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The Past, Present, and Future of § 4(f) of the Department of Transportation Act

William Holt
Georgetown University Law Center

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The Past, Present, and Future of § 4(f) of the Department of Transportation Act

William Holt

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Professors Boasberg and Byrne
Introduction

Recent efforts to reauthorize the Department of Transportation Act for the 21st Century have spurred debate over the relative merits of what is known as § 4(f). § 4(f) is a set of provisions contained in the 1966 Department of Transportation Act that prohibit the Secretary of Transportation from using parklands and historic sites in transportation projects unless stringent requirements have been met.\(^1\) As such § 4(f) is the only substantive federal provision protecting historic resources. Despite acknowledging the vast success that § 4(f) has had at protecting environmental and historic resources, the current Administration would like to reform § 4(f) in order to decrease the delays associated with the environmental review and approval process for transportation projects. This paper will examine: the background and passage of § 4(f); its interpretation by the Federal Courts; the benefits and criticisms of § 4(f); and the current proposals to reform § 4(f) including exempting the interstate highway system and creation of a de minimis impact exception from § 4(f)’s requirements.

Background of § 4(f)

The decades of the 1950s and 1960s saw the rapid development of the interstate highway system. As cities were connected and many miles of rural areas were paved over people began to realize the danger this growth posed to precious environmental and historic sites across the country. At the same time, urban renewal programs and the redevelopment of many towns and cities sparked interest and energy in local groups aiming to protect the historical fabric of their communities in the face of destruction and development. As the environmental and cultural carnage mounted, so too did the

\(^{1}\) 49 U.S.C § 303(a) (2005).
grassroots opposition to projects undertaken with blatant disregard for their effects on the environment and historic sites. Congress was unable to ignore the voices of preservationists for long and by the middle of the 1960s passed several pieces of groundbreaking legislation aimed at preserving the nation’s environmental sites and historical heritage. 1966 saw the passage of both the National Historic Preservation Act\(^2\) and the Department of Transportation Act.

Among the many accomplishments of the Department of Transportation Act, some of the most notable were the provisions outlined in § 4(f). The principles underlying § 4(f) had been enacted earlier that year in the Federal Aid-Highway Act.\(^3\) The provisions that would be part of the 4(f) system were part of an amendment offered by Senator Yarborough (D-TX). While Senator Yarborough’s amendment originally included substantive protection in the form of a prohibition on the use of protected lands unless there was no “feasible alternative to the use of such land,” the language adopted in the act eliminated that phrase instead giving only procedural protection to parklands and historic sites.\(^4\)

While the Federal Aid-Highway Act, with provisions derived from the Yarborough amendment, was a step in the right direction by recognizing the potential for conflict between the goals of transportation delivery and the protection of parklands and historic sites as well as the importance of codifying some principles to ensure that the park lands and historic sites are not systematically disregarded in favor of transportation projects, more was needed to ensure substantive protection of these resources.

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In the Department of Transportation Act of 1966 (DOT Act) Congress consolidated the major transportation administrations. Additionally, this legislation made explicit the principles by which these administrations were to be guided and also placed limits on the ability of the transportation officials to enthusiastically plough forward with new projects for construction and expansion. §2(b)(2) of the DOT Act established that: “it is hereby declared to be the national policy that special efforts should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” Importantly, the DOT Act not only echoed the statement in Federal Aid-Highway Act that preservation is to be national policy but also expanded the scope of such policy to include all modes of transportation.

As opposed to the merely procedural requirements imposed on the federal government in the National Historic Preservation Act and Federal Aid-Highway Act to take into consideration effects on protected resources and seek to minimize the harm done to them, § 4(f) of the DOT Act enacted a substantive federal policy to protect the environmental and historic sites threatened by transportation projects. By coupling already existing procedural hurdles with the substantive provisions of § 4(f), congress imposed a ‘potent prohibition against the use of parklands and historic lands for highway construction.” Exactly how stringent the substantive provisions would be would remain unknown until implementing regulations were passed and cases arose demanding that courts examine the appropriateness of the Secretary of Transportation’s actions in

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5 Id. at 328-9.
fulfillment of his responsibilities. The debate surrounding the enactment of § 4(f) suggests a broad interpretation of its provisions in order to satisfy the remedial purpose it was intended to serve.8 This is even more appropriate considering the time at which it was enacted, a time when Congress was concerned with rapid bulldozing and construction wreaking havoc on the nation’s parks and historic sites.

Despite recodification of the DOT Act in 1983, § 4(f) has remained mostly unchanged since its original enactment. Currently § 4(f), which is codified at 49 U.S.C. § 303, reads as follows:

(a) It is the policy of the United States Government that special effort shall be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing plans and programs that includes measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project requiring the use of publicly owned land of a public park, recreation areas or wildlife and waterfowl refuge, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, recreation areas, refuge, or site) only if,
   (1) there is no prudent and feasible alternative to using that land; and
   (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge or historic site resulting from the use.

The Federal Highway Administration has acknowledged in a policy paper, which outlines its understanding of § 4(f) practice, that, notwithstanding recodification, the provisions continue to be called § 4(f) by those in the transportation industry.9

**Treatment of § 4(f) in the Federal Courts**

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8 *Id.*
Despite laying out the principles driving the enactment of § 4(f), Congress did not adequately explain how the Secretary of Transportation (hereinafter Secretary) could satisfy the process required of him by § 4(f). As a result, second only to the National Environmental Policy Act, § 4(f) has been the most frequently litigated environmental statute in the Federal Highway Program. Despite the prevalence of § 4(f) litigation, the Supreme Court has only decided one case interpreting the requirements of § 4(f). In Overton Park, the Court discussed § 4(f) and provided interpretive guidance that would serve as the starting point for future Circuit Court cases involving § 4(f). While several Circuits have remained faithful to the strict interpretation of § 4(f) outlined in Overton Park, other Circuits have strayed quite far from the Supreme Court’s guidance and instead adopted a much more flexible approach to § 4(f). The resulting split in the Circuits regarding the requirements that § 4(f) places on the Secretary has caused the legal status of federally funded transportation projects to be unclear and unpredictable, often having different results depending on what state the project is to be constructed in.

The strict interpretation of the Supreme Court in Overton Park v. Volpe

The lone case concerning § 4(f) to be litigated before the Supreme Court dealt with a proposed highway project in Tennessee. The Secretary authorized the construction of a six-lane interstate highway through Overton Park. As approved, the highway construction would necessitate the destruction of twenty-six acres of the park.

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13 Overton Park, 401 U.S. at 406.
14 Id.
and sever the municipal zoo from the rest of the park.\textsuperscript{15} In seeking to defend his actions, the Secretary asserted that § 4(f) “requires the Secretary to engage in a wide range balancing of competing interests.”\textsuperscript{16} This assertion was explicitly rejected by the Court, which did not feel as though such a wide-ranging endeavor on the part of the Secretary was intended by § 4(f).\textsuperscript{17}

In rejecting any possibility that § 4(f) necessitated a balancing approach by the Secretary, the Court made sure that the protection of parkland was given paramount importance as required by § 4(f).\textsuperscript{18} The Court found the very existence of § 4(f) to be a signal that Congress could not have intended for such commonplace factors as cost, directness of route and community disruption to be placed on an equal footing with the preservation of parkland.\textsuperscript{19} After making it clear that there shall be no balancing of competing interests when reviewing the use of protected sites under § 4(f), the Court provided some helpful guidance as to what situations would make it appropriate for the Secretary to authorize the use of protected lands. Only the most unusual situations may be exempted from the “clear and specific directive” of § 4(f), which acts as a “plain and explicit bar to the use of federal funds for construction of highways through parks.”\textsuperscript{20} In order for a Secretary to dismiss an alternative to the use of a protected resource as

\textsuperscript{15} Id.
\textsuperscript{16} Id., at 411.
\textsuperscript{17} Id.
\textsuperscript{18} Id., at 412-3. It is also interesting to note that writing separately, Justice Black opined that the “solemn determination of the highest lawmaking 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 [the Secretary].” Moreover § 4(f) was “obviously passed to protect our public parks from forays by road builders except in the most extraordinary and imperative circumstances. Black’s concurrence at 421-2.
\textsuperscript{19} Id.
\textsuperscript{20} Id., at 411.
imprudent he must find that there are “truly unusual factors present in a particular case or that the cost or community disruption resulting from alternate routes reached extraordinary magnitudes.”\textsuperscript{21} Additionally, an alternative that presents “unique problems” may be dismissed as imprudent.\textsuperscript{22}

It is clear from this case that the Court interpreted § 4(f) as placing strict requirements on the Secretary. In order to meet the aim of Congress to place the protection of parklands as a paramount goal, § 4(f) reviews may not include a balancing of competing interests. Moreover, the types of concerns found in most transportation projects do not qualify an alternative as imprudent. The problems presented by an alternative must be unique or the costs of an extraordinary magnitude before the alternative may be rejected in favor of using the protected land.

