Speculation: 
How the Growth of 
Fundamental Economic Issues 
Has Been Done Through 
Legislation Rather than 
Research or How 
Fundamental Economic 
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Ignored in Legislation, 
Notwithstanding Research

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These remarks today grow out of some rather irreverent comments I made to a Board of Trade seminar earlier this year when Congress Assembled was devoting its substantial talent and energy to a typically in-depth, probing, and dispassionate analysis of Paul Volcker's nocturnal attire and other great issues of state relating to the so-called Silver Debacle.¹

It was during that period that a prominent economist—a Harvard Ph.D no less—was contributing greatly to Congress's better understanding of the economics of futures markets, through his incessant repetition of the phrase speculative bubble and his unabashed assertion (before several Congressional committees) that the best futures markets are those with relatively modest levels of speculation—such as Kansas City or Minneapolis—the findings of Gray and Working notwithstanding. I speak, of course, of Dr. Stone, the chairman of the CFTC.²

I was reminded at the time of an observation of two British economists, Goss and Yamey, in their Economics of Futures Trading: "The ease with which futures trading can be made the scapegoat for price levels and price movements considered to be against the public interest explains much ill-considered official intervention and regulation."³

And thus I happened upon the topic which is assigned to me this morning: "How the Growth of Fundamental Economic Issues Has Been Done through Legislation Rather than Research." Perhaps a more accurate title would be: "How Fundamental Economic Principles Have Been Ignored in Legislation, Notwithstanding Research." There are several impressive examples right in the Commodity Exchange Act, the statute closest and dearest to me as a commodities lawyer.

The Commodity Exchange Act is a venerable patchwork creation, now almost 60 years young, of our best and brightest in Washington. John Rainbolt, who helped write several important chunks of it in 1974 before moving on to the CFTC he helped create, once described it as Congress's "longest chain letter." It certainly must be. Congress after Congress—at least 15 by my rough count, beginning in 1936 and as recently as this June (1980) — have busily scribbled away—adding postscripts, but never editing—on a core text hastily contrived

¹ I allude to the considerable interest shown in whether Federal Reserve Board Chairman Volcker was wearing pajamas when he met late one evening with a delegation of bankers to discuss the financing of Hunt-family silver positions. Mr. Volcker maintains that he was not wearing pajamas. "CFTC Regulatory Authority Review," Hearings Before the Subcommittee on Conservation and Credit of the House Committee on Agriculture, 96th Cong., 2d Sess. 104 (1980) (testimony of P.A. Volcker). As to Congress's review of the so-called Silver Debacle, see also "Silver Prices & the Adequacy of Federal Actions in the Marketplace, 1979-80," Hearings Before a Subcommittee of the House Committee on Government Operations, 96th Cong., 2d Sess. (1980); "Price Volatility in the Silver Futures Market," Hearings Before the Subcommittee on Agricultural Research & General Legislation of the Senate Committee on Agriculture, Nutrition & Forestry, 96th Cong., 2d Sess. (1980); and "Margin Requirements for Transactions in Financial Instruments," Hearings Before the Senate Committee on Banking, Housing & Urban Affairs, 96th Cong., 2d Sess. (1980).

² See, e.g., House Agriculture Committee Hearings (note 1) at 87, 178; Senate Agriculture Committee Hearings (note 1) at 6; Senate Banking Committee Hearings (note 1) at 147.


in a matter of weeks in 1922, from the tattered remnants of a 1921 statute that the Supreme Court had just declared unconstitutional.\(^4\)

The resulting act is now replete with solemn declarations of economic truth. Legislating in the 1920's and 1930's, you see, was something of a pseudoscience. It was not enough merely to regulate, prohibit, and sanction. You had to do so "scientifically"—based on immutable facts—to justify ever more expansive interpretations of the Constitution's Commerce Clause.\(^6\) In the Commodity Exchange Act, this involved declaring certain economic verities, such as the true nature, scope, and impact of "speculation." Really, I do not know why so many of you economists in the audience continue to busy yourselves studying these issues—analyzing data, constructing formulae, drafting learned papers. Congress has already said it all, right in the Commodity Exchange Act.

As I said, the act is replete with examples. One such example is section 4a, which permits the CFTC to impose speculative limits.\(^5\) Implicit in that section are certain interesting assumptions. The section, you see, declares that speculation can be "excessive"; and that, if "excessive," it will cause "price fluctuations" which, in turn, are "sudden," "unreasonable," or "unwarranted." And this results in an "undue and unnecessary burden on interstate commerce." On this foundation, Congress has erected a system for imposing position and trading limits.

Dr. Hieronymus has done some interesting research on this, however, which effectively knocks down any empirical basis for Congress's declarations. The economic studies which Congress apparently relied upon—or the studies that at least were available at the time that section 4a was enacted in 1936—were made in the 1920's. Although, as Dr. Hieronymus observes, they were "interesting pieces of pioneering work," they were seriously flawed. To put it most charitably, the legislation authorizing speculative position limits was, at the very least, on "shaky ground."

Another example is the act's ban on agricultural options, also enacted in 1936.\(^8\) To my knowledge, there never has been an economic study of any comprehensive scope into agricultural options trading. Certainly there has never been a study which concludes that options on agricultural commodities lack substantial economic justification, or that they have, as was apparently assumed in 1936, a theoretically destabilizing influence on commodity markets.

