.C. § 1653(f) (1970); 23 U.S.C. § 138 (1970).

29. *But see The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 322-25 (1971) (arguing for a discretionary interpretation).

ostensibly left with the determination of what constitutes a "feasible and prudent alternative," in most cases there is likely to be only one permissible conclusion. Any other conclusion would be in excess of statutory authority. The most significant aspect of the *Overton Park* decision then becomes the establishment of a three-step procedure for review which shifts the focus of judicial inquiry from a traditional reliance upon section 706(2)(A) of the APA, permitting the court to set aside agency action which is arbitrary and capricious,[30] to a review of the agency's scope of authority under section 706(2)(C), which permits the court to set aside agency action outside the scope of its statutory authority.[31] The traditional scope of review under section 706(2)(A) has been very limited, with the courts giving deference to most agency factual decisions.[32] Decisions falling under section 706(2)(C), however, have been considered to involve questions of law and therefore to permit a much more substantial judicial scrutiny of the agency's decisions.[33] In *Overton Park*, for example, by construing the "feasible and prudent" clause to be a firm legal standard limiting the agency's authority, the Supreme Court has permitted the reviewing court on remand to exercise almost complete control over the final decision. The Court's method, therefore, lays the groundwork for future substantive scrutiny of many administrative decisions heretofore believed to be relegated solely to the discretion of the agency.

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30. 5 U.S.C. § 706(2)(A) (1970).

31. *Id.* § 706(2)(C).

32. *See, e.g.*, American Airlines, Inc. v. CAB, 445 F.2d 891 (2d Cir. 1971); Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971); Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Dorothy Thomas Foundation, Inc. v. Hardin, 317 F. Supp. 1072 (W.D.N.C. 1970); West v. Dep't of Agriculture, 305 F. Supp. 1312 (N.D. Miss. 1969); 4 DAVIS § 28.16; JAFFE 182; Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U.L. REV. 201 (1970); Comment, *Abuse of Discretion: Administrative Expertise vs. Judicial Surveillance*, 115 U. PA. L. REV. 40 (1966). Some noted authorities have extended this "limited scope of review" doctrine to argue that, in certain instances, agency action is completely unreviewable. *See, e.g.*, 4 DAVIS § 28.16; Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968). *But see* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969).

33. *See, e.g.*, cases cited in note 13 *supra*. Numerous cases have found agency action to be outside of its statutory authority, without citing specifically to § 706(2)(C). *See, e.g.*, NLRB v. Brown Food Store, 380 U.S. 278 (1965); Leedom v. Kyne, 358 U.S. 184 (1958); R.V. McGinnis Theatres & Pay T.V., Inc. v. Video Independent Theatres, Inc., 386 F.2d 592 (10th Cir. 1967); Salazar v. Hardin, 314 F. Supp. 1257 (D. Colo. 1970); JAFFE 181-84, 359. *See generally* 4 DAVIS ch. 30, §§ 30.00-.14; JAFFE 546-94.

The Court's approach in this case does not appear on its face to be limited to any particular class of cases. However, the environmental area has been notably characterized in recent decisions by strict construction of statutory language,[34] particularly, the National Environmental Policy Act.[35] While the *Overton Park* opinion cites NEPA only in passing,[36] the decision here may well have been influenced by the recently expressed general congressional concern for environmental matters.

The ultimate result of the decision made on the issue of the scope of statutory authority leaves little for the third phase of the Court's mode of review—review for any abuse of whatever discretion remains. The Court reiterated the traditional standard for review for such abuse,[37] declaring that the standard is narrow and stating rather generally that the Court is not empowered to substitute its judgment for that of the agency.[38] This oft-stated prohibition on substitution of judgment at the discretionary stage is somewhat ironic here, for under the Court's delineation of the Secretary's scope of authority and the reviewing court's role therein, such substitution seems a distinct possibility, if not a probability.

The desirability of the result here, while initially attractive from an environmental perspective, is doubtful in view of the rationale behind the utilization of administrative agencies. Concentration of

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34. *E.g.*, Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); EDF, Inc. v. HEW, 428 F.2d 1083 (D.C. Cir. 1970); Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971). *But see* Scenic Hudson Preservation Conference v. FPC, ___ F.2d ___, (2d Cir. 1971). *See generally* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

For cases involving "public interest" areas other than the environment which illustrate the same willingness to require strict agency compliance with what are arguably discretionary policy provisions, *see, e.g.*, Udall v. FPC, 387 U.S. 428 (1967); EDF, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970).