**Conflicting Interpretations of § 4(f) in the Circuit Courts**

There have been many discrepancies in the ways that various Circuits have applied the interpretive guidance provided by the Supreme Court in *Overton Park* when dealing with cases involving § 4(f). This split in the Circuits is readily ascertainable by examining the different ways that Circuits have dealt with various elements that go into an analysis under § 4(f). The main elements that courts must deal with when faced with § 4(f) litigation are determining what constitutes a “use” of the protected resource that triggers the requirements of § 4(f) and when the Secretary may determine that there is no prudent and feasible alternative to the use of the protected resource.

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\textsuperscript{21} *Id.*, at 413.
\textsuperscript{22} *Id.*
Determining What Constitutes a “Use” of Protected Land

The Circuits have split as to whether there is a minimum threshold that must be met before a “use” will be considered to trigger the requirements of § 4(f). While the statute makes no mention of an exception for minimally intrusive or insubstantial uses, some Circuits have nonetheless implied a threshold requirement into the term “use” in the statute stating that anything below the threshold does not constitute a use of protected resources for the purposes of § 4(f).

The Fifth Circuit has read § 4(f) strictly and determined that any use, regardless of how minimal that use may be constitutes a use necessitating § 4(f) review of the Secretary’s decision. In *Louisiana Environmental Society v. Coleman*, the Fifth Circuit rejected the decision of the Secretary to approve the Louisiana Highway Department’s proposal to build a bridge over Cross Lake to be part of I-220. In eliminating the eight alternatives he considered as imprudent, the Secretary had failed to comply with the mandate of § 4(f) which the Fifth Circuit determined requires a “thumb on the scale approach” providing disparate weighting against the use of parklands. Any other approach would not satisfy the desire of Congress because, it is always going to be more attractive to go ahead and use the park because the land will be cheaper to acquire and will not involve the displacement of residents.

In this case the Secretary sought to defend his decision by claiming that the highway would not enact a substantial use of the park and should not be forbidden by §

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24 *Id.*, at 84.
25 *Id.*
4(f) and that choosing an alternative would cause a delay of ten years.\textsuperscript{26} Taking umbrage at the Secretary’s casual dismissal of his § 4(f) requirements, Judge Clark said simply “any park use, regardless of its degree, invokes 4f.”\textsuperscript{27} This decision is supported by Judge Clark’s reading of Overton Park, which he found to be “clearly to the effect that the statute is to be read broadly to protect greenlands.”\textsuperscript{28} Recognizing that as approved the highway would use protected resources, Judge Clark moved on to examine whether the reason for rejecting the alternatives satisfies the requirements of § 4(f)(2). Despite the rather extreme length of the delay that would be caused by avoiding the use of the park, the court opined that time delays do not rise to the level of unique problems and cannot be used as a reason to reject an alternative as imprudent.\textsuperscript{29}

In addition to signaling that all future transportation projects using protected resources contemplated within the states of the Fifth Circuit must be reviewed by the Secretary according to the strict interpretation of Overton Park, \textit{La. Envtl. Soc’y} also made two contributions to the interpretation of the statute. The Fifth Circuit does not interpret § 4(f) to include a threshold requirement of a substantial use of protected land before its requirements are triggered, rather any use of parkland no matter how small, must be reviewed according to § 4(f). Additionally, lengthy delays, even those lasting a decade, are not to be considered unique and may not be used to disqualify an alternative to use of the protected resource.

In cases dealing with federal funding of transportation it is almost always an option to bring an appeal before the D.C. Circuit. The D.C. Circuit has jurisdiction over

\begin{itemize}
\item\textsuperscript{26} \textit{Id.}
\item\textsuperscript{27} \textit{Id.}
\item\textsuperscript{28} \textit{Id.}
\item\textsuperscript{29} \textit{Id.}, at 85.
\end{itemize}
the activities of federal agencies. In transportation cases, this jurisdiction is concurrent with the Circuit whose territory the transportation project will be constructed in. As a result, a D.C. Circuit willing to adhere closely to the rationale of Overton Park would prove to be a great friend to preservation groups bringing suit under § 4(f). Unfortunately for those who wish to preserve protected lands from being used for transportation projects, this has not been the case. In two cases dealing with airport expansions, the D.C. Circuit has interpreted § 4(f) as imposing a threshold requirement for the impact on a protected land, below which the requirements of the statute do not arise.

In Sierra Club v. Dole, Judge Bork affirmed the Secretary’s decision to allow 737 jets to operate out of Jackson Hole Airport.\(^{30}\) This airport is located within Wyoming’s Grand Teton National Park.\(^{31}\) Seeking to avoid a blizzard of useless § 4(f) statements, Judge Bork failed to find congressional intent that § 4(f) sought to create “ongoing review of relatively minor changes in the operational character of an established transportation facility.”\(^{32}\) The requirements of § 4(f) do not arise for “relatively minor changes” that do not “substantially impair the value of the site in terms of its prior significance and enjoyment.”\(^{33}\)

While it might be true that there should be a threshold below which improvements and changes need not be subject to § 4(f) review, it is not clear that this type of change should necessarily fall below it. After forty-five years of propeller planes, a switch to 737 commercial jets seems as though it might be more than a mere “change in flight

\(^{30}\) Sierra Club v. Dole, 753 F.2d 120 (D.C. Cir. 1985).
\(^{31}\) Id., at 129.
\(^{32}\) Id., at 130.
\(^{33}\) Id.
scheduling or operations.” 34 It is also questionable whether it is appropriate to adopt such a hands-off approach for transportation projects that were constructed before 1966, especially for something such as a commercial airport located in a national park. § 4(f) very well might have intended to protect resources from even very minor changes if the use of the resource began at an earlier time when Congress’ attitude towards preservation was very different. Finally, the fear of a blizzard of § 4(f) statements and potential litigation might not prove to be warranted.

More recently, the D.C. Circuit decided another airport case and affirmed its earlier decision that minor impacts may not be considered a use. In Citizens Against Burlington, Inc. v. Busey, the court determined that minor increases in airplane noise that would be caused by the expansion of Toledo’s airport did not rise to the level of a “constructive use” and would not be subject to § 4(f) review. 35

Analysis of Alternatives Under § 4(f)

In cases where it is found that the proposed transportation project will use a protected resource, the Secretary may not approve the project unless he can reject all alternatives as being imprudent or infeasible. 36 Unfortunately, § 4(f) does not elaborate on what these alternatives that the Secretary will consider must consist of, nor does the statute explain what are appropriate reasons for determining that an alternative is not prudent.

It is well settled that in order to fairly be considered an alternative to the use of a protected resource, the proposal being considered must not use the protected resource

34 Id., at 129.
itself. In *Druid Hills*, the Eleventh Circuit reviewed a decision by the Secretary to allow the Georgia Department of Transportation to use land in Atlanta’s Druid Hills Historic District to build its Presidential Parkway.\(^{37}\) While the court ultimately remanded to the Secretary to investigate further the mitigation of harm to the historic district that was contemplated by the plan he approved, this case is important for its discussion of what may be considered as an alternative to the use of protected lands as well as what type of costs associated with a no-build alternative may conceivably be truly unique or unusual.