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\(^5\) U.S. Const., art. I, sec. 8, cl. 3.
\(^6\) Commodity Exchange Act, §4a (7 U.S.C. §6a); as added June 15, 1936, ch. 545, §5, 49 Stat. 1492 (1936). The constitutionality of this provision was implicitly upheld in Moore v. Chicago Mercantile Exchange (and companion case), 90 F.2d 735, 739 (7th Cir. 1937), cert. denied, 302 U.S. 710 (1937), rehearing denied, 302 U.S. 774 (1937). See also Board of Trade of Kansas City v. Milligan, 90 F.2d 855, 860 (8th Cir. 1937), cert. denied, 302 U.S. 710 (1937).
\(^7\) Hieronymus, Economics of Futures Trading, 334-37 (1977).
\(^8\) Commodity Exchange Act, §4c (7 U.S.C. §6c); as added June 15, 1936, ch. 545, §5, 49 Stat. 1494 (1936). The constitutionality of this provision was expressly upheld in Moore v. Chicago Mercantile Exchange (and companion case), 90 F.2d 735, 740 (7th Cir. 1937), cert. denied, 302 U.S. 710 (1937), rehearing denied, 302 U.S. 774 (1937). See also Board of Trade of Kansas City v. Milligan, 90 F.2d 855, 858 (8th cir. 1937), cert. denied, 302 U.S. 710 (1937).
One study was done in 1934 by the USDA, but it basically concluded that option or "privilege" trading on the Chicago Board of Trade was useful, a source of profit to some, which provided very low-cost protection against price changes. Nonetheless, Congress proceeded to declare trading in agricultural options to be absolutely illegal. This ban on options trading may simply have been placed in the act because no respectable interests had any incentive to come forward to demonstrate that options had utility and that they were not the culprit in an era of great market instability. I suspect that this was the case. To save futures, options were offered up for sacrifice.8

Yet another example is the 1958 onion trading ban. The Commodity Exchange Act now defines everything in this world—from securities to space on a ship—as a commodity, except one thing—onions. Contrary to what any educated person might think, onions are simply not a "commodity." Also, it is actually a crime to trade them for future delivery.9 (Whether leeks are embraced by this ban is still open to debate).

The onion ban in 1958 was spearheaded in good part by a radical congressman from Michigan by the name of Gerald Ford.10 The reason for the ban was stated in a Senate Agriculture Committee report: "It now appears"—it appeared to Congress at least—"that speculative activity in the futures markets causes such severe and unwarranted fluctuations in the price of cash onions as to require complete prohibition of onion futures trading in order to assure the orderly flow of onions in interstate commerce."11

That judgment was reached notwithstanding the USDA's own position at the time that "[t]he prohibition of futures trading in onions could not be expected to eliminate erratic price movements traditional in the marketing of this

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10 As for President—then Representative—Ford's role, see H.R. 1933, 85th Cong., 1st Sess. (1957), Mr. Ford's bill "To amend the Commodity Exchange Act to prohibit trading in onion futures in [sic] commodity exchanges." Mr. Ford's onion-ban bill was referred to the House Agriculture Committee on January 5, 1957. 103 Cong. Rec. 228 (Jan. 5, 1957). The bill which eventually cleared the Committee was an earlier but identical bill (H.R. 376), passage of which Mr. Ford "urge[d] most earnestly" to eliminate "the evils of the present system." 104 Cong. Rec. 4322 (March 13, 1958) (remarks of Rep. Ford).

11 Sen. Rep. No. 1631, 85th Cong., 2nd Sess. (1958). Representative Poage was more candid: "The producers feel this futures trading is making the price of onions too high when there are few onions and too low when there are plenty of onions." 104 Cong. Rec. 17833 (Aug. 15, 1958). That was good enough for the House of Representatives, which promptly thereupon agreed to the ban. 104 Cong. Rec. at 17834.
commodity." For an appraisal of the wisdom—or unwisdom—of Congress's judgment in 1958, I refer you to Dr. Gray's essay, "Onions Revisited." It is a pity, really, to think of so many great minds devoting so much time and attention to such a humble herb.)

As you see, the culprit is always "speculation"—the theme of this seminar. When in doubt, blame the speculator. And make futures the scapegoat, as Goss and Yamey have correctly observed.

But what I really want to focus on today is not onions, options, or limits—as fascinating as they each are—but on section 3 of the Commodity Exchange Act. As one of the act's most ardent supporters in 1922, a Mr. Jones of Texas, observed—it is the very "foundation for the legislation." By "act" I mean the Grain Futures Act which, in 1936, was renamed the Commodity Exchange Act.

Section 3 tells us that "transactions in commodities... known as 'futures' are affected with a national public interest." They are "carried on in large volume." The "prices involved... are generally quoted and disseminated," etc., etc. Section 3 goes on to declare, however, that "the transactions and prices of commodities on... boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation or control, which are detrimental to the producer or the consumer and the persons handling commodities... and such fluctuations in prices are an obstruction to and a burden upon interstate commerce... and render regulation imperative for the protection of such commerce and the national public interest therein."

Again, in the words of Representative Jones—and I want to emphasize this—section 3 "is the statement of the basis" upon which the entire regulation of futures markets is predicated. Representative Jones, I should add, was speaking on June 26, 1922, some 40 days after the Supreme Court had declared key provisions of the Future Trading Act of 1921 unconstitutional. In 40 short days, Mr. Jones' colleagues on the House Agriculture Committee had managed to sift through economic theory and economic literature and determine, once and for all, in the most unequivocal terms, certain important, fundamental truths concerning the nature of "speculation." We will see in a moment how they spent those 40 days.

