1981

Judicial Review of the Commodity Futures Trading Commission: *Chicago Board of Trade v. Commodity Futures Trading Commission*, 605 F.2d 1016 (7th Cir. 1979)

Terry Curtiss
*University of Nebraska College of Law, tc3@bbc.net*

Follow this and additional works at: [http://digitalcommons.unl.edu/nlr](http://digitalcommons.unl.edu/nlr)

**Recommended Citation**

Terry Curtiss, *Judicial Review of the Commodity Futures Trading Commission: Chicago Board of Trade v. Commodity Futures Trading Commission*, 605 F.2d 1016 (7th Cir. 1979), 60 Neb. L. Rev. (1981) Available at: [http://digitalcommons.unl.edu/nlr/vol60/iss1/7](http://digitalcommons.unl.edu/nlr/vol60/iss1/7)
Note

Judicial Review of the Commodity Futures Trading Commission

*Chicago Board of Trade v. Commodity Futures Trading Commission*, 605 F.2d 1016 (7th Cir. 1979).

I. INTRODUCTION

In a September, 1979, decision, the Seventh Circuit Court of Appeals refused to review an administrative decision to suspend trading in the Chicago Board of Trade wheat contracts made by the Commodity Futures Trading Commission (CFTC). Based on a provision of the Administrative Procedure Act (APA), which excepts from judicial review those actions which by law are committed to agency discretion, the court held that judicial review would inhibit the unfettered discretion which is necessary to effectively regulate the volatile futures area. This ruling will provide a detrimental effect on participation in the futures market if it creates a perception that the exchange is no longer a free market in the traditional sense, but now one subject to the risk of government interference. This is not to say that regulation of the commodities market is undesirable, but this additional risk (that an arbitrary and unreviewable government action will deprive participants of their opportunity to transact in the market) may drive some participants away.

The CFTC was created by the Commodity Futures Trading Commission Act of 1974, which amended the existing Commodity Exchange Act, in order to better regulate the expanding futures field. The CFTC replaced the commodity exchanges themselves

1. Chicago Bd. of Trade v. Commodity Futures Trading Comm'n, 605 F.2d 1016 (7th Cir. 1979).
2. Ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-576, 701-706 (1976)) [hereinafter cited as APA]. The Act's application section provides: "(a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1976).
and the Commodity Exchange Authority (an arm of the Department of Agriculture that was the forerunner of the CFTC)\(^5\) in policing commodity trading and protecting those participating in the futures market.

"Futures trading" is the act of entering into a contract for future delivery of a commodity. A wheat futures contract on the Chicago Board of Trade is a contract, made on, or subject to, the rules of the Board of Trade, in which one party agrees to sell and deliver and the other party agrees to buy and receive 5000 bushels of wheat at a specified price in a designated month in the future.\(^6\) This contract is performed or "settled" by either delivery in the manner required by the Board of Trade with an exchange of title in the commodity delivered from seller to buyer, or by offsetting the initial contract with a reverse transaction in the futures market. Under the latter situation the participant would then own both a contract to buy and a contract to sell which would effectively cancel his involvement in the market. The price differential between the two contracts would determine whether the participant realizes a profit or suffers a loss.\(^7\)

The CFTC was given broad authority to regulate futures trading practices in order to prevent dealers from taking advantage of participants\(^8\) and to monitor the market operations to avoid "those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves."\(^9\) To prevent these demoralizing actions, the CFTC was granted the power to declare an emergency with respect to a commodity:

> \[W\]henever it has reason to believe that an emergency exists, [and] to take such action as, in the Commission's judgment, is necessary to maintain or restore orderly trading in, or liquidation of, any futures contract. The term 'emergency' as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the sources of supply and demand for such commodity . . . .\(^{10}\)


\(^6\) For a general explanation of the operation of the wheat futures market, see Cargill, Inc. v. Hardin, 452 F.2d 1154, 1156 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972).

\(^7\) T. Hieronymus, *The Economics of Futures Trading for Commercial and Personal Profit* 41-42 (2d ed. 1977).

\(^8\) See generally 7 U.S.C. §§ 6 to 6p, 13a, 13a-1, 13b, 13c (1976).