Before deciding to use land in the historic district, the Secretary considered five alternative designs for the parkway.\(^{38}\) After discovering that four of these so-called alternatives actually used or impacted the park as well, the court reprimanded the Secretary for including these as alternatives making it clear that this was unacceptable because an alternative route that also impacts upon parks and historic sites is not an alternative to the use of such property.”\(^{39}\) Therefore, the only real alternative considered by the Secretary was the no-build alternative.\(^{40}\) In this case the cost associated with not building the parkway at all was said to be the loss of the opportunity to build the Carter Complex, which would include President Carter’s presidential library.\(^{41}\) Despite refusing to pass judgment on the validity of the Secretary’s claim that this would be the cost of not building the parkway (mostly due to the court’s suspicion that there would probably be another place to build the complex without building a highway through the historic

\(^{37}\) *Druid Hills Civic Association v. Federal Highway Administration*, 772 F.2d 700 (11th Cir. 1985).
\(^{38}\) *Id.*, at 715.
\(^{39}\) *Id.*
\(^{40}\) *Id.*, at 716.
\(^{41}\) *Id.*
district), the court provided insight into the kind of costs that they would consider to be truly unusual or unique.\(^\text{42}\)

In *Overton Park*, the Supreme Court provided some guidance as to what may constitute an imprudent alternative. Alternatives that pose truly unique or unusual problems or result in costs of extraordinary magnitude may be rejected as imprudent. Several Circuits have closely adhered to this interpretation of imprudent. In addition to the Fifth Circuit, which in *Louisiana Environmental Society* rejected the notion that excessive delays constitute unique problems, the Ninth Circuit has also set a lofty bar that must be cleared before an alternative may be dismissed as imprudent. In 1984 the Ninth Circuit affirmed *Overton Park* in a decision that offered additional guidance into the requirements of § 4(f). The Secretary approved a plan to extend Interstate Route H-3 in Hawaii using lands from two of Oahu’s most popular public parks.\(^\text{43}\) Interpreting § 4(f) in the context of Congress’ broader “response to growing public concern over the preservation of our Nation’s natural beauty,” Judge Ely did not believe that the Secretary’s decision to reject the alternatives to use of the parks satisfied the requirements of § 4(f).\(^\text{44}\)

The Secretary considered two main alternatives, the Makai realignment and not building the road at all. For reasons that the court does not find satisfactory, the Secretary dismissed both alternatives as imprudent. Citing many reasons such as the dislocation of businesses and residences, increased noise and air pollution, a cost increase

\(^\text{42}\) *Id.*
\(^\text{43}\) *Stop H-3 Association v. Dole*, 740 F.2d 1442 (9th Cir. 1984). Interstate H-3 was a very controversial highway that prior to this case had already been the subject of extensive litigation for twelve years. *See Id.*, at 1444.
\(^\text{44}\) *Id.*, at 1447.
of forty-two million dollars and safety concerns, the Secretary determined that the Makai realignment would impose costs of extraordinary magnitude. In so doing, the Secretary amalgamated the various reasons in order to find that their sum made the alternative imprudent. While there was some debate over whether the decision by the Secretary to add up the various costs was appropriate, the court did not find it necessary to decide on the validity of such a tactic because even when taken together the costs did not rise to such an extraordinary magnitude that the alternative could be rejected. While the court dismissed the first three concerns with ease, the safety concern proved a bit more troublesome. The Makai alternative called for a portion of Highway H-3 to be built to “lesser design geometric standards” which forced the court to consider the prudence of an alternative that would increase the potential risk to human life. Recognizing the importance of safety concerns in designing transportation projects, Judge Ely asserted that these costs warrant close scrutiny in the determination of whether they make an alternative imprudent. On the other hand, Judge Ely also noticed that such a widespread concern as safety could easily be transformed into a “talisman” available to be cited whenever the Secretary wishes to reject an alternative. Avoiding the potential head-on collision between these competing concerns, Judge Ely determined that in this case the

45 *Id.*, at 1451.
46 *Id.*
47 *Id.*
48 *See Id.*, at 1451-2.
49 *Id.*, at 1452.
50 *Id.*
51 *Id.*, at 1452-3.
safety concerns posed by the Makai alternative really aren’t that bad, certainly not of extraordinary magnitude.\(^\text{52}\)

An alternative always available to the Secretary when faced with the possibility of having to use protected lands is to decide to simply not build the road at all. Assuming that most roads are built to satisfy the need for them, this is likely to be a rather unattractive alternative to the Secretary. In reviewing the Secretary’s decision, Judge Ely laid down a high standard to be met before a no-build alternative can be rejected as imprudent. In rejecting the no-build alternative in this case, the Secretary cited increasing congestion and commuter delays as establishing a need for the highway.\(^\text{53}\)

This was unacceptable to the majority of the Ninth Circuit; however, which took the opportunity to assert that the costs of the no-build alternatives must be unusual or of extraordinary magnitude just like any other alternative that the Secretary might want to reject.\(^\text{54}\) Relying on the fact that increased congestion and commuter delays are two of the main reasons cited for the construction of almost every highway, the court did not feel as though these costs qualify as unusual or of extraordinary magnitude.\(^\text{55}\) It was the no-build alternative that prevented unanimity in the court’s decision as Judge Kunz dissented to warn the majority that, in his view, their approach was creating almost an implied “presumption for the no-build alternative.”\(^\text{56}\) Judge Kunz felt that the court was improperly interfering with the cooperative system of transportation project design.\(^\text{57}\)

\(^{52}\) *Id.*, at 1453.  
^{53}\) *Id.*, at 1455.  
^{54}\) *Id.*  
^{55}\) *Id.*  
^{56}\) *Id.*, at 1468.  
^{57}\) *Id.*
Throughout its opinion in *Overton Park*, the Supreme Court rejected the notion put forward by the Secretary that competing interests in transportation projects such as cost, community disruption and safety concerns were to be balanced against the paramount interest in preservation enacted by § 4(f). If such concerns, which are present in every transportation project, were to be simply placed alongside preservation concerns then § 4(f) would have enacted no change in policy at all.\(^{58}\) The notion that the Secretary was supposed to avoid engaging in a balancing approach was closely adhered to for a decade and a half.

In *Eagle Foundation v. Dole*, the Seventh Circuit departed from the trend that other Circuits had followed since *Overton Park*.\(^{59}\) Following twenty years of planning by federal officials, the Secretary had approved the funding of a four-lane east-west highway through central Illinois.\(^{60}\) The proposed route for this highway ran directly through Pike County Preservation Area, a bald eagle habitat and popular wildlife preservation area.\(^{61}\) The highway’s construction would also impact historic Wade Farm, an early nineteenth century stone farmhouse that had been deemed eligible for inclusion on the National Register of Historic Places.\(^{62}\)

Judge Easterbrook begins this opinion with an extended discussion of the appropriate standard of review for courts to use in examining decisions by the Secretary. Recognizing that it would be inappropriate for the court to substitute its opinion for that of the Secretary on such a specialized decision, Easterbrook determines that courts must

\(^{58}\) *Overton Park*, 401 U.S. at 412.

\(^{59}\) *Eagle Foundation v. Dole*, 813 F.2d 798 (7th Cir. 1987).

\(^{60}\) *Id.*, at 800.

\(^{61}\) *Id.*, at 801-2.

\(^{62}\) *Id.*, at 800-1.
make a searching review of what the Secretary considered and the way in which it was considered, but the inquiry must be replaced with deference when it comes to the wisdom of the Secretary’s ultimate consideration.\footnote{Id., at 803.} The court then goes on to explain both what the Secretary can and should consider and how that consideration should be done. The Secretary, in fulfilling his responsibility to make prudent judgments, must take into account ‘everything important that matters.’\footnote{Id., at 805.} Even the smallest problem associated with an alternative should play some role in the determination of whether or not to reject it.\footnote{Id.} This is in sharp contrast to the principle of \textit{Overton Park} that only problems of extraordinary magnitude or those that are found to be truly unique or unusual should play a role in the decision. Not content to simply extend the breadth of things to be considered, Judge Easterbrook goes on to reinterpret how the Secretary is allowed to consider these things. After paying lip service to the traditional view of § 4(f) and reminding the Secretary to give added weight to protected lands by keeping a thumb on the scale, Judge Easterbrook proceeds to turn the § 4(f) review process on its head. In deciding what is “prudent,” the Secretary is supposed to “balance” the competing interests and come to a “practical” decision.\footnote{Id., at 804.} In conducting this balancing test the Secretary need not confine herself to single problems of extraordinary magnitude, instead “a cumulation of small problems may add up to a sufficient reason to use § 4(f) lands.”\footnote{Id., at 805.}

After reinterpreting § 4(f) to allow exactly the approach that the Supreme Court explicitly rejected in \textit{Overton Park}, the Seventh Circuit goes on to attribute new meaning
to the requirement that an alternative create truly unique factors to be imprudent. Judge Easterbrook asserts that the Supreme Court did not really mean that a factor needed to be unique when it said that a factor needed to be truly unique. He reaches this decision by reasoning that a literal interpretation of Overton Park’s uniqueness requirement would be more extreme than the statute intended. Rather the Supreme Court must have simply been emphatically asserting that the reasons for using protected lands must be good ones. In this way, § 4(f) would be able to achieve its strong presumption against turning “chlorophyll clover leaves in the parks into concrete ones.” Judge Easterbrook sought to move away from the Overton Park principle that there must be “one whale of a problem” with an alternative before it could be rejected in favor of using protected lands. From now on projects being constructed in the states of the Seventh Circuit may use protected lands whenever the Secretary determines that each of the alternatives has enough small and common drawbacks to add up to an imprudent route.