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Again, the legislation declared unconstitutional was the Future Trading Act of 1921. To put this in some perspective, we must look at that act for a moment—adopted in 1921 in an orgy of populist rhetorical excess—and particularly the remarks of Senator Capper of Kansas, who was its sponsor in the Senate. Senator Capper was a marvelous orator, and I must quote him just briefly, so you can savor the flavor of the time and appreciate why we are where we are today:

"Mr. President, it is nothing new that we hear today from the producers of food, from grain dealers and millers, and from the victims of speculation carried on without restriction, of the abominations of speculation in these basic products. During the past year the price of wheat and corn has been determined to a large extent not by the demand and supply of the commodity itself but by the fabulous quantities sold on the exchange that never had an existence, that no grain farmer in the world ever planted, ever toiled over its cultivation and harvest, or offered for sale. Mr. President, it is against the law to run a gambling house anywhere within the United States. But today under the cloak of business respectability, we are permitting the biggest gambling hell in the world to be operated on the Chicago Board of Trade. The grain gamblers have made the exchange building in Chicago the world's greatest gambling house. Monte Carlo or the Casino at Habana are not to be compared with it."  

This was mild stuff, however. The good Senator knew how to get people really excited, which he did. (The Congressional Record frequently indicates "applause" and even "laughter" during his tirade on the evils of grain exchanges.)

So Senator Capper proceeded with a litany of horror stories, to the delight of his audience. I will share just two of them with you. One involved a gentleman from "Prophetstown, one of the largest grain centers of Illinois." (Frankly, I have never heard of it. There must have been some severe economic reversal in Prophetstown, no doubt because of the gambling hell here in Chicago.) I quote again from Senator Capper of Kansas:

"Prophetstown's most prominent citizen and bank president, George E. Paddock, is now a fugitive from justice at the age of 72. His son, the bank's cashier, indicted with him for embezzlement of $150,000 of depositors' funds, has recently given himself up to the sheriff. Behind the bank room proper, examiners found a secret chamber with direct wire connections to Chicago Brokerage houses." And also: "F. R. Robertson, prominent real estate and insurance man of Newton, Illinois, in a fit of insanity caused from brooding over losses on the Chicago Board of Trade, shot and killed Charles Sutton, member of a grain brokerage firm, then killed himself."

That is more effective than reparations, I would say. These populist politicians were marvelous orators, of course. What they lacked in economics, they certainly made up for in elocution.

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Just an aside: I note that in 1921 the statute was called the "Future Trading Act." Then in 1978, when the CFTC was reauthorized, the reauthorization legislation was called the "Futures Trading Act." Plural. So I do not know if, in 57 years, Congress has learned how to spell, or if it has forgotten how to spell. Perhaps Dr. Hieronymus knows the explanation for this significant shift—from his extensive studies, not from any contemporary observation, of course.

The case which declared Senator Capper's 1921 brainchild unconstitutional was *Hill v. Wallace.* It is interesting to note—to me at least—that the case was brought by eight disgruntled members of the Chicago Board of Trade against the Secretary of Agriculture and various federal officials—including the revenue agents here in Chicago who were supposed to collect the tax that the act imposed on futures transactions—but also against the Board of Trade itself, and its directors and officers.

The disgruntled members of the Board of Trade had been spurned in their entreaties to the Board to launch a constitutional challenge in the name of the Board of Trade itself. These members went so far as to allege in their complaint that the Board of Trade officials were "fearful of antagonizing" government officials. They probably were, since there was considerable sentiment in Congress to close down the Board of Trade altogether. The Future Trading Act represented a relatively moderate piece of legislation compared to what Senator Capper and his colleague in the House of Representatives—Representative Tincher—actually wanted and had campaigned for four years.

In any event, the principal gripe of the eight disgruntled Chicago Board of Trade members was not the prospect of federal regulation per se, but the foisting of co-ops upon the exchanges. Co-ops rebated commissions.

Chief Justice, ex-President Taft wrote the Court's opinion. He found, first, that the Board of Trade should have brought the lawsuit in its own name, to which Justice Brandeis retorted, in so many words, that that was a ridiculous notion. Why should the Board of Trade have to "play the knight-errant" and "tilt" at statutes whenever some disgruntled member suspected that a law was unconstitutional?

But getting to the merits, Chief Justice Taft and Justice Brandeis were in full agreement. The act was, in essence and on its face, not a revenue-raising statute. It could not be sustained under Congress's taxing powers. Nor could it be sustained under the Commerce Clause, because it really had not been

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259 U.S. 44 (1922).

As a contemporary observer noted: "The direct impetus for it [futures trading legislation] is to be found in the desire to relieve farmers from the critical condition created by the fall in agricultural prices in 1920 and 1921. *** The conclusion was at once drawn that the wild fluctuations and sharp decline in prices were because of 'speculation on the board of trade.' Some form of regulation was made certain. During the short session of the 66th Congress, which convened in December, 1920, half a dozen bills were introduced. The plan of these bills ranged all the way from a simple provision for the admission of producers' associations to membership on boards of trade, to the suppression of all future trading and speculation." G.O. Virtue, "Legislation for the Farmers: Packers and Grain Exchanges," *37 Quar. J. of Econ.* 687, 697 (1923).
intended to be based on that, and there were not Congressional findings or evidence to support the statute on that basis.