The CFTC first used this power in connection with a widely traded futures contract when it suspended trading in the Chicago Board of Trade (Board) March, 1979, wheat contract.\textsuperscript{11} After the Board successfully enjoined the enforcement of the suspension in federal district court, the Seventh Circuit Court of Appeals held that the declaration of an emergency and the suspension of trading were not judicially reviewable, but were committed by law to agency discretion within the exception to judicial review created by the APA.\textsuperscript{12} This note addresses the significance that this denial of judicial review has on the participants in the futures markets. No attempt is made to enter into the academic debate as to the definition of a futures market manipulation.\textsuperscript{13} The other enforcement powers of the CFTC are only dealt with peripherally. Additionally, this note examines the effect an involuntary suspension of trading has on those utilizing the futures markets to hedge and the corresponding effect upon the speculators, the other essential participants in the futures markets.\textsuperscript{15}

II. BACKGROUND

When the CFTC suspended trading in the March, 1979, contract on Thursday, March 15, 1979,\textsuperscript{16} there were four trading days left on the contract during which a trader with either a long or short posi-

\begin{itemize}
  \item \textsuperscript{11} Wall St. J., Mar. 19, 1979, at 4, col. 1.
  \item \textsuperscript{12} 605 F.2d 1016 (1979).
  \item \textsuperscript{13} For a discussion of the various theories and methods used to manipulate a futures market, see generally: Hieronymus, \textit{Manipulation in Commodity Futures Trading: Toward a Definition}, 6 Hofstra L. Rev. 41 (1977); McDermott, \textit{Defining Manipulation in Commodity Futures Trading: The Futures “Squeeze”}, 74 Nw. U. L. Rev. 202 (1979); Case Comment, 57 Minn. L. Rev. 1243 (1973).
  \item \textsuperscript{14} A “hedge” is a form of risk aversion, not insurance. It is created by assuming a position in futures market which is equal and opposite to an already existing or immediately anticipated cash position. To hedge is an attempt to insulate one’s business activities from price level speculation while retaining the opportunity to speculate in basis variation. In theory, the hedge would insulate the hedger from price changes when both the cash and futures markets increase or decrease together, which makes it appear to be a form of insurance. However, the hedger may have gains or losses on his transactions if the futures and cash markets do not have parallel price changes, but rather a widening or narrowing of the basis—the price difference in the cash and futures price that reflects storage costs until the date of sale. T. Hieronymus, \textit{supra} note 7, at 148-54.
  \item \textsuperscript{15} Speculators are a necessary component of a futures market because the hedgers transfer their unwanted risk to them. Speculators also provide the liquidity needed in the futures market. Naturally, they expect and receive a return on their investments for providing these services. Indeed, the vast majority of the participants in the futures markets are speculators. \textit{See generally} T. Hieronymus, \textit{supra} note 7.
  \item \textsuperscript{16} 605 F.2d at 1018. Initially the CFTC ordered only a one day suspension, but at
JUDICIAL REVIEW

The end of that day, a supplemental order was issued suspending trade for the remainder of the contract.


18. For the CFTC's reasons for suspending trading, see 605 F.2d at 1018-19.

19. As previously stated, see text accompanying note 6 supra, futures trading involves entering into contracts for future delivery of the traded commodity. A trader in a long open position has gone "long" when he has made an agreement to deliver the trading unit of the commodity, but he is still "open" because he has not yet made the corresponding purchase of a "short" contract for delivery in order to cancel his involvement in the market. Either "long" or "short" positions of traders of a certain size must be reported to the exchange where the commodity is traded. The reporting requirements for the wheat contract are given in 17 C.F.R. § 15.01-.03 (1977).

20. 605 F.2d at 1018-19.

21. See note 14 supra.

22. If an emergency is declared, no new long positions could be taken, and only existing long positions could be sold to a short trader to close out his interest.
the Board's actions during the prior two weeks to control the liqui-
dation of the contract had been successful. Based on this belief,
the Board challenged the suspension of the final three days of trad-
ing in a suit filed on Saturday, March 17, 1979.