Eagle Foundation has served as a fork-in-the-road of § 4(f) jurisprudence. This landmark decision has paved the way for other Circuits to move away from the strict interpretation of Overton Park, to the delight of transportation officials and the chagrin of preservationists and the occasional bald eagle.

Following the lead of the Seventh Circuit, other Circuits began to branch out in their interpretation of § 4(f). Twenty years after the decision in Overton Park, the Fourth Circuit tackled a case involving the North Carolina Department of Transportation’s

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68 Id., at 804.
69 Id., at 805.
70 Id.
71 Id.
72 See Id.
decision to widen a highway in Hickory, North Carolina.\footnote{Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159 (4th Cir. 1990).} This plan, the funding of which was approved by the Secretary, would disturb a three-block portion of the Claremont Historic District.\footnote{Id., at 161.} In affirming the decision of the Secretary to approve the plan, the Fourth Circuit strongly distanced itself from the language used in \textit{Overton Park} as well the Ninth’s Circuit’s evaluation of no-build alternatives.

Seeking to give the Secretary more latitude in her decision making, the court announced that it would no longer require use of the “magic” terminology introduced in \textit{Overton Park} and diligently repeated for twenty years of “unique” and “extraordinary.”\footnote{Id., at 162.} Instead, the Secretary “need only determine that there were compelling reasons for rejecting the proposed alternatives as not prudent.”\footnote{Id., at 163.} Echoing the Seventh Circuit in \textit{Eagle Foundation}, the court also determined that the compelling reasons may result from a cumulation of problems.\footnote{Id.}

The Fourth Circuit also broke new ground in its evaluation of no-build alternatives. Previously, the Ninth Circuit had announced that common reasons for planning new highways such as congestion and delays in and of themselves did not constitute justification for rejecting a no-build alternative. This approach made it very unlikely that a no-build alternative could be rejected in favor of using protected lands. The Fourth Circuit adopted the opposite approach to no-build alternatives. Where it is established that there is a demonstrated need for a highway and failing to build the highway would result in the current traffic problem not being alleviated, the no-build

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\begin{enumerate}
\item[74] Id., at 161.
\item[75] Id., at 162.
\item[76] Id., at 163.
\item[77] Id.
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alternative may be rejected as imprudent.\textsuperscript{78} Under this approach the no-build alternative will likely be rejected in every instance it is considered.

Finally, a more recent trend has developed regarding alternative analysis under § 4(f). State Departments of Transportation are beginning to narrowly craft their statements of purpose for proposed projects. By doing so, the Department may then reject many alternatives without examining their prudence because they fail to satisfy the very narrow purpose previously crafted. This process leads to an alternatives analysis that usually finds no prudent and feasible alternative leading the Secretary to allow the use of a protected resource.

An example of this strategy is the Whittier Road case. In 1995 the Alaska DOT and FHWA proposed a project designed to replace the existing rail service to the small town of Whittier, a popular and secluded destination tucked inside the Portage Glacier Recreation Area.\textsuperscript{79} The proposal that was finally chosen was the Whittier Access toll road. This was chosen despite the existence of an alternative (improving the current rail service) that would be safer, less expensive and less damaging to the environment.\textsuperscript{80} The Secretary was able to reject this alternative as imprudent because it would not satisfy the purpose of the project, which the Alaska DOT had crafted as “to bring as many people as possible to the Town of Whittier.”\textsuperscript{81} By crafting the purpose of the transportation project as such, the Alaska DOT had ensured that only one alternative would satisfy the purpose.

\textsuperscript{78} See Id., at 164.
\textsuperscript{79} Alaska Ctr. For the Env’t v. Armbrister, 131 F.3d 1285 (9th Cir. 1997).
\textsuperscript{80} Matthew Singer, The Whittier Road Case: The Demise of § 4(f) Since Overton Park and its Implications for Alternatives Analysis in Environmental Law, 28 Env’tl. L. 729 (1998).
\textsuperscript{81} Id.
of the project: that which maximized the volume of traffic to the town.\textsuperscript{82} It was clear to all parties at the outset that the only option to do so would be a major highway.\textsuperscript{83} However, the Ninth Circuit did not investigate the crafting of the statement of purpose.\textsuperscript{84} If this practice continues, and Circuit courts refuse to look into the appropriateness of a purpose statement for a proposed transportation project, then alternative analysis under §4(f) will no longer result in meaningful protection of historic resources.

\textbf{The Benefits of §4(f)}

§4(f) placed preservation as a paramount goal to be considered in transportation planning. In its forty years of existence it has had tremendous success at preventing the destruction of the nation’s historical and environmental heritage by transportation projects. As discussed earlier, §4(f) has prevented: the severing of Overton Park in Tennessee;\textsuperscript{85} the construction of a bridge over Cross Lake in Louisiana;\textsuperscript{86} the extension of an interstate through two of Hawaii’s most popular public parks;\textsuperscript{87} and the disruption of the Druid Hills Historic District in Georgia.\textsuperscript{88} There have been myriad other transportation projects that were prevented from using historic sites and parks by §4(f). Some of these §4(f) successes include: the selection of a tunnel beneath the Baltimore Harbor as a “prudent and feasible alternative” to building a massive suspension bridge over Fort McHenry; leading Secretary Volpe to cancel plans to construct an elevated riverfront highway in New Orleans that would have walled off the French Quarter from

\begin{itemize}
\item \textit{Overton Park}, 401 U.S. at 406.
\item \textit{La. Envtl. Soc’y}, 537 F.2d at 84.
\item \textit{Stop H-3 Association}, 740 F.2d at 1451.
\item \textit{Druid Hills}, 772 F.2d at 715.
\end{itemize}
the Mississippi River; the preservation of the Historic Tenth Street Bridge in Great Falls, Montana; and prevention of the demolition and replacement of the beautiful Michigan Street Lift Bridge over Sturgeon Bay in Wisconsin with a four-lane concrete stationary bridge.\(^{89}\)

In addition to simply preventing the construction of projects that might destroy historic and environmental resources, § 4(f) has also been a success at encouraging cooperation between transportation engineers and preservation officials. This collaboration has resulted in better transportation designs that are conscious of the context in which they will be built and aware of the desires and preferences of the community. Two strong examples of this kind of effect of § 4(f) include the portion of U.S. 93 running through the Flathead Indian Reservation in Montana and the Paris Pike in the bluegrass region of Kentucky.

By the 1980’s the Department of Transportation realized that U.S. 93 was in need of improvement.\(^{90}\) Part of the plan the Secretary devised to deal with this problem involved widening a fifty-six mile stretch of the road that runs through the Flathead Indian Reservation.\(^{91}\) This construction would have disrupted the habitat of many endangered species and threatened the cultural survival of the Confederated Salish and Kootenai tribes who have lived there for many centuries.\(^{92}\) After a decade long dispute over whether the Secretary had satisfied the requirements of § 4(f), the Montana Department of Transportation began to work with the tribes to develop concepts for the

\(^{90}\) Id.
\(^{91}\) Id.
\(^{92}\) Id.
highway that would be satisfactory to both sides.\textsuperscript{93} The result of this collaboration has been an award-winning example of community-based planning and context-sensitive design.\textsuperscript{94}

In the late 1960’s the Kentucky Department of Transportation became interested in widening the two-lane Paris Pike to four lanes to accommodate increased traffic.\textsuperscript{95} The original design for the reconstruction would have destroyed many historic features in a twelve mile stretch of the road that winds through the Bluegrass Region of Kentucky.\textsuperscript{96} These features include historic stone walls and canopies created by mature trees.\textsuperscript{97} By relying on the protection of § 4(f), local citizens were successful at convincing the courts to grant an injunction halting progress on the highway.\textsuperscript{98} When the Kentucky DOT returned to the plan later they decided to work with farmers, conservationists and other concerned citizens to create a “radical new approach to the road’s design” seeking to maximize the “preservation of the corridor’s character-defining features.”\textsuperscript{99} This radical new approach accomplished the goals of the Kentucky DOT as the highway was indeed widened to four lanes; however its design was so impressive that this project has been celebrated by such diverse bodies as the Federal Highway Administration, the American Society of Landscape Architects, and the National Trust.\textsuperscript{100} The story of Paris Pike shows two ways in which § 4(f) has been successful. First, § 4(f) “stopped the original,
insensitive plan; then, its enthusiastic embrace by the Kentucky DOT led to a beautiful project that respected the values of the community it served.”¹⁰¹

Having recognized the success of the collaborative design process utilized in the Paris Pike project, Kentucky adopted “a similar approach to its other work, using it to protect historic places and build support for new construction.”¹⁰² In fact many states have had experiences similar to that of Kentucky. The long, drawn out process of dealing with § 4(f) litigation has provided states with an incentive to incorporate the concerns of preservationists and conservationists at the outset of the design process. This is a valuable change because context-sensitive design combined with early and meaningful public involvement in the design process results in a better transportation project. In addition to resulting in a project that will steer clear of the prohibitions of § 4(f), involving the public in the design process is also likely to facilitate consensus building which will prevent many other kinds of delays involved in transportation project delivery that come from local opposition. § 4(f) has led to the development of better practices by state and local transportation officials in designing projects that incorporate the concerns of the community as well as being conscious of the specific attributes and resources that will be impacted by the project. This not only results in better transportation projects but might also reduce the delay associated with environmental review and other roadblocks that sidetrack design approval for transportation projects.