The Chief Justice did volunteer—lawyers call it “dicta”—that Congress could bring futures trading within its regulatory power if it concluded from evidence before it that such trading (I quote from the Chief Justice) is “directly interfering with interstate commerce so as to be an obstruction or a burden thereon.” You heard those words a few minutes ago—section 3.

As Representative Ellis of Missouri observed at the time: “[T]he writer of the opinion, the distinguished Chief Justice, was prompted to depart somewhat from the direct path to his conclusions to suggest another possible basis for the bureaucratic sway the promoters of this legislation have so ardently craved.” Ellis also noted that the Chief Justice’s opinion reflected in that dicta “a tolerance of bureaucratic control of private business for which I have neither sympathy nor patience.”

But, alas, the seed had been sown. The legislative draftsmen at the U.S. Department of Agriculture, seizing upon Taft’s gratuitous suggestion, immediately took pen in hand to give the Chief Justice the magical language he wanted.

When I say immediately took pen in hand, I mean immediately. The Future Trading Act was declared unconstitutional on May 15, 1922. Less than a month later—June 13, 1922—not only had a new bill been introduced, but House “hearings” had been held and a full-fledged Agriculture Committee report had been filed with the House. The subject, miracle of miracles: The “Prevention and Removal of Obstructions and Burdens upon Interstate Commerce in Grain, by Regulating Transactions on Grain-Future Exchanges.”

The Department of Agriculture lawyers had simply reframed the 1921 act under the Constitution’s Commerce Clause. To do so, the department lawyers felt it necessary, given the case law of the time, to give us findings of fact—bases and truths—upon which Congress could construct a regulatory scheme. They were and are contained in section 3.

Section 3 was written in the Department of Agriculture—the House debates make that clear. As Representatives Ellis succinctly put it, evoking the memory

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259 U.S. at 69. An earlier (but nonprohibitory) “stamp tax” on futures transactions (imposed to help finance the Spanish-American War) had been upheld by the Supreme Court in Nicol v. Ames, 173 U.S. 509 (1899). The decision in Hill v. Wallace did not overturn the prohibitory tax on options transactions also contained in the Future Trading Act. That provision did not fall until 1926. Trussler v. Crooks, 269 U.S. 475. (Mr. Crooks was the tax collector, not the options trader. The options trader, Mr. Trussler, was a Board of Trade member and a constituent of Senator Capper. 269 U.S. at 481.)


The Court was in a very nasty mood that day. It also declared unconstitutional, for similar reasons, the Child Labor Tax Law. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922). Earlier in the same term, however, the Court had upheld the constitutionality of the Packers and Stockyards Act of 1921 (enacted in the same month that the Future Trading Act was enacted). Stafford v. Wallace, 258 U.S. 493 (1922). The Court’s reasoning in Stafford was the basis for the Chief Justice’s suggestion in Hill as to how to rewrite the Future Trading Act.
of a prominent Illinois railroad lawyer: "It is absolutely a bureau bill—of the bureau, by the bureau, and for the bureau." And section 3 was, as he also observed, the "crux" of the new legislation.27

The nature of the House Agriculture Committee's "deliberations" (which also gives us some clue as to how the congressional process operates generally) is chronicled in a minority report filed by Representative Rainey of Illinois.28

On Wednesday, June 7, 1922, an assistant to the Secretary of Agriculture came up to the Hill, chatted with the boys (this was 1922) and assured them that it was a good bill. (Of course it was. He wrote it.)

The next two days, June 8 and 9, the grain exchange people came in, quite meekly I gather, and suggested a few technical improvements here and there, but generally accepted the new statute as proposed. They had had virtually no time to prepare, and they knew, of course, that the situation could be worse. Much worse.

Further hearings were scheduled for Monday, June 12, to take the testimony of officials of the Minnesota Railway and Warehouse Commission, which had "long and valuable experience" in the administration of similar grain laws. Much attention was given to the fact that these emissaries were coming all the way from Minneapolis to testify. They were taking the train, of course, being Railway Commission people—not that they had any chance in 1922.

While enroute to Washington, a severe storm of some sort delayed them in Wisconsin for 12 hours. Unable to arrive in Washington in time for the Monday hearings, the Minnesotans dutifully telegraphed the House Agriculture committee, requesting that their appearance be rescheduled for Tuesday. The Committee ignored the request, however, and proceeded, on June 12, 1922, to "mark up" the new Capper-Tincher-USDA bill.

Representative Rainey recounts to us that, halfway through the actual reading of the bill, a bell rang for a quorum call on the House floor. At that point, the legislators stopped the "mark-up" process and voted, then and there, to report the bill to the full House. There was no further reading, and there were no Committee amendments.29

The bill went to the floor of the House a scant two weeks later. The debates suggest that most of the people had not read the bill, and no doubt that was the case. It certainly is the case today with commodities legislation. At least we know that the bill was never read in full by the reporting committee.