The Board asserted that the CFTC's actions were arbitrary, ca-
pricious, an abuse of discretion, not in accordance with law, and in
excess of statutory authority because no emergency within the
provisions of the statute existed. The Board asked the district
court to enjoin the CFTC's enforcement of its trading suspension
in order to allow the contract to trade out. The court granted the
injunction after an evidentiary hearing held on Sunday, March 18,
1979, basing this decision on the testimony of five experts called by
the Board, that, as defined by statute, no emergency existed. The
CFTC had presented no evidence, but had stood on the position
that its action was not reviewable, and immediately filed an appeal
and a motion for a stay of the injunction pending the appeal.

The court of appeals declined to stay the injunction which sus-
pended the final three days of trading, basing its decision on the
CFTC's failure to rebut the charges of arbitrariness made in con-
nection with the discretionary suspension. When the appeal was
heard, the court of appeals reversed the district court, holding that
judicial review of the CFTC's determination that an emergency ex-
isted was precluded by the APA.

III. THE ANALYSIS BY THE COURT OF APPEALS

Before examining the question of whether the CFTC's action
was reviewable, the court of appeals disposed of two motions to
dismiss made by the Board. The Board based these motions on
the grounds of mootness, and further, on the fact that the merits of
the appeal by the CFTC had been heard by its motion to stay the
injunction. The court found that while the injunction expired at
the end of March, the issue satisfied the exception to dismissal for
mootness since it was "capable of repetition yet evading review." The
court also held that the denial of the stay was a discretionary
ruling, and not a review on the merits, in spite of the denial's lan-
guage which based the refusal to grant a stay on the CFTC's failure
to rebut the charge of arbitrariness.

23. The Board had been encouraging long traders to sell since the first of March
so as to limit the effect of the supply imbalance. Wall St. J., Mar. 19, 1979, at 4,
col. 1.
26. 605 F.2d at 1020 (citing Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515
(1911)).
27. 605 F.2d at 1020.
The refusal to dismiss forced the court to determine whether the CFTC's action was reviewable, and, if so, to decide whether the district court correctly found that no emergency existed. The court of appeals focused on the 1974 Act's grant of authority to the CFTC, and found that the agency's action fell within the exception to judicial review presented in 5 U.S.C. § 701(a)(2). The court based its holding on the language and the legislative history of the emergency provision, and on the purpose and structure of the 1974 Act as a whole.

The court interpreted the language of the emergency provision to commit the determination of the existence of an emergency to agency discretion. By employing the statutory language which states "whenever it has reason to believe that an emergency exists", and limiting the types of emergencies the CFTC could act on, the court found that Congress had carefully designated the discretion that was to be used. The court found nothing in the statutory language to indicate that the district court could substitute its judgment for the judgment of the CFTC. The lower court's action was viewed as an unacceptable determination on the merits that no statutorily defined emergency existed.

The court then examined the structure of the 1974 Act as a whole, and analogized from other provisions which grant the CFTC authority to act on the basis of its "reason to believe." It found that these provisions constitute a comprehensive regulatory scheme to regulate the growing and volatile futures markets. The court noted that this was a congressional authorization to take emergency action in an area where traditional administrative and injunctive remedies were not particularly well suited. Asserting that Congress intended to provide the CFTC with "a strong law which will enable it to regulate both agricultural and non-agricultural goods and services in the public interest," the court believed that the allowance of judicial interference asked for in this case, would frustrate that intent.

To buttress this conclusion, the court cited several cases in which an analogous grant of power to act in an emergency situation had been held to be unreviewable. Of particular note are Daugherty Lumber Company v. United States and United States v. Southern Ry. Co., cert. denied, 141 F. Supp. 576 (D. Or. 1956).
v. Southern Railway Company,\textsuperscript{34} which were concerned with a similar discretionary grant of emergency power to the Interstate Commerce Commission (ICC).\textsuperscript{35} The ICC emergency power allowed it to direct rail car usage in times when it perceived a shortage. The courts in those cases had found the ICC's power was unreviewable because the statutory emergency provision granted to the ICC the power to act whenever, in its opinion, the public good required the sacrifice of individual rights. However, neither of these cases raised the issue of whether there had been an arbitrary or capricious exercise of power.