**Criticisms of § 4(f)**

Despite the many benefits of § 4(f) discussed above, there have been calls for reform to § 4(f) for most of its existence. Most of these arguments in favor of revising

¹⁰¹ *Id.*
¹⁰² *Id.*
the requirements of § 4(f) rely on three main criticisms: the § 4(f) review process creates excessive and unnecessary delays; the rigid requirements of § 4(f) do not allow for flexibility in the Secretary’s decision making and sometimes lead to absurd and undesirable results; and § 4(f)’s requirements are confusing and unclear, often leading to different results depending on what State the project is being constructed in.

The time wasting aspect of § 4(f) review is one of the most frequently cited reasons for requesting that its requirements be changed and lies at the heart of the Administration’s desire to include § 4(f) reform as part of the reauthorization of TEA. The American Association of State Highway and Transportation Officials (AASHTO) views § 4(f) to be “one of the greatest causes of delay” in the existing environmental review and approval process.103 Furthermore, the American Road and Transportation Builders Association (ARTBA) has testified before the House of Representatives that “if § 4(f) historic preservation or parkland avoidance issues come into play, the average time period (for completing the environmental review and approval process) grows by an additional two years, on average.”104

Aside from the inconvenience of having to wait additional time for the completion of new roads and the money spent to navigate the bureaucratic process, there is another

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104 ExPDITE Hearing (statement of Brian Holmes, Executive Director, Maryland Contractors Assoc. on behalf of the Am. Road and Transp. Builders Assoc.) available at http://house.gov/transportation/highway/10-08-02/holmes.html. (hereinafter Holmes statement) (The ARTBA testimony referred to data gathered in a January, 2001 study on “Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance” conducted by the Louis Berger Group on behalf of the FHWA.)
very real cost associated with excessive delays in the transportation project approval process. As the Executive Director of the Maryland Highway Contractors Association Brian Holmes has put it quite simply: “Delay Kills.” According to statistics kept by the U.S. Department of Transportation, one person in the United States dies from a traffic crash every thirteen minutes.

The concern that public health and safety might be at risk by unnecessary delays in the review and approval process for transportation improvements led Chairman Young of the House Committee on Transportation and Infrastructure to request that the General Accounting Office conduct a survey regarding “Stakeholders’ Views on Time to Conduct Environmental Reviews of Highway Projects.” Not surprisingly there was disagreement between the environmental stakeholders and the transportation improvement stakeholders as to what factors added undue time to environmental reviews. Fifty-six percent of transportation stakeholders believed that § 4(f) adds undue time to the review process because of its inflexibility, which makes it burdensome to comply with. Of much greater concern to transportation stakeholders; however, is the lack of sufficient staff felt in State Departments of Transportation and federal resource agencies preventing them from handling their responsibilities in a timely manner. This factor was cited by sixty-nine percent of transportation stakeholders as adding undue time to the environmental review process. On the other hand, environmental stakeholders believed that the leading factors adding undue time to the process are the failure of State

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105 Id.
106 Id.
108 Id., at 23.
109 Id. at 22.
Departments of Transportation to consider environmental and historic preservation concerns early enough in the design process and neglecting to include important stakeholders early on in the environmental review process.\textsuperscript{110} These factors were cited by seventy and sixty-four percent of the environmental stakeholders, respectively.\textsuperscript{111} It is interesting to note that the factors cited by the environmental stakeholders as being the omissions of State Departments of Transportation that lead to delays in the approval process are precisely the factors which, when actually practiced by the State DOT, have led to some of the most successful and widely praised transportation projects.

It is beyond doubt that § 4(f) review does add time to the review and approval process of transportation projects. This should not come as a shock as the purpose behind the legislation was not to streamline the transportation delivery process but rather to place preservation as a paramount goal. It is with this goal in mind that the delays caused by § 4(f) review should be compared to the delays caused by other problems associated with transportation projects and the benefits created by having the § 4(f) review. This wider perspective will prevent an analysis of § 4(f)’s weaknesses from relying on anecdotal evidence of excessive delays and provide a better view of where along the spectrum of delay causing factors § 4(f) actually fits.

Despite the widespread belief that § 4(f) is a leading cause of delayed transportation projects, data collected by the FHWA suggest otherwise. A September, 2000 FHWA survey of its state and regional offices found that the primary causes of slow

\textsuperscript{110} Id. at 21.
\textsuperscript{111} Id.
progress were a lack of money or local disputes. The FHWA study concluded that the reasons for project delays included: (A) lack of funding – 18%; (B) local controversy – 16%; (C) low priority – 15%; (D) complex project – 13%; (E) change in scope – 8%; (F) resource agency review – 8%; (G) endangered species act review – 7%; (H) historic preservation reviews – 6%; (I) wetlands – 4%; (J) lawsuits – 3%; and (K) hazardous materials – 2%. Not only do these statistics show that it is misleading to portray § 4(f) review as one of the leading causes of delayed transportation projects but they also point to ways in which § 4(f) might even increase the speed with which transportation projects are approved. The most successful way that State Departments of Transportation have begun to deal with the requirements of § 4(f) has been to involve the community in the design process and seek to achieve a context-sensitive design. According to the FHWA, local controversy and the complexity of the project are two of the four factors most responsible for delayed projects, combined accounting for twenty-nine percent of delays. The benefits of improved State practices of dealing with the requirements of § 4(f) have the added benefit of being able to minimize local controversy by involving the community in the design process at the outset and also maximizing the extent to which the design takes into account all relevant features of the context thereby mitigating some of the problems caused by complexity.

The next criticism of § 4(f) is that its requirements are too rigid. As a result, the Secretary does not have the flexibility to take into account other factors which might be important along with the preservation goals. Sometimes this inflexibility has led to

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113 Id.
pervasive and unpopular results. Proponents of this view assert that § 4(f) predates most other federal environmental laws and is much more rigid.\textsuperscript{114} One example of the inflexibility of § 4(f) occurred in Kentucky and cost the State over one million dollars to comply with § 4(f)’s mandate. The proposed path of a road that the Kentucky DOT sought to construct would require the demolition of an historic farmhouse. In order to avoid the use of the farmhouse, the DOT chose an alternative path that required the taking of a modern farmhouse, which happened to be owned by the same person who owned the historic farmhouse. In an unexpected turn of events, the owner of the modern farmhouse used the compensation provided by the State in exchange for moving his farmhouse to demolish the historic farmhouse and move his modern home to the location previously occupied by the historic farmhouse. Thus, after much administrative hassle and public expense, the result of the entire process was the destruction of an historic resource.\textsuperscript{115} Despite assuring the Committee that this was but one example of many 4(f) atrocities, Mr. Horsley neglected to share any other anecdotes. If anything, this story calls for stronger local preservation laws more than a weakening of § 4(f) protection. The argument that § 4(f)’s requirements are too rigid and should be changed to allow for a more balanced approach by the Secretary has led to many proposals to change § 4(f). These proposals are examined below, along with some of the possible drawbacks to the changes.

The final criticism of § 4(f) is that it is confusing. This criticism is thoroughly appropriate. Following its decision in \textit{Overton Park}, the Supreme Court has not decided another case involving § 4(f). As a result, the majority of the work done on interpreting

\textsuperscript{114} Holmes statement, supra note 104.  
\textsuperscript{115} Horsley statement, supra note 103.
its provisions has been left to the Circuits. As often happens, the interpretations adopted by the federal Circuits have varied. The result of this split in the Circuits is tremendous confusion as to how the law will be applied to individual projects. As it currently stands, there are different standards used to analyze the decision of the Secretary depending on what State a transportation project is to be constructed in. While this criticism of § 4(f) is on the mark, it is silent as to how the law should be changed. The confusion created by § 4(f) does not, in and of itself, call for § 4(f) to be weakened. Instead it suggests that Congress ought to adopt an amendment to § 4(f) clarifying its terms and provisions.