The House Agriculture Committee's report states that after these (in-depth) hearings, the Committee had solemnly concluded that transactions on the grain exchanges are indeed "extremely susceptible to speculation, manipulation, and control, and that sudden and unreasonable fluctuations in the prices thereof occur, as the result of such speculation, manipulation, and control; and that these fluctuations are an obstruction to and a burden upon interstate commerce. . . ."30

Of course, the Committee did not find it necessary to submit any evidence for that unequivocal conclusion. It merely referred generally to "volumes of testimony given by the prominent men of the Nation which uphold the Committee in its conclusion."31 End of majority report. It was three pages long. (The minority report was much, much longer.

I must add that the Committee did observe that it was motivated, in particular, because, immediately after the Supreme Court decision, there had been a "straight out manipulation" of Chicago wheat futures, during which prices dropped $3.32 a bushel in a mere 15 days. (You have to remember that a "manipulation" back then always meant that prices were going down.

The "grain gamblers" were not jacking prices up. They were always driving prices down. That is what upset the people in Kansas. They saw prices going down because of "speculation" and "manipulation," but never because of decreased demand for their oceans of grain. Today, we always think of "manipulation" as just the opposite.

The Committee took the view that this "straight out manipulation" of Chicago wheat futures had occurred because of the Supreme Court decision—that, as a result of the decision, traders no longer had to file reports with the USDA and, therefore, felt perfectly free to "manipulate."32 The Committee did not note, however, that enforcement of the Act's reporting requirements had been enjoined in Chicago, and that no one in Chicago had ever filed a report.33 So there is absolutely no basis for that conclusion.

Also, their figures were wrong. The price had not changed the way they said it had.34 So there were factual errors in both cases. But the Committee concluded, nonetheless, that section 3 "sets forth the situation in detail," and was "fully supported by an abundance of evidence introduced before the Committee."35

Now it is important to note that in reframing the 1921 bill, the USDA draftsmen—and Representative Tincher—did have to make a significant

31 Id.
32 Id.
concession. Representative Tincher, for example, had spent much of his public career lambasting the grain exchanges. His whole purpose in going to Congress—it would seem—was to vilify the exchanges. To him, futures trading was a “gambling hell,” or so he often said.

Populists like Tincher now had to concede, however, in the preamble of section 3, that there was really something salutary and “in the national public interest” about this “gambling hell,” but that the marvelous process called futures trading was somehow being impeded by manipulation and excessive speculation and, thus, interstate commerce was burdened. Clearly, that was a monumental concession for a man like Tincher.

As Representative Ellis observed on the House floor: “[M]aking a virtue of necessity, the bureau solicitor, special pleader, asks us to find as a further fact that these transactions, while normally wholesome and salutary, are susceptible of control and manipulation.” He further noted that “section 3 has been painstakingly—perhaps I should say cunningly—contrived to serve the one definite purpose.” That purpose, of course, was to convince Chief Justice Taft and his brethren that the new act was constitutional.

The evidence before the House, on this particular bill anyway, consisted, basically, of the solicitor of the USDA saying that the legislation was written to be constitutional, and that he had included those “facts” in section 3 for that reason and that reason alone. A Mr. Wells of Minneapolis—a vice-president of Peavey & Company—had pointed out to the Committee, however: “I fail to find in the record any testimony from men of experience that transactions are extremely susceptible to speculation, manipulation, and control.”

In any event, the bill was brought to the floor of the House on June 26. The rule for debate provided for but two hours of general debate. It was brought “under whip and spur,” as Mr. Ellis pointed out. He also volunteered that:

“There is nothing in it to praise; there is everything to condemn. The bad features of the old bill are made distinctly worse; there is nothing contained in it to redeem it. The old bill violated a party promise and an administration promise to keep the Government out of private business. This bill does all that and more; it seeks to broaden the scope of governmental, bureaucratic domination of private enterprises. More than all, and worst than all, this bill reeks of populism.”

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62 Cong. Rec. 9420 (June 26, 1922) (remarks of Rep. Ellis). President Stream of the Chicago Board of Trade, himself making a virtue of necessity, commented in 1923 that “American grain exchanges have now been given the stamp of government approval. ... [which] will tend to encourage the grain trade into greater use of the future trading system for hedging and for commercial price insurance purposes.” O.C. Virtue, “Legislation for the Farmers: Packers and Grain Exchanges,” 37 Quar. J. of Econ. 687, 703-4 (1923). To Stream’s credit, courts have also read section 3 in this manner, e.g.: “[T]his court can take judicial notice that futures trading is generally accepted, under proper regulation as a useful and lawful business. See Title 7 U.S.C.A. § 5.” Chicago Mercantile Exchange v. Tiekert, 177 F. Supp. 660, 666 (N.D. Ill. 1959). This is hardly what Capper and Tincher had had in mind in 1921.


Id.
Having sniffed out his prey, Ellis proceeded to deliver a marvelous diatribe against populism in general. I commend it to you if you are interested in the history of the populist movement. Again, as I said, there is applause and laughter indicated throughout the debate transcription. The people in the gallery were obviously quite excited about the whole thing, on both sides of the question.

Representative Ellis did know his economics. He and some of his colleagues—no doubt considered the hired guns of the grain exchanges at the time—were able to “speak the truth” and make some rational, intelligent statements with which, I am sure, all of you economists in the audience would readily agree. For example, it was duly pointed out that grain futures trading had a stabilizing influence, for which the world was a better place. The statements were good, but no one was really listening. The whole thrust of this opposition exercise was to build a record to demonstrate that, as Ellis said, “the bill was neither good English nor good sense.” (It was abominable English and it still is, in spite of some later tinkering in the Senate).