The court concluded its consideration of the reviewability of the CFTC decision by examining the legislative history of the emergency provision. The Act was aimed at creating a regulatory scheme similar to that of the Security Exchange Commission, and in order to do this, the CFTC would need the power to regulate not only the participants in the futures markets, but the exchanges themselves.\textsuperscript{36} While it was accepted that the emergency provision was one means to this end, substantial disagreement existed between the House of Representatives and the Senate as to how to limit their power over the exchanges. The House proposal would have allowed the use of the emergency power whenever the CFTC had reason to believe that conditions threatened orderly trading in, or liquidation of, any futures contract.\textsuperscript{37} The Senate opposed such a broad grant of power, and chose instead to limit the exercise of this emergency power to those instances where failure to exercise the power would cause a greater adverse impact on the market than the CFTC's proposed action. The Senate thought that over-use of the emergency power would create doubt and apprehension in the futures market participants, who feared abrogation or alteration of the sanctity of their contract by arbitrary government action.\textsuperscript{38} The statute as ultimately passed adopted the Senate proposal, but without the greater adverse impact language, because the House Conference Committee felt that the CFTC could not possibly make such a determination at the time when an

\begin{itemize}
  \item \textsuperscript{34} 364 F.2d 86 (5th Cir. 1966), \textit{cert. denied}, 386 U.S. 1031 (1967).
  \item \textsuperscript{35} The provision granting the ICC this power reads in part as follows:
    
    Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists . . . , the Commission shall have, and it is given, authority . . . (b) to make such just and reasonable directions with respect to car service . . . as in its opinion will best promote the service in the interest of the public . . . .
    
  \item \textsuperscript{36} S. REP. NO. 93-1131 at 18, [1974] U.S. CODE CONG. & AD. NEWS 5859.
\end{itemize}
emergency order was issued.\textsuperscript{39}

In light of these committee decisions, the court of appeals determined that Congress recognized that effective regulation required an expert agency with powers beyond traditional enforcement powers. The congressional attention directed to the limits of the CFTC's extraordinary emergency power, caused the court to find that Congress had limited the area in which the CFTC's discretion was to operate, and that, within this area, the expertise of the agency should control. The court further asserted that judicial review of such CFTC exercises of discretion and expertise would thwart the very purpose for which Congress had authorized the exercise of emergency power. Although this was recognized as an exception to the general rule allowing judicial review,\textsuperscript{40} the court of appeals concluded it was statutorily bound to reverse the district court's review because of 5 U.S.C. § 701(a)(2).\textsuperscript{41}

IV. ANALYSIS

The court of appeals' analysis of the legislative history and language of the emergency provision appears to place the CFTC's discretionary action beyond review. However, the court failed to address the Board's allegation that the action was arbitrary, capricious, and an abuse of discretion, not in accordance with law, and in excess of statutory authority; all claims which fall within the scope of review provision of the APA.\textsuperscript{42} In addition, the court ignored its earlier ruling refusing to stay the district court's injunction because of the failure of the CFTC to rebut the charge of an arbitrary exercise of discretion. Finally, the court of appeals gave


\textsuperscript{40} The case often cited as establishing a general presumption of reviewability is Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), which held that review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the intent of Congress.


\textsuperscript{42} 5 U.S.C. § 706 (1976), provides in part that:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or . short of statutory right.

\textit{Id.}
summary treatment to the Supreme Court's consideration of the "committed to agency discretion" dilemma by relegating to a footnote its consideration of Citizens to Preserve Overton Park, Inc. v. Volpe which had been invoked by the Board in order to apply the "law to apply" rationale to avoid the exception to judicial review.

These inconsistencies are not too disturbing if one accepts the notion that the CFTC's emergency action was necessary to prevent a manipulation of the short traders. Such undesirable conduct (manipulation) would be a prime example of the "demoralizing form of speculation" harmful to the public interest. This "proper" exercise of agency expertise and discretion would necessarily sacrifice the private interests of a few traders (i.e., those deprived of the opportunity to close their contracts by choosing between delivery or corresponding futures trade) in order to protect the broad public interest. It must be pointed out, however, that this notion ignores the fact that in this case, the March contract, which continued to be traded only due to the filing of suit by the Board, finished the month with little, if any, price fluctuation. Also ignored is the impact of the expert testimony heard at the evidentiary hearing. If the trading suspension by the CFTC had been allowed to stand by the district court, the result would have been damage to the Board's reputation. In addition, traders would have been deprived of their right to operate in the market, and the profit that is necessary to insure the participation of speculators within the market, in order to provide liquidity in the contract and risk spreading for hedgers, would have been limited. These harms and deprivations should occur only when the public interest demands it and judicial review to protect these private rights should not be precluded. While the courts should not interfere with the sound exercise of discretion by agencies, the presumption in favor of agency action should not be the sole basis for a refusal to protect individuals, particularly when the allegations are of the scope of those made by the Board.