**Proposals to Reform § 4(f)**

For many of the reasons outlined in the previous §, the past decade has seen persistent efforts to reform § 4(f) to increase the discretion of the Secretary of Transportation and weaken the statute’s protection of historic resources. These efforts have come to the forefront with the pending expiration of the Transportation Equity Act for the 21st Century (TEA-21). In each of the past four sessions of Congress there have been proposals introduced to reauthorize TEA, which included substantive changes to the § 4(f) review process. Some of the main goals that these reform efforts have sought to achieve have included: clarifying the standard for § 4(f) review to eliminate the confusion caused by inconsistent Circuit court interpretations of *Overton Park*; establish a minimum threshold impact level, below which a use of protected resources will not trigger the requirements of § 4(f); replace the strict interpretation of the Secretary’s responsibilities developed by the Supreme Court in *Overton Park* with a more flexible balancing approach consistent with Judge Easterbrook’s opinion in *Eagle Foundation*;

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allowing §106 consultation under the NHPA to suffice for historic properties; and explicitly exempting the interstate highway system from treatment as a historic resource.

Thus far Congress has had to get by with piecemeal extensions of the old TEA-21 because of failures to complete and pass a reauthorization package in the past two sessions of Congress. While the Senate’s most recent TEA-21 reauthorization legislation has tempered some of the more radical proposals to weaken § 4(f), an approach that might assist Congress in mustering the votes to actually pass a bill this time, it is instructive to first review some aspects of previous legislative attempts to discover how we have arrived at the current language being debated in Congress.

SAFETEA 2004

In February of 2004, the Senate introduced a bill that closely tracked the Bush Administration’s proposal to reauthorize TEA-21.117 The initial language of the bill sought to allow §106 review under the NHPA to suffice for historic sites used in transportation projects. While the administration included some language in the proposal insisting that the NHPA review process used in lieu of § 4(f) would be made more sensitive to the special concerns that inhere in using historic resources for transportation projects it was apparent that this would weaken the protection afforded historic sites by § 4(f). Once it became clear that such a huge departure from § 4(f)’s current state would likely impede the progress of SAFE-TEA and perhaps jeopardize its ultimate passage, members of congress began looking for ways to find a compromise between the needs of the transportation industry and the goals of those concerned with preserving the nation’s environmental and cultural heritage.

The charge for compromise was led by Senator Voinovich (R-OH). Recognizing the need for clarification of § 4(f)’s requirements as well as the unattractiveness of wholesale changes to its protections, Senator Voinovich settled on an amendment that included a “de minimis” exception to § 4(f)’s requirements and also sought to encourage earlier incorporation of “environmentally protective measures into projects.”\(^\text{118}\) The amendment ultimately united the support of the National Trust for Historic Preservation (NTHP) and the AASHTO.

In addition to requiring the DOT to promulgate new and clearer regulations describing the factors to be considered and standards to be applied by the Secretary in making his determination of the prudence and feasibility of alternatives, an effort seeking to eliminate the confusion created by the differing views of the various courts of appeals, this amendment made two main changes to § 4(f). For the first time, § 4(f) would explicitly not apply to uses small and mundane enough to fall below the threshold created by the de minimis exception. In addition, by allowing the Secretary to consider the measures taken by the project at avoidance, minimization, mitigation and enhancement when determining if a use is de minimis, the amendment encourages the incorporation of these environmentally and historically conscious design features from the beginning of the project development process. Despite the compromise-building amendment, this bill, like several other reauthorization efforts before it, failed to become the law of the land. Nonetheless, the delicate way in which Senator Voinovich attempted to respond to the persistent calls for § 4(f) reform while not neglecting the purpose for which the

\(^{118}\) Kunz, supra note 9 at 73.
legislation was passed and the concerns of the preservation community has been influential in more recent legislation introduced in the Senate.

TEA:LU 2005

The arrival of a new Congress has coincided with the arrival of fresh efforts to reauthorize TEA-21. Not surprisingly, these efforts have been influenced by the administration’s desire to streamline and update the transportation process and include potentially misguided attempts to weaken the protection provided by § 4(f).

Disappointingly, the House’s bill, the Transportation Equity Act: A Legacy For Users,\(^\text{119}\) which was introduced on February 9\(^{\text{th}}\) 2005, remains faithful to previous attempts to eliminate § 4(f) review of historic sites, replacing it with the procedural consultation requirement of § 106 under the NHPA. While steering clear of environmental resources and parklands, the TEA:LU seeks to create a new policy for historic sites. The pertinent portion of this bill, section 6003 reads as follows:

(a) Title 49- Section 303 of title 49, United States Code, is amended by adding at the end the following:

(d) Special Rules for Historic Sites-

(1) IN GENERAL- The requirements of this section are deemed to be satisfied in any case in which the treatment of a historic site has been agreed upon in accordance with section 106 of the National Historic Preservation Act (16 U.S.C. 470f) and the agreement includes a determination that the program or project will not have an adverse effect on the historic site.

(2) LIMITATION ON APPLICABILITY- This subsection does not apply in any case in which the Advisory Council on Historic Preservation determines, concurrent with or prior to the conclusion of section 106 consultation, that allowing section 106 compliance to satisfy the requirements of this section would be inconsistent with the objectives of the National Historic Preservation Act. The Council shall make such a determination if petitioned to do so by a section 106 consulting party, unless the Council affirmatively finds that the views of the requesting party have been adequately considered and that section 106 compliance will adequately protect historic properties.

(3) DEFINITIONS- In this subsection, the following definitions apply:

(A) SECTION 106 CONSULTATION- The term 'section 106 consultation' means the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f).
(B) ADVERSE EFFECT- The term 'adverse effect' means altering, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.

(b) Title 23- Section 138 of title 23, United States Code is amended--
(1) by inserting '(a) Policy- ' before 'It is'; and
(2) by striking 'In carrying' and inserting the following:
  (c) Studies- In carrying'; and
(3) by inserting after subsection (a) (as designated by paragraph (1)) the following:
(b) Special Rules for Historic Sites-
(1) IN GENERAL- The requirements of this section are deemed to be satisfied in any case in which the treatment of a historic site has been agreed upon in accordance with section 106 of the National Historic Preservation Act (16 U.S.C. 470f) and the agreement includes a determination that the program or project will not have an adverse effect on the historic site.
(2) LIMITATION ON APPLICABILITY- This subsection does not apply in any case in which the Advisory Council on Historic Preservation determines, concurrent with or prior to the conclusion of section 106 consultation, that allowing section 106 compliance to satisfy the requirements of this section would be inconsistent with the objectives of the National Historic Preservation Act. The Council shall make such a determination if petitioned to do so by a section 106 consulting party, unless the Council affirmatively finds that the views of the requesting party have been adequately considered and that section 106 compliance will adequately protect historic properties.
(3) DEFINITIONS- In this subsection, the following definitions apply:
  (A) SECTION 106 CONSULTATION- The term 'section 106 consultation' means the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f).
  (B) ADVERSE EFFECT- The term 'adverse effect' means altering, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.

For the same reasons that led to the adoption of the Voinovich amendment in 2004, there is strong opposition to such a cavalier departure from the original goals of § 4(f). It is unlikely that such a position, remaining uninformed and unimproved by the attempts at compromise occurring in the Senate will ultimately pass both houses.

120 Id.
Interstate Exemption Provision

The other § of TEA:LU that concerns § 4(f) and protected resources is a provision seeking to exempt the interstate system from the requirements of the § 4(f) review process. The section of TEA:LU 2005 that would exempt the Interstate System, section 6004, reads as follows:

Section 103(c) of title 23, United States Code, is amended by adding at the end the following:

(5) EXEMPTION OF INTERSTATE SYSTEM-
(A) IN GENERAL- Except as provided in subparagraph (B), the Interstate System shall not be considered to be a historic site under section 303 of title 49 or section 138 of this title, regardless of whether the Interstate System or portions of the Interstate System are listed on, or eligible for listing on, the National Register of Historic Places.
(B) INDIVIDUAL ELEMENTS- Subject to subparagraph (C), a portion of the Interstate System that possesses an independent feature of historic significance (such as a historic bridge or a highly significant engineering feature) that is listed on, or eligible for listing on, the National Register of Historic Places, shall be considered to be a historic site under section 303 of title 49 or section 138 of this title, as applicable.
(C) CONSTRUCTION, MAINTENANCE, RESTORATION, AND REHABILITATION ACTIVITIES- Subparagraph (B) does not prohibit a State from carrying out construction, maintenance, restoration, or rehabilitation activities for a portion of the Interstate System referred to in subparagraph (B) upon compliance with section 303 of title 49 or section 138 of this title, as applicable, and section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470f).