Even supporters of the bill recognized its drafting defects. Representative Voigt, a member of the Agriculture Committee, conceded: “The bill before us can hardly be called a perfect piece of legislation. It was drawn and considered rather hurriedly, so that it might pass the House this session.” Understand, this is still the statute under which the futures industry is regulated.

By the way, in reading the musty old debates, I have come to particularly appreciate Mr. Ellis of Missouri. I share this choice tidbit from him, although it has little to do with my topic this morning. Mr. Ellis, speaking on the floor of the House concerning the Grain Futures Act, observed, no doubt with a tremor in his voice:

“I do not believe, and I doubt that any considerable number of you believe, the experience of recent years, while we have fast multiplied boards, commissions, and like bureaucratic agencies—have been substituting for government by law, government by men—has convinced the American people that government interference in private enterprises through these instrumentalties has either been wise or salutary. The American people are becoming mortally tired of having bureau agents nosing about as veritable snoops in their business affairs. The people realize, even if we do not, that we are becoming about as bureaucratic as Russia ever was.”

Now that was 1922. Ronald Reagan was still in grammar school.

On the floor of the House on June 26 considerable effort was made, as I pointed out, to amend or water down the excesses of section 3, but without any success.

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"[T]he steam-roller is in operation," Representative Chindblom of Illinois correctly observed.46 Each negative assumption of section 3 was challenged, but Representative Tincher refused to budge.

Mr. London said: "Of course, there is no such thing as a fluctuation being reasonable or unreasonable."47 Mr. Chindblom: "All these things [showers in Kansas, heat waves in Missouri, little foreign demand, severe storms in northwest Canada] caused a fluctuation in prices, and the Congress of the United States solemnly passes legislation under which fluctuations such as that are described as 'unreasonable.'"48

Mr. Hull: "I am not opposed to the reasonable regulation of grain exchanges. I am opposed to using a bill for propaganda purposes, as is done in section 3 of this bill."49 Mr. Mills: The bill "is one of the worst drawn bills that it has ever been my misfortune to read. * * * Facts are stubborn things, you know. You cannot change facts by act of Congress ... [T]he proposition is ... bad from the standpoint of draftsmanship, novel in character and thoroughly unscientific. ... The gentleman from Kansas [Mr. Tincher] asks us to pass a law declaring certain facts to be so, irrespective of whether they are or not, and I submit that this is a thing that cannot be done. [Applause.]"50

It could. Section 3 passed the House without amendment.51

The Senate acted with somewhat more deliberation. Its Agriculture Committee did not report out the bill until almost two months later, on August 23. As for section 3, the Committee did make some changes to correct the obvious grammatical errors of the solicitor of the Agriculture Department. The Committee also deleted some "superfluous" words, such as "extremely" when describing the susceptibility of markets to speculation.

Section 3 remained the cornerstone of the new legislation, however. As the Senate Agriculture Committee report explained, most succinctly and to the point:

"A recital of the ultimate facts adduced at these hearings ... is made in section 3 ... because it is manifest from several recent decisions of the Supreme Court ... that the Supreme Court attaches great importance to congressional finds."52

The Senate report also noted that the measure was "particularly urgent" because farmers were terribly concerned. The price fluctuations which the agricultural economy was experiencing were perceived by the farmers as being

51 See 62 Cong. Rec. 9440 (June 26, 1922).
caused by "manipulations" on the grain exchanges. That, the Senate Agriculture Committee said, was the reason why the legislation was so urgent.\textsuperscript{81} The Committee did not note that a national election was going to be held in November.

The bill passed the Senate on September 14, 1922, after about 20 minutes of debate.\textsuperscript{82}

The very next day, September 15, it came back to the House. Congressman Tincher was in a real pickle. The Senate had deleted several of his most favored rhetorical excesses—declarations that all good Kansans had wanted for decades. He was obviously displeased with that. But he was in a quandary. It was an election year, and he had to get back home to campaign in the "Bloody Seventh."\textsuperscript{83}

The decision was made, albeit reluctantly, to go along with the Senate version, rather than to go Conference and haggle over the Senate deletions. Thus, the House merely adopted the Senate changes verbatim, then and there. On September 15, 1922, by voice vote and without a quorum—the record is clear that there was no quorum—the House agreed to the Senate amendments.\textsuperscript{84} And thus was born the Grain Futures Act, now the Commodity Exchange Act.

Before this happened, of course, certain enlightened Congressmen did once again question each of the "findings" in section 3. Clearly they were doing so in the hope of laying a foundation for a later assault on the constitutionality of the statute. Thus, they went through a tedious exercise of analyzing each phrase, trying to put into the record the fact that Congress was proceeding to make declarations with no factual support whatsoever, and that, in fact, the evidence supported the contrary position.\textsuperscript{85}

Indeed, the constitutional challenge did come. The case was \textit{Board of Trade v. Olsen}.\textsuperscript{86} Obviously, the Board of Trade had learned a lesson. It sued first, rather than having its members sue it. Beginning a modern tradition, the Board of Trade became the "knight-errant," "tilting at statues," as Justice Brandeis had observed a year earlier.\textsuperscript{87}

The Board of Trade made a number of allegations in its complaint against the new law—detailing what futures trading was all about. One allegation was that no corners had been run on the Board of Trade for 15 years.\textsuperscript{88} They were proud of that fact.