35. 42 U.S.C. §§ 4321 *et seq.* (1970). Courts have generally been quite ready to utilize NEPA's policy provisions in conjunction with other statutes to establish a strict standard of agency compliance relevant to environmental considerations. *See, e.g.*, Ely v. Velde, 451 F.2d 1130, (4th Cir. 1971) (reversing district court decision that NEPA's "discretionary" provisions were subordinate to the "mandatory" provisions of the Law Enforcement Assistance Administration). *See also* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); EDF, Inc. v. Corps of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971).

36. 401 U.S. at 404 n.1.

37. See authorities cited in note 32 *supra*.

38. 401 U.S. at 416.

expertise in given areas should result in more informed and responsible decisions in those areas.[39] To ask courts to attempt to make such decisions on the basis of their limited knowledge vis-a-vis that of an agency in a given area would seem to be a mistake, sacrificing expert and informed judgment[40] for an individual court's notion of desirability in a particular instance.[41] The ultimate result of *Overton Park*, then, may be a step-up in federal court involvement in many technical and specialized controversies,[42] with the consequent delay and loss of efficiency in decision making.

The Tenth Circuit's opinion in *Parker v. United States*[43] constitutes the first major application of the *Overton Park* principles to define the scope of administrative authority under other legislation and illustrates the far-reaching consequences of the *Overton Park* mode of review.[44] In *Parker* the Forest Service had contracted with Kaibab Industries for the sale of timber in the East Meadow Creek Area of the White River National Forest as permitted by the Multiple Use-Sustained Yield Act.[45] Subsequently, plaintiffs, several conservation groups, petitioned the Forest Service to rescind the contract and include the East Meadow Creek Area in its report to the President and Congress on the Gore Primitive Region as required by the Wilderness Act.[46] The Wilderness Act, passed in 1964, required the Forest Service to study all areas which are contiguous to existing wilderness areas and which are also suitable for wilderness classification.[47] The

39. *See, e.g.*, F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 14-20 (1951); 1 DAVIS § 1.05, at 37-39; JAFFE 25-26.

40. *But see* 4 DAVIS § 30.09, at 241; Sive, 70 COLUM. L. REV., *supra* note 34, at 626-31.

41. This motion of substitution of judgment was recently rejected by the Second Circuit in Scenic Hudson Preservation Conf. v. FPC, ___ F.2d ___ (2d Cir. 1971), where the court upheld a decision of the Commission to issue a permit for a pumped storage power plant on the Hudson River. Dismissing petitioners' argument that different standards ought to prevail with respect to issues concerning the environment, the court stated that "we will not allow our personal views as to the desirability of the result reached by the Commission to influence us in our decision." *Id.* at ___

42. *Cf.* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

43. 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3450 (U.S. Mar. 21, 1972).

44. *Parker* is also significant as the first case delineating the scope of authority of the Secretary of Agriculture and the Forest Service under the Wilderness Act of 1964. 16 U.S.C. §§ 1131 *et seq.* (1970). The Act has been mentioned only in brief dicta in recent cases concerning forest regulations and proposed road projects. *See, e.g.*, McMichael v. United States, 355 F.2d 283, 285 (9th Cir. 1965); Sierra Club v. Hardin, 325 F. Supp. 99, 111, 124 (D. Alas. 1971).

45. 16 U.S.C. § 529 (1970). See note 50 *infra* and accompanying text.

46. 16 U.S.C. §§ 1131 *et seq.* (1970).

47. *Id.* § 1133(b).

studies are to be forwarded to the President and Congress for a decision as to whether to preserve the areas as wilderness. In *Parker* the plaintiffs argued that the East Meadow Creek Area was both contiguous to a primitive area and suitable for wilderness classification and that if the logging contract were performed it would be irretrievably damaged, thus precluding the President and Congress from making the decision prescribed in the Wilderness Act. The Forest Service rejected the plaintiffs' petition and stated that the proposed sale would proceed as planned. The plaintiffs filed suit in federal district court. After making the factual determination that the area in question was indeed "contiguous" and "suitable" for wilderness classification within the meaning of the Wilderness Act, the court granted plaintiffs injunctive relief.[48] The Tenth Circuit affirmed, resting its decision on the theory that the substantially objective criteria contained in the Wilderness Act precluded approval of the sale by the Secretary of Agriculture and the Forest Service.

The reservation and retention of some public lands in their natural state has long been an objective in the management of the federal domain.[49] Prior to the enactment of the Wilderness Act of 1964, wilderness areas under the jurisdiction of the Secretary of Agriculture and the Forest Service were administered under the authority of the Multiple Use-Sustained Yield Act.[50] Administrative decisions with respect to the suitability of an area for wilderness classification, the need for preserving the natural state of such an area, and the relative value of resources in the particular area were final and unreviewable.[51] The vague concept of public interest was the only limitation on agency

48. Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970).