Construction on the Dwight David Eisenhower National System of Interstate and Defense Highways (“Interstate System”) began in 1956 following the passage of the Federal-Aid Highway Act. Over the years that followed the Interstate System has arguably become the largest piece of infrastructure in world history. As the Interstate System approached its fiftieth birthday in 2006, the increasing recognition of its historic significance has “raised the possibility that the Interstate System was potentially eligible

121 Id.
This possibility was cause for concern among the transportation community as inclusion on the National Register would trigger the protection of § 106 of the NHPA as well as § 4(f) of the DOT Act. This would mean that even basic maintenance and improvements to any element of the Interstate System would bring enormous burdens involved with administrative compliance. As a result the Federal Highway Administration (FHWA) worked with the Advisory Council on Historic Preservation (ACHP) to address the concerns of preservation and transportation officials. This collaboration resulted in the ACHP’s adoption of the “Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System.”  

This exemption, which became effective on March 10, 2005, acknowledges the historical importance of the Interstate System but “releases all Federal agencies from the § 106 requirement of having to take into account the effects of their undertakings on the Interstate System.” The exemption is not a blanket one; however, as the ACHP has required the FHWA to designate individual elements of the Interstate System whose historical significance demands that they be excluded from this exemption.

The process of individual designation of historically significant aspects of the Interstate System is to be completed and published by June 30, 2006 and is to be undertaken in conjunction with the ACHP, state transportation agencies, State Historic

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123 *Id.* It is interesting to note the irony of the fact that the rapid expansion of the Interstate System, often done with disregard for historic resources, was one of the main factors leading to the adoption of the National Historic Preservation Act and this system is now recognized as being a historically significant resource in and of itself.


125 *Id.*

126 *Id.*
Preservation Offices, and members of the public. The criteria used to determine the elements that should be excluded consist of: (i) elements that are at least 50 years old, possess national significance and meet the National Register eligibility criteria; (ii) elements that are less than 50 years old, possess national significance, meet the National Register eligibility criteria, and are of exceptional importance; (iii) elements that were listed in the National Register prior to the effective date of this exemption; and (iv) elements such as bridges, tunnels and rest areas, constructed prior to 1956 and later incorporated into the Interstate System, that possess State or local significance and meet the National Register eligibility criteria. Satisfaction of criteria (i), (ii) or (iii) results in automatic exclusion from the exemption while elements satisfying criteria (iv) may be excluded at the discretion of the FHWA.

The Interstate System exemption from the § 106 review process has received support from both the transportation and preservation communities. This is an excellent example of the possibilities created by collaborative work between these sometimes antagonistic communities. The FHWA and ACHP have fashioned a practical response to a potential conflict that satisfies the concerns of the FHWA that necessary improvements to the Interstate System are not held up by pointless administrative review requirements while also recognizing and protecting the historic aspects of the Interstate System. The ACHP does not have jurisdiction over the historic preservation regulations under § 4(f) of the DOT Act. The proposed exemption in § 6004 of TEA:LU 2005 wisely follows the structure of the ACHP exemption. The House’s proposal would exclude individual

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127 Id.
128 Id.
129 Id.
elements of the Interstate System that possess independent historic significance and are listed on, or eligible to be listed on the National Register of Historic Places. This provision of the house proposal is a reasonable accommodation of the interests of both the preservation and transportation communities.

**SAFETEA 2005**

Reflecting greater sensitivity to the conflicting interests of the transportation and preservation communities than its counterpart in the House of Representatives, this year’s effort by the Senate to reauthorize TEA was introduce on March 6th, 2005. The Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005 has already received favorable comments from the Environment and Public Works Committee regarding the provisions that seek to modify § 4(f). The relevant section of SAFETEA 2005 reads as follows:

Sec. 1514. Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites.
(a) PROGRAMS AND PROJECTS WITH DE MINIMIS IMPACTS-
(1) TITLE 23- Section 138 of title 23, United States Code, is amended--
(A) in the first sentence, by striking 'It is hereby' and inserting the following:
(a) DECLARATION OF POLICY- It is'; and
(B) by adding at the end the following:
(b) DE MINIMIS IMPACTS-
(1) REQUIREMENTS-
(A) IN GENERAL- The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) or (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.
(B) CRITERIA- In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.
(2) HISTORIC SITES- With respect to historic sites, the Secretary may make a finding of de minimis impact only if--

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130 H.R. 3.
(A) the Secretary has determined, in accordance with the consultation process required under section 106 of the National Historic Preservation Act (16 U.S.C. 470f), that--

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation, if participating in the consultation); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) PARKS, RECREATION AREAS, AND WILDLIFE AND WATERFOWL REFUGES- With respect to parks, recreation areas, and wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) (including public notice and opportunity for public review and comment), that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(2) TITLE 49- Section 303 of title 49, United States Code, is amended--

(A) by striking `(c) The Secretary' and inserting the following:

(c) APPROVAL OF PROGRAMS AND PROJECTS- Subject to subsection (d), the Secretary'; and

(B) by adding at the end the following:

(d) DE MINIMIS IMPACTS-

(1) REQUIREMENTS-

(A) IN GENERAL- The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) or (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) CRITERIA- In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) HISTORIC SITES- With respect to historic sites, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, in accordance with the consultation process required under section 106
of the National Historic Preservation Act (16 U.S.C. 470f), that--

(i) the transportation program or project will have no adverse effect on the historic site; or
(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation, if participating in the consultation); and
(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) PARKS, RECREATION AREAS, AND WILDLIFE AND WATERFOWL REFUGES- With respect to parks, recreation areas, and wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if--

(A) the Secretary has determined, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) (including public notice and opportunity for public review and comment), that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and
(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(b) CLARIFICATION OF EXISTING STANDARDS-

(1) IN GENERAL- Not later than 1 year after the date of enactment of this Act, the Secretary shall (in consultation with affected agencies and interested parties) promulgate regulations that clarify the factors to be considered and the standards to be applied in determining the prudence and feasibility of alternatives under section 138 of title 23 and section 303 of title 49, United States Code.

(2) REQUIREMENTS- The regulations--

(A) shall clarify the application of the legal standards to a variety of different types of transportation programs and projects depending on the circumstances of each case; and
(B) may include, as appropriate, examples to facilitate clear and consistent interpretation by agency decisionmakers.

(c) IMPLEMENTATION STUDY-

(1) IN GENERAL- The Secretary and the Transportation Research Board of the National Academy of Sciences shall jointly conduct a study on the implementation of this section and the amendments made by this section.

(2) COMPONENTS- In conducting the study, the Secretary and the Transportation Research Board shall evaluate--

(A) the processes developed under this section and the amendments made by this section and the efficiencies that may result;
(B) the post-construction effectiveness of impact mitigation and avoidance commitments adopted as part of projects conducted under this section and the amendments made by this section; and
(C) the quantity of projects with impacts that are considered de minimis under this section and the amendments made by this section, including information on the location, size, and cost of the projects.

(3) REPORT REQUIREMENT- The Secretary and the Transportation Research Board shall prepare--

(A) not earlier than the date that is 4 years after the date of enactment of this Act, a report on the results of the study conducted under this subsection; and

(B) not later than September 30, 2009, an update on the report required under subparagraph (A).

(4) REPORT RECIPIENTS- The Secretary and the Transportation Research Board shall--

(A) submit the report and update required under paragraph (3) to--

(i) the appropriate committees of Congress;

(ii) the Secretary of the Interior; and

(iii) the Advisory Council on Historic Preservation; and

(B) make the report and update available to the public.\footnote{132}

Much of this bill’s treatment of historic resources is similar to the language in the Voinovich amendment to last year’s SAFETEA. In particular, this bill seeks to carve out a de minimis exception to the requirements of § 4(f). As the Environment and Public Works Committee realized, the language outlining the appropriate considerations of the Secretary in determining whether a de minimis exemption applies “builds in an incentive for project sponsors to incorporate environmentally protective measures into a project from the beginning.”\footnote{133}

SAFETEA 2005 goes further than previous bills in ways that should be encouraging to those concerned with preservation. Subsection (b) deals with clarification of existing standards. The language in the Environment and Public Works Committee’s report asserts that “issuing regulations to clarify the criteria to be considered and the standards to be applied in determining whether alternatives are prudent and feasible” under § 4(f), the legal standard will remain that contained in Overton Park.\footnote{134} This

\footnote{132} Id.
\footnote{133} Staff of Senate Committee on Environment and Public Works, 109th Cong., Report to accompany S.732 (April 6, 2005).
\footnote{134} Id.
indicates that this bill will assert the applicability of Overton Park’s interpretation for transportation projects throughout the nation thereby undermining the efforts of some Circuits to stray from Overton Park towards a flexible balancing approach.