\textsuperscript{84} See 62 Cong. Rec. 12723, 12725 (September 15, 1922).
\textsuperscript{85} See 62 Cong. Rec. 12720-25 (September 15, 1922).
\textsuperscript{86} 262 U.S. 1 (1923).
\textsuperscript{87} \textit{Hill v. Wallace}, 259 U.S. 44, 74 (1922) (Brandeis, J., dissenting).
\textsuperscript{88} \textit{Board of Trade v. Olsen}, 262 U.S. at 9.
In support of its case, the Board also marshalled, I am sure, some of the best economic minds in America. The record before the Supreme Court reflects that a large number of affidavits were submitted by the Board of Trade in support of its motion for a preliminary injunction, which had been denied by the district court. Chief Justice Taft goes on to say: “These contained opinions of many professors of political economy in the colleges of the country to the effect that trading in futures in the long run did not depress prices, but stabilized them.”

The Chief Justice then proceeded to totally ignore the affidavits and to state the facts in a most self-serving way, along the lines of Representative Tinchel and Senator Capper. Taft framed the question presented as to “whether the conduct of [futures] sales [at the Board of Trade] is subject to constantly recurring abuses which are a burden and obstruction to interstate commerce in grain” and whether they are “such an incident of that commerce and so intermingled with it that the burden and obstruction caused therein can be said to be direct.” The Board of Trade’s affidavits notwithstanding, Taft’s answer was a ringing “yes” on both counts. The act was constitutional.

I must point out that the efforts of the distinguished economists who were retained by the Board of Trade or who, perhaps, gratuitously volunteered their services in the interest of truth, knowledge, and the American way, were not utterly of no avail. In 1931, a Dominion of Canada report on Trading in Grain Futures was issued. It was largely favorable to futures trading, and made specific note of all the affidavits that had been adduced before the Supreme Court in the Olsen case. The Canadian commission accepted these affidavits—the testimony of the economists in Board of Trade v. Olsen—as the basis for their determination that futures trading had a “marked tendency to

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99 262 U.S. at 10. The constitutionality of the law "was strongly contested in the very able brief for the Board of Trade. The question, counsel argued, was one of fact, of 'economic or trade law,' not to be settled by the congressional declaration in section 3 of the law, but by a resort to expert opinion. Counsel therefore introduced the affidavits of twenty-two professors of economics, bearing on the function of organized speculation, the effect of future trading and speculation on fluctuations and orderly trading." G.O. Virtue, "Legislation for the Farmers: Packers and Grain Exchanges," 37 Quar. J. of Econ. 687, 701 (1923).

100 262 U.S. at 36. As was observed in 1934 in the George Washington Law Review, this "opinion of Mr. Chief Justice Taft is of decided interest in the broad philosophy which it expounds. It clearly goes beyond the current of trade doctrine of the earlier [Stafford] case [see note 26, supra] and expresses a willingness to proceed on a foundation of 'national public interest.' This willingness, thus announced, may well be of extreme importance in furnishing a benchmark for the high court in its later determinations. *** As a legal proposition much encouragement lies ... for those who believe that progress implies an increase in governmental supervision such as the currently proposed National Securities Act." Mayers, "Federal Regulatory Legislation, the Federal Grain Futures Act," 2 Geo. Wash. L. Rev 457, 459, 462 (1934).

And as Judge Friendly recently observed in analyzing Congress's 1922 opinions now memorialized in section 3: "Wickard v. Filburn, 317 U.S. 111 (1942), then lay twenty years in the future." "Liest v. Simplot, 2 Comm. Fut. L. Rep. (CCH), 124,174 (2d Cir. 1980). Wickard v. Filburn made it "immaterial" whether a regulated entity’s business is "local or interstate." "Chicago Mercantile Exchange v. Tioken, 178 F. Supp. 779, 783 (N.D. Ill. 1959). Specifically, the Supreme Court upheld provisions of the Agriculture Adjustment Act of 1938 which restricted the amount of wheat which Farmer Filburn could grow for his own consumption. In reaching this result, the Court (per Justice Jackson) expressly found Board of Trade v. Olsen to be of a kind. 317 U.S. at 128 n.28. (See also 317 U.S. at 122 n.21 where the earlier Hill decision was consigned to a place of infamy along with the Child Labor Tax Case and other restrictive decisions which Justice Jackson declared had departed from "principles first enunciated by Chief Justice Marshall in Gibbons v. Ogden."
stabilize prices.” So the views of the academics prevailed in Ottawa, if not in Washington.

As to section 3, the obvious happened. Chief Justice Taft said that the Court was faced with Congress's expressed declarations and that, as a result, the Court "would be unwarranted in rejecting the finding of Congress as unreasonable" and "must accept the view" and is "prevented from questioning the conclusion of Congress." He also cited, ad nauseam, several of those time-honored manipulation and corner stories, the celebrated Patten case, for example. As to all of these, I commend to you Dr. Hieronymus's analysis of "historic corners," for example, the Patten corner. As you said, Dr. Hieronymus, that corner was the corner that was not a corner at all.

Well, all of this would be a mildly amusing historical journey if it were not for the fact that the words so solemnly set forth in section 3 continue to haunt us. They haunt, at least, the economists and businessmen—and even lawyers—who are concerned about these markets. I underscore. This is not merely amusing. It is relevant, because we keep having the same words thrown back at us, time and time again.