49. H.R. REP. No. 1538, 88th Cong., 2d Sess. 2 (1964), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3618-19.

50. 16 U.S.C. § 529 (1970). This act recognized that the national forests were to be primarily used for recreation, range, wildlife, timber, and watershed purposes. The classification of such uses was entirely within the discretion of the Secretary and the Forest Service. *See* McMichael v. United States, 355 F.2d 283 (9th Cir. 1965); *The Meaning of the Multiple Use-Sustained Yield Act of 1960*, 41 ORE. L. REV. 49, 73 (1961). *See also* Jones v. Freeman, 400 F.2d 383 (8th Cir. 1968) (recognizing an implied power to promulgate regulations to protect forest resources).

51. Winder, *Environmental Rights for Environmental Polity*, 5 SUFFOLK L. REV. 820, 821 (1971); *see* McMichael v. United States, 355 F.2d 283, 284-85 (9th Cir. 1965); West Virginia Highlands Conservancy v. Island Creek Coal Co., ___ F. Supp. ___ (N.D. W.Va. 1971); Jones, *The Role of Administrative Agencies as Instruments of Social Reform*, 19 AD. L. REV. 279 (1967); Zamir, *Administrative Control of Administrative Action*, 57 CALIF. L. REV. 866 (1969).

discretion.[52] Recognizing that this limitation was inadequate and that, because of undue agency orientation and responsiveness to interests representing economic development and mass recreational uses, the present administrative machinery was dysfunctional for preserving such areas,[53] Congress enacted the Wilderness Act of 1964. The purpose was to provide a statutory framework requiring long-range planning in order to assure that administrative agencies would not irretrievably alter areas which should be preserved as wilderness.[54]

The statutory scheme of the Wilderness Act prescribes a procedure for review of all areas of the national forests for classification as "wilderness areas," which requires the Forest Service to make several decisions. The issues in *Parker* involved the extent of the agency's discretion in making each decision.[55] The Secretary of Agriculture must first determine which areas are "contiguous" and "suitable" for classification; second, which of those areas should be stud-

52. *See* Rogers v. City of Mobile, 277 Ala. 261, 169 S.2d 282 (1964); Nelson v. Mobile Bay Seafood Union, 263 Ala. 195, 82 S.2d 181 (1955); S. Doc. No. 676, 60th Cong., 2d Sess. 109 (1909); Henning, *The Ecology of the Political Administrative Process for Wilderness Classification*, 11 NAT. RES. J. 69 (1971); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474-80 (1970).

53. *See* S. Doc. No. 676, 60th Cong., 2d Sess. 109 (1909); Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51 (1971); Heyman, *Environmental Management of Public Lands*, 58 CALIF. L. REV. 1364 (1970); Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFFALO L. REV. 231 (1970); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968); Sax, 68 MICH. L. REV., *supra* note 52.

54. *See* H.R. REP. No. 1538, 88th Cong., 2d Sess. 2 (1964), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3618-19; 109 CONG. REC. 5707 (1963).

55. The issue of the agency's discretion had been presented in only two cases prior to *Parker* and neither dealt explicitly with the power to commit the areas in question to some use. In McMichael v. United States, 355 F.2d 283 (9th Cir. 1965), a case involving vehicular trespass within the Idaho Primitive Area, the Ninth Circuit upheld regulations banning motorized vehicles in that area. In rejecting assertions that the choice of areas for wilderness purposes was subject to review, the court stated that the choice of what area to preserve was an administrative choice in which geographical and topographical considerations were germane but not reviewable. *Id.* at 286. Despite the apparent emphasis on the Secretary's broad discretion, the Ninth Circuit gave no indication how broad that power was within the designation process, since the case concerned only the maintenance of park areas and not their use-classification. *Id.* at 284. In West Virginia Highlands Conservancy v. Island Creek Coal Co., ___ F. Supp. ___ (N.D. W.Va. 1971), a case involving the construction of a road and timbering rights in a national forest, the controversy centered on the suitability of the area for wilderness classification under the Multiple Use-Sustained Yield Act, Wilderness Act and the National Environmental Policy Act. The case called for broader interpretations of statutory language concerning the environmental impact in the issuance of use permits, but the court limited its review to the Secretary's failure to comply with the National Environmental Policy Act.