A. The Berger-Davis Split

Two noted academicians, Professor Raoul Berger of Stanford and Professor Kenneth Culp Davis of the University of Chicago, have debated, sometimes heatedly, the proper role of the judiciary

43. 605 F.2d at 1022 n.8.
44. 401 U.S. 402 (1971).
45. See notes 68-78 & accompanying text infra.
47. The prices for the final three days of trading were: $3.77, Wall St. J., Mar. 20, 1979, at 38, col. 2; $3.77, Wall St. J., Mar. 21, 1979, at 38, col. 2; and $3.74, Wall St. J., Mar. 22, 1979, at 38, col. 2.
in reviewing agency action. Each has considered and compared at length the relationship of the general grant of judicial review within 5 U.S.C. § 556 and the specific exception in section 701(a)(2) for acts "committed to agency discretion by law," with the specific provision for judicial review for an abuse of discretion in section 706. In their attempts to harmonize these provisions, each has reached different conclusions: Professor Berger favors judicial review in all situations where there is a question of abuse in the exercise of discretion, while Professor Davis finds a much more limited review of exercises of discretion.

Both scholars agree, however, that read literally, the two provisions of the APA do not make sense. They agree that the legislative history of the APA is conflicting and confusing and that it does not conclusively support either point of view. Indeed, each has found that the legislative history supports his view. Berger and Davis both agree with the Supreme Court's statement that "there is no place in our constitutional system for the exercise of arbitrary power," yet they disagree as to its application to the question of whether the courts should review all arbitrary exercises of agency discretion.

Davis and Berger differ because they focus on different statutory language. Professor Davis begins his analysis by formulating three categories: (1) exercises of discretion; (2) proper exercises of discretion; and (3) abuse of discretion. In order to rationalize


50. See Berger's "literal reading" in Berger, Article, supra note 48, at 58-62; Berger, Reply, supra note 48, at 788-89; Davis' "literal reading" in Davis, Postscript, supra note 48, at 823-25.

51. See Berger, Sequel, supra note 48, at 614-19 (confusion is in terms of reviewability in general, not specifically for abuse of discretion); Davis, Postscript, supra note 48, at 826.

52. See Berger, Article, supra note 48, at 57; Davis, Final Word, supra note 48, at 815.

53. Davis, Not Always, supra note 48, at 647. The explanatory analogy offered by
the conflicting statutory provisions, Professor Davis emphasizes the word "committed" in section 701(a)(2) in order to support his conclusion that "committed to agency discretion" and "unreviewable" have, in this limited context, the same meaning. If an action is "committed" to agency discretion by the terms of the statute or prior case law, it is unreviewable; if it is reviewable under the existing case law then it has not been "committed" to agency discretion. To determine whether agency action is reviewable or committed to agency discretion, (i.e., unreviewable), Davis incorporates the pre-APA case law. In effect, Davis treats the exception provisions of section 701 consistently by finding that section 701(a)(1) deals with explicit statutory direction that an action is not judicially reviewable, and determining that section 701(a)(2) deals with implicit removal from judicial review on the basis of past treatment of the exercise of discretion.

Professor Berger views discretion and abuse of discretion as complete opposites. Professor Berger's analysis differs from that of Professor Davis in that he chooses to focus on the section 706(2)(A) language of "or otherwise not in accordance with law," and its relation to the section 701(a)(2) language of "committed to agency discretion by law." Section 706 catalogs a number of improper actions, including abuse of discretion which Congress found to be "not in accordance with law." Since abuse in the exercise of discretion is not in accordance with the law, it cannot be committed by law to agency discretion. The effect is that a proper exercise of discretion precludes a claim of abuse of discretion or arbitrariness while an arbitrary exercise or abuse of discretion could not be the sort of exercise of discretion Congress intended to be committed by law to agency discretion. The crux of the differences in the interpretation of reviewability reached by Professors Berger and Davis lies in the fact that each puts his emphasis on different words in the statutory sections.