The final measure of this section with an impact on § 4(f) is subsection 1514(c)’s requirement for the completion of a study of the implementation of § 4(f) as amended. This study may prove invaluable for numerous reasons including: providing a clear assessment of just how these changes have worked out in practice and the compilation of more accurate information on the impacts § 4(f) has including its benefits, costs and the actual impact it has on delays. This will hopefully bridge the gap between the data espoused by transportation and preservation advocates, which often seem worlds apart.

**Analysis of the “De Minimis Impact” Exception**

While the statutory clarification and study of the amendment’s implementation are certainly important aspects of the Senate’s proposal to reauthorize TEA, the creation of a de minimis exception is by far the most important change to § 4(f) advocated by this bill. Subsection 1514(a) provides that the requirements of § 4(f) are satisfied if there is a finding that the project will have only a de minimis impact on the area.\(^{135}\) The proposal then sets forth two different sets of criteria that must be met before a finding of de minimis impact may occur. The impacts on a historic site may only be found to be de minimis if: “(1) through the consultative process under § 106 of the National Historic Preservation Act (16 U.S.C. 470(f)), the Secretary determines that the program or project will have no adverse impact on the historic site or that there will be no historic properties affected; (2) the applicable State or tribal historic preservation officer provides written

\(^{135}\) *Id.*
concurrence with the Secretary’s determination; and (3) the finding is developed in consultation with consulting parties under the § 106 process.”  

When dealing with parks and recreation areas, an impact may be found to satisfy the de minimis exception only if: “(1) through review required under the National Environmental Protection Act of 1969 (42 U.S.C. 4321), the Secretary determines that the program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under § 4(f); and (2) the official(s) with jurisdiction over the protected resource concurs with the Secretary’s finding.”  

The Environment and Public Works Committee has interpreted this language to be an attempt to clarify the portions of a resource that are important to protect. What they have in mind is the difference between playground equipment and parking lots.  

“What a minor but adverse effect on the use of playground equipment should not be considered a de minimis impact under § 4(f), encroachment on the parking lot may be deemed de minimis, as long as the public’s ability to access and use the site is not reduced.”  

Subsection 1514(a) of SAFETEA 2005 also indicates that the Secretary shall consider any avoidance, minimization, mitigation, or enhancement measures to be part of the transportation project when determining whether the use of protected resources is de minimis. This seems to be an additional change to § 4(f). As § 4(f) reads today there are two separate requirements that must be met before the Secretary may authorize the use of

136 Id.
137 Id.
138 Id.
139 Id.
140 Id.
a protected resource: there is no prudent and feasible alternative to using that land and the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuges or historic site resulting from the use.\footnote{49 U.S.C. 303(c)(1),(2) (2005) (emphasis added).}

The Senate’s proposal creating a de minimis exception allows the Secretary to get around the requirements stated above by determining that the use of the protected resource is insignificant enough to not really constitute a use. It has always been the case that if the Secretary finds that a project does not use a protected resource then the strict requirements of § 4(f) are not triggered. However, courts have indicated that the question of whether or not a project will use a protected resource and what mitigation measures have been taken to minimize the impact of the use must be considered separately. Therefore, the Secretary has usually not been allowed to consider efforts to minimize and mitigate the harm to a protected resource as evidence that the resource is not being “used.” This trend seems to be upset by the new proposal which would direct the Secretary to do what the courts have forbidden him from doing: considering mitigation measures to be evidence that a use is de minimis.

While a de minimis exception may seem to be a very reasonable accommodation to allow transportation officials to get projects approved while not posing a great threat to historic resources, many people in the preservation community are concerned that the effects on protected resources may be greater than advocates of § 4(f) have indicated. The National Trust for Historic Preservation has traditionally believed that an exemption for minor impacts such as the de minimis exemption included in SAFETEA, will actually be a \textit{Trojan Horse} resulting in far greater usage of protected resource than Congress
might intend. The reason why such an innocuous sounding exemption as de minimis may result in greater usage of protected resources is that it may give “the Secretary unilateral power to invoke the exemption.” After asking the individuals with jurisdiction over the protected resource to identify specific activities, features and attributes that qualify the site for protection, the Secretary will then be allowed to disregard any attributes not making it onto the list and “decide unilaterally whether the characteristics on the short list would suffer only “minor impacts.” Given the requirement that the Secretary’s decision receive written concurrence from the State Historic Preservation Officer in the case of historic sites or the officials with jurisdiction over the park or recreation area, it seems as though the National Trust’s concern over unilateral power in the hands of the Secretary has been taken into account by language in the Voinovich Amendment which has been incorporated into SAFETEA 2005. Indeed, the National Trust has supported the Voinovich Amendment.

The concerns that preservationists have regarding the possibility for abuse of a de minimis exemption may derive in part from the unfortunate experience they have had in preventing the use of historic sites, parks and recreation areas by airport development and expansion projects. While paying lip service to the notion that the doctrine of “constructive use” applies to airport projects just as it does in highway projects, courts have developed an alternative test for airport projects that has guaranteed that the project will never be found to use the protected resource. When dealing with airport cases, courts have applied a “no significant impact” test to determine whether the project uses a

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143 Id.
144 Id.
protected resource.\textsuperscript{145} Defining use as having a significant impact is a deviation from the statutory standard enacted by § 4(f). § 4(f) does not include a threshold level for use, below which impacts and effects and on protected resources are considered acceptable. This deviation has had drastic results as courts have considered airport projects that have added commercial jets to a small airport located inside a national park\textsuperscript{146} or created one of the nation’s largest airports adjacent to a state park and wildlife refuge\textsuperscript{147} not to have had a significant impact on the protected resource. The final result of creating a definition of use in airport cases that differs from the standard laid out in the statute is that § 4(f) “has never been applied to prevent the construction of a new airport or even to curtail the expansion of an existing airport located near an environmentally-sensitive park.”\textsuperscript{148} Having realized the effect that anything other than a literal definition of the term use can have on the protection afforded by § 4(f), the concern that the preservation community has expressed over the possible implications of a de minimis exception become more understandable.

The creation of a de minimis exemption may actually increase the delays associated with transportation projects. Whatever its drawbacks, the current interpretation of a use that falls under the auspices of § 4(f) has been developed over forty years and is relatively clear in most cases. A new standard for uses that are de minimis, is likely to create confusion which will result in litigation to determine whether the

\begin{footnotesize}
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\item See Allison v. Dep’t of Transportation, 908 F.2d 1024 (D.C. Cir. 1990); Sierra Club v. Dole 753 F.2d 120 (D.C. Cir. 1985).
\item Sierra Club, 753 F.2d at 130.
\item Allison, 908 F.2d at 1027.
\item Matthew J. Christian, Proliferation and Expansion of America’s Airports at the Expense of its Treasured Parks and Preserves: Judicial Perversion of the Term “Use” in § 4(f) of the Department of Transportation Act, 3 Nev. L.J. 613 (2003).
\end{enumerate}
\end{footnotesize}
Secretary is abusing the exemption. During the period in which the definition of de
minimis and its appropriate scope get hammered out in court and in many cases before
the Secretary, this proposal to change § 4(f) in order to streamline the transportation
project approval process may actually slow it down.

Conclusion

Currently, both the House and Senate proposals are being considered in their
respective committees. Debate on § 4(f) reform will likely not begin until the issues of
funding created by the reauthorization process have been settled. This process has not
been completed within the past two sessions of Congress. It is important that Congress
consider the importance of § 4(f) in protecting historic and environmental resources from
being used by transportation projects and not blindly capitulating to the Administration’s
anecdotal assertions about the delays caused by § 4(f) review. This reauthorization
process is an opportunity to improve § 4(f). The best ways to do so include a clarification
as to the correct interpretation of the statute’s requirements (perhaps by explicitly
affirming the interpretation of the Supreme Court in Overton Park) and the
encouragement (perhaps with appropriate incentive-based funding) of States to adopt the
practices of context-sensitive and community-involved design that have proven
successful in many states already. These changes would go a long way towards
eliminating the confusion and time-wasting caused by § 4(f) while ensuring that the only
substantive federal preservation law remains an effective tool.