ied; third, whether to recommend that they be classified as a wilderness; and fourth, whether to send his recommendations to the President.[56] Arguably each of these decisions involves the exercise of substantial discretion on the part of the Secretary. The *Parker* court, however, expressly held that the Secretary had no discretion as to the second and fourth steps. He must study *all* areas meeting the requirements of being contiguous and suitable[57] and must forward those studies to the President and Congress.[58] The Court also expressly held that he did have discretion as to the third step—whether to recommend the area for wilderness classification.[59] All three determinations are within the traditional scope of the judiciary, since they involve primarily the interpretation of the Wilderness Act and do not involve the court in factual determinations normally left to the agency. With regard to the first step, the determination of what is a "contiguous" and "suitable" area, however, the result is significantly different. The court, applying the *Overton Park* mode of review, reasoned that the Secretary had the statutory authority to approve the logging contract only if the forest area in question was not "contiguous" to an existing wilderness area and not "suitable" for wilderness classification. By construing "contiguous" and "wilderness" to constitute the legal standards framing the parameters of the Secretary's authority, the court necessarily left itself with the task of determining which areas came within the named definition. The court thus limited the Secretary's function under the Act to the issuance of study reports and recommendations, leaving no power to classify wilderness areas or

56. 16 U.S.C. §§ 1131 *et seq.* (1970).

57. 448 F.2d at 796.

58. *Id.* The court's holding that the Secretary's discretion was restricted with regard to the second and fourth decisions appears to be accurate. Statements in the congressional reports indicate that the Wilderness Act was intended to remove some of the Secretary's discretion under the previously controlling Multiple-Use Sustained Yield Act. *Conf. Rep. No.* 1829, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3631; S. REP. NO. 4, 88th Cong., 2d Sess. 2 (1964); H.R. REP. NO. 9070, 88th Cong., 2d Sess. 2 (1964). In addition, shortly after the passage of the Wilderness Act the Forest Service promulgated regulations which carefully delineated the Service's responsibilities under the Act, implying that the Service itself interpreted the Act as narrowing the agency's discretion. See 448 F.2d at 797; 36 C.F.R. 251.22-.25a (1971). Further indication of an intent to limit discretion is found in the Act's express provision that the primitive areas would be *maintained* as they had been under the Multiple-Use Sustained Yield Act, 16 U.S.C. § 1132(b) (1970), implying that any decisions to *utilize* the areas would be tested against a more stringent standard. *See also* Letter from John Carver, Asst. Sec. of the Interior, to Hon. Wayne Aspinall, Chmn., Committee on Interior and Insular Affairs, Dec. 12, 1963, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3623.

59. 448 F.2d at 797.

permit their use in ways incompatible with their preservation and reserving for the court the ultimate determination of what is "contiguous" and "suitable." Like the phrase "feasible and prudent alternative" utilized in *Overton Park*, the meaning of the words "contiguous" and "suitable" would traditionally be left to the expertise of an administrative agency.

The conclusion reached by the *Parker* court was perhaps an extreme one. In the sense that the Secretary of Agriculture had the responsibility to transmit a report on wilderness areas to the President, it might at first glance seem logical to assume that the Secretary should not be able to determine the President's decision in advance as to a particular area. Nevertheless, it seems odd indeed that the Congress would construct such a sketchy statutory scheme for the administration of wilderness areas and yet leave no discretion to the officials responsible, especially since in many respects the Secretary of Agriculture will be acting as the President's delegate and adviser when the final report is transmitted to the Congress with Presidential recommendations. When the court looks at areas contiguous to wilderness areas, it seems to forget that such areas must of necessity be contiguous to developed areas as well, and that at some point an area, technically contiguous to a wilderness area, will be so unsuitable for eventual wilderness classification that no sound reason exists for denying development. The court rejected a contention by the Secretary that, since a "bumper" area of contiguous territory would be retained under the logging scheme proposed,[60] the region where logging was to take place was not "contiguous" to the wilderness area. Still, if a rational use of "bumper" strips cannot be employed, the potential land contiguous to wilderness areas and arguably suitable for such classification is greatly expanded.

An examination of *Overton Park* and *Parker* reveals that by perhaps overstating the proper role of the courts in *Overton Park* the Supreme Court has created a situation with enormous potential for abuse. The statutory scheme in *Overton Park*, being essentially a command not to approve a project unless certain specific criteria were met, was an invitation to an absolutist approach which in some circumstances may prove harmful. The *Parker* legislative scheme, while not totally dissimilar to that of *Overton Park*, still consisted of somewhat more generalized positive duties. To the extent that congres-

60. *Id.* at 796.

sional standards are interpreted to eliminate any creativity in administrative decision making, much of the rationale for using the administrative form of governmental organization fails.