The cases decided at the height of this scholarly debate are construed by both scholars to support their respective positions. The debate pre-dates the Overton Park decision, but the Supreme Court cites the Berger viewpoint to support its review of the agency action then at issue. This Supreme Court opinion is

---

54. Davis, Postscript, supra note 48, at 825.
56. Berger, Article, supra note 48, at 61; Berger, Reply, supra note 48, at 788-89; Berger, Sequel, supra note 48, at 609.
severely criticized by Professor Davis. Confusion continues to exist within the area as is reflected in the present case law construction of the judicial review exception of section 701(a)(2).

The case law indicates that a court will seek to utilize whichever of the Berger-Davis rationales will allow it to justify the particular conclusion reached in the case. It is worthy to note that, in some instances, the Berger analysis has not made much of an impact, particularly in those areas traditionally granted deference by the judicial system. One such area is that of foreign policy. The Davis view is implicitly followed in this area since judicial review has never been allowed (i.e., a common law of nonreviewability exists), in spite of Professor Berger's assertion that the Supreme Court has not precluded such review. Berger points out that the Supreme Court has held it to be an error to assume that foreign policy is beyond judicial review.

It seems that one or both of the scholars' positions merit consideration in light of the district court's decision to grant relief based on the Board's section 706 claims and the reliance of the court of appeals on section 701(a)(2) in order to preclude review. While invocation by the Board of nearly all the claims for review within section 706 may have confused the issue for the court, this shotgun approach specifically invoked the debated issue of review for abuse of discretion. By such a triggering, Berger's analysis would have required judicial review of some of the allegations made by the Board. This initial review (to determine if there was a sound exercise of agency discretion as committed by law or an abuse of agency discretion not in accordance with law) would be quite simple. The CFTC would be required to explain its action rather than simply standing on the position that its actions were unreviewable. By granting this initial stage of judicial review, a court

---

58. 4 K. DAVIS, TREATISE, supra note 48, at § 28.16.
59. Compare Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979) (limited review of SEC actions in applying NEPA) with Save The Bay, Inc. v. Administrator of Environmental Protection Agency, 556 F.2d 1282 (5th Cir. 1977) (no review of a refusal by the EPA to veto a state agency's permit to allow plant operation); and St. Louis Univ. v. Blue Cross Hosp. Serv., Inc. 537 F.2d 283 (8th Cir. 1976), cert. denied, 429 U.S. 977 (1977) (no review of Social Security Administration's denial of Medicare claims) and Greater New York Hosp. Ass'n v. Mathews, 536 F.2d 494 (2d Cir. 1976) (no review of the timing of Medicare reimbursements by the Social Security Administration) with Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975) (allowed review of refusal to grant disability payments under the Social Security Act). See also Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971) (granted review); Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) (same); Cappadora v. Celebrezze, 356 F.2d 1 (2nd Cir. 1966) (same).
60. Berger, Article, supra note 48, at 79.
61. See discussion of a possible standard of review in Section V infra.
would not be substituting its limited expertise for that of the agency's, but rather, would be protecting the rights of private individuals in the face of a deprivation that could only be justified if it was truly for the benefit of the greater common good. The switch by the court of appeals from an emphasis on the procedural problems and possible harm to the public, due to the CFTC's lack of capacity for swift and unfettered action, to the emphasis on the effect on the participants in futures markets of the denial of review for an arbitrary act by the CFTC would indicate that the court was following the Berger approach.

It is also possible to employ the Davis approach to find that the CFTC's emergency action was reviewable. If one views the CFTC's act as based on a finding that there was a threatened manipulation which called for an invocation of emergency power, one could apply the "committed to" test to the manipulation determination. In prior years, the courts were often involved in the settling of alleged manipulations on various futures markets.\textsuperscript{62} Assuming these court actions created a common law with respect to manipulation, the grant of discretionary power in the 1974 Act would therefore be treated as if it were the pre-APA law, and, in essence, a common law limitation on the section 701(a)(2) exception to review. To hold otherwise is, in effect, to treat the discretionary grant as within the explicit statutory exception to review of section 701(a)(1), rather than within section 701(a)(2) as the court of appeals had determined. If one applies this common law of manipulation instead of that of emergency situations, the necessity of applying the law from areas other than the commodities field is avoided. For instance, courts in futures market cases would not be forced to analogize, as the court of appeals did in \textit{Chicago Board of Trade}, to the rail car shortage cases of \textit{Daugherty Lumber Company v. United States}\textsuperscript{63} and \textit{United States v. Southern Railway Company}.\textsuperscript{64}