For example, in 1966, when a serious assault was made on margin independence and an effort was made to give the Secretary of Agriculture "standby" margin authority, the Assistant Secretary of Agriculture quoted section 3 virtually verbatim. He said that this was Congress's finding in 1922 (after careful, searching, and serious scrutiny?) and implied that section 3 was an irrefutable declaration of economic fact: these markets can get out of hand.

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43 Goss & Yamey, The Economics of Futures Trading 55 n.59, 59 n.97 (1976). Nor was this economic evidence totally lost on Chief Justice Taft. On Jan. 24, 1924, he wrote in U.S. v. N.Y. Coffee & Sugar Exchange, 263 U.S. 611 (1924), that "[t]hose who have studied the economic effect of such exchanges for contracts for future deliveries generally agree that they stabilize prices in the long run instead of promoting their fluctuation." 263 U.S. at 619.


Currently, as stated by the United States District Court for the Northern District of Illinois with respect to Congress's 1958 ban on onion futures trading, "the burden is on the party attacking a statute to establish beyond a reasonable doubt that there are no facts—social, economic or otherwise—which would justify the enactment of the law." Chicago Mercantile Exchange v. Tiekken, 177 F. Supp. 660, 662 (1959). As to the "binding effect of legislative determinations of fact," the court cited Board of Trade v. Olsen as rejecting the "contention that it must take evidence to determine whether facts or conditions, upon which the exercise of constitutional power depended, actually existed." 177 F. Supp. at 662. The Court expressly recognized that "[a]n effective argument can be made from the testimony presented [to Congress] favoring continued trading in onions futures that this legislation is unwarranted and untrue. But these matters were also before Congress; and, Congress, having weighed these factors, has reasonably concluded that a complete prohibition of onions futures is socially and economically desirable. It is not for this Court to avert a legislative announcement of general economic policy on the grounds that it might consider it untrue." 177 F. Supp. at 666. See also Chicago Mercantile Exchange v. Tiekken, 178 F.Supp. 779 (N.D. Ill. 1959) (onion trading ban constitutional).

45 Hieronymus, Economics of Futures Trading 324 (1977).
There are unreasonable speculation and price fluctuations, etc., and the government must have total, complete, and plenary control over the markets.64

The industry—thus far—has been successful in not permitting that to happen.

The disturbing thing is that the populist perception, which ran through the twenties and is best evidenced by my quotations from Senator Capper, still persists. There is a constant danger that this perception will precipitate disastrous legislation.

In the 1974 Senate hearings, for example, a Minnesota farmer appeared before the Senate Agriculture Committee and talked about what he called the “price-marketing structures, known as the commodity exchanges.” They were “foisted on farmers,” had their “inception” in Chicago, and were later given the approval of Congress under the Future Trading Act. “It is my belief,” he continued in Capperlike understatement, “that there has been nothing in the history of the nation that has perpetrated a greater injustice on a segment of our society, other than war and slavery, than this price-marketing structure.”65

That was in 1974. I should add that the 1974 Senate report solemnly restated all of section 3 as being the fundamental premise from which all this great public-interest regulation flows.66 So the populist perception does live on.

Most recently—1980—we have had Senator Proxmire’s contribution to economic enlightenment—S.2704, 96th Congress, 2nd Session, “To amend the Federal Reserve Act to authorize the Board of Governors of the Federal Reserve System to establish margin requirements for transactions in financial instruments.” (By definition, gold, silver, and interest rate futures are included.) Be it enacted by Congress Assembled, etc., that “To prevent excessive speculation with substantial adverse impact on the Nation’s banking system, credit markets, or economy, the Board of Governors shall prescribe regulations. . . .” Some 17 pages flow from that—page after page of regulatory license.67

So the ghosts of Tincher and Capper still haunt the halls of Congress. The sort of declaration you find in Mr. Proxmire’s recent bill—about “excessive

64 Hearings Before the Subcommittee on Domestic Marketing & Consumer Relations of the House Agriculture Committee on H.R. 11788, 89th Cong., 2d Sess. 21 (1966) (testimony of G.L. Mehren). Courts also take the words of section 3 at face value:

“Congress has recognized that excessive speculation and manipulation in commodity transactions obstruct and burden interstate commerce and has enacted preventive legislation known as the Commodity Exchange Act.”

Miller v. N. Y. Produce Exx., 550 F.2d 762 (2d Cir. 1977). See also, e.g., U.S. v. Grady, 225 F.2d 410, 413 (7th Cir. 1955); Moore v. Chicago Mercantile Exchange (and companion case), 90 F.2d 735, 740 (7th Cir. 1937), cert. denied, 302 U.S. 710 (1937), rehearing denied, 302 U.S. 744 (1937); Nelson v. Secretary of Agriculture, 133 F.2d 453, 455 (1943).


speculation"—could become law. It has become law—the Commodity Exchange Act.

To the many economists in the audience, I can only say that you must keep up the good work. Do not necessarily expect our officials in that city on the hill to listen to you, however. You might fare better in Ottawa, as the economists did in the case of the Board of Trade v. Olsen.

There are some pluses, of course. Times have changed; perceptions are improving somewhat. The message has gotten across to some. In fact, in 1973, when Representative Poage introduced the bill which eventually became the Commodity Futures Trading Commission Act, he prefaced his remarks with a virtual panoply in praise of speculation. It was an appropriate and accurate discussion of the true role of speculation—although not nearly as marvelous as