\textbf{B. Overton Park}

The Board argued that the controlling precedent for its claims was the \textit{Overton Park} case.\textsuperscript{65} In \textit{Overton Park}, the Supreme Court was presented with the question of the reviewability of a determination by the Secretary of Transportation as to the route an inter-

\textsuperscript{62} See, e.g., Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971), \textit{cert. denied}, 406 U.S. 932 (1972); Volkart Bros. Inc. v. Freeman, 311 F.2d 52 (5th Cir. 1962); Great W. Food Distrib. v. Brannan, 201 F.2d 476 (7th Cir. 1953). For the first exception in 5 U.S.C. § 701(a), see note 2 supra.

\textsuperscript{63} 141 F. Supp. 576 (D. Or. 1956).

\textsuperscript{64} 364 F.2d 86 (5th Cir. 1966), \textit{cert. denied}, 386 U.S. 1031 (1967).

\textsuperscript{65} 605 F.2d at 1022 n.8.
state highway was to take through Memphis. The Federal-Aid Highway Act of 1968 provided that these highways were not to go through parks unless there were no other "feasible and prudent alternatives." The Secretary of Transportation had determined there were no feasible and prudent alternatives to the route through Overton Park and, when challenged, the Secretary asserted that his decision as to what constitutes "prudent" was a grant of discretion.

The Supreme Court allowed review of the Secretary's determination of "prudent," finding that the statutory language was neither a clear and convincing expression of a legislative intent to limit judicial review under section 701(a)(1), nor a "committed to agency discretion" under the section 701(a)(2) exception. The Court stated that the legislative history of the APA indicated that an action is committed to agency discretion "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Citing Professor Berger, the Supreme Court further noted that this is a narrow exception. The Court recognized that statutes are rarely drawn to provide "no law to apply" because of the danger that such statutes will be unconstitutionally vague. If there is truly no law to apply, the statute would not withstand constitutional challenge under the doctrines of Panama Refining Co. v. Ryan, which limit the delegation of legislative powers. Since Congress does not work in a vacuum, it appears that the law to apply in limiting such seemingly unconstitutional grants of discretion would be the existing case law, and the express statutory limits and expressions found within the legislative history.

Utilizing the "law to apply" test of Overton Park, the court of appeals examined the emergency provision of the 1974 Act and found no law to apply. By focusing on the exercise of the emergency power, it is not surprising that the court found there was no law to apply, because this was a case of first impression—the first time a major commodity contract had been suspended in a major commodity exchange. Because the emergency provision is defined in terms of manipulation, the court of appeals looked further for "law to apply" but found that the term "manipulation" was not

68. 401 U.S. at 405.
69. Id. at 410.
70. Id. at 410 (1971) (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)).
71. 401 U.S. 410 n.23.
72. 293 U.S. 388 (1934).
defined within the 1974 Act. Thus, the court held that the emergency provision was necessarily addressed to the expertise of the CFTC. This analysis ignores three things: (1) prior to the 1974 Act the problems of manipulation were left to the expertise of the commodity exchanges themselves; (2) the facts show that the Board still had considerable control of the market as shown by the fact that the March contract liquidated out without the price fluctuation that should have occurred if there had been a manipulation; and (3) the courts had been regulating trading in commodities without a legislative definition of manipulation as demonstrated in *Great Western Foods, Inc. v. Brannan*, *Volkart Bros., Inc. v. Freeman*, and *Cargill, Inc. v. Hardin*. These cases illustrate the “law to apply” on manipulation. By reading section 701(a) (2) to be the narrow exception that the *Overton Park* decision claims it to be, the court could have found “law to apply” on the determination of manipulation. This law could have served as the basis for review.

If the CFTC’s decision to suspend trading is read as falling within the emergency provision language of “any other major market disturbance,” rather than as being based on the fear of actual or potential manipulation, the analysis must change. If this is invoked as the reason to suspend trading, a determination is necessary as to what basic policy the CFTC should adopt in regulating the futures markets; whether it should be activist and attempt to prevent all major price fluctuations or whether it should assume a passive role that allows the market to adjust to conditions so long as there is not an artificial interference with the forces of supply and demand. It would appear that if the CFTC exercises its discretion in order to prevent a transportation and storage shortage from causing a major market disturbance, the agency has interfered with the futures markets in spite of the fact that the market was accurately reflecting supply and demand.

When this type of CFTC action (interference when the market accurately reflects supply and demand) is considered in light of the apparent legislative intent to preserve the sanctity of the futures contract and its concern for the effect a decline of the public faith in the futures agreement would have, the agency’s action might be in violation of its statutory grant of authority. The fear of

166 NELBASKA LAW REVIEW

74. 605 F.2d at 1022.
75. Confusion existed in the academic world as to what constituted a manipulation. *See* note 13 *supra*.
76. 201 F.2d 476 (7th Cir. 1953).
77. 311 F.2d 52 (5th Cir. 1962).
governmental intervention in response to price fluctuations, such as this severe supply shortage seemed to have caused, would drive speculators from the market. This increased risk would cause those who believe that their investment return does not merit incurring the greater risks resulting from governmental intervention would withdraw from the market. This decrease in participation would, in turn, injure the future markets themselves because liquidity would decrease as participants dropped out. This would lessen the risk-spreading afforded to hedgers and make the markets more prone to manipulation.

In addition, a localized supply shortage, such as that which occurred in the March contract, is publicized. Traders have knowledge of such shortages, unlike an actual or potential manipulation situation. Thus, those traders who hold on to contracts in the face of an announced shortage could be presumed to know what they are doing, perhaps in expectation that the shortage would be alleviated to their advantage. These traders do not need government protection. Some traders might even gamble on government intervention of some sort, which arguably is the sort of activity the Senate feared when it discussed the limits that should be placed on the emergency power. Therefore, the CFTC's actions can be viewed as self-defeating because the action itself, not the external factor, a publicized supply shortage, affected trading and violated the sanctity of the futures contract.

V. CONCLUSION—SCOPE OF REVIEW IF GRANTED

Granting judicial review of the CFTC emergency action should not lead the courts to ignore the previously mentioned reasons for deferring to agency discretion. In the volatile and technical futures area, and in the face of an express legislative desire to create a powerful and effective regulatory agency, the initial judicial review should merely require the CFTC to make a "prima facie" showing that its action was reasonable, in good faith and not arbitrary. In the case of manipulation, the CFTC's initial showing could be satisfied quite simply by using the records on the behavior of the futures markets which the commodity exchanges themselves are required to maintain for the benefit of the CFTC. However, the CFTC would only be required to make this prima facie showing after some showing by a challenger that the agency's action was in bad faith, arbitrary or otherwise impermissible.

For a manipulation, the CFTC might initially show a dominant long position in the hands of a few speculators, and perhaps bolster the appearance of potential manipulation by showing a split in the basis between the contract month terminating and a subsequent trading month (provided they were within the same crop
Then, by showing that control of the deliverable supply was in the hands of these long traders, the CFTC would have made its showing of reasonableness and good faith. If necessary this showing could be done \textit{in camera} to avoid privacy objections by traders whose positions in the market might be revealed. This analysis is simple and swift, since such records are already kept by the commodity exchanges and such review could be implemented very quickly (even over a weekend as was the case in \textit{Chicago Board of Trade}). This approach would enable the CFTC to remain swift and effective in regulation, yet insure that, unless absolutely necessary, the private rights of market participants are not sacrificed for the public good.

\textit{Terry Curtiss '81}

\footnote{81. There is a broad proposition that the contract months within the same crop year should reflect in their price differential only the storage costs of holding to the later contract. Therefore, when the two months split by more than the storage cost, some force is affecting the supply-demand determination for one of the months, and absent a showing by the commodity exchange that this split is not due to manipulative pressures, but some other economic force, such as transportation shortages due to strikes or natural disasters the CFTC's allegations should stand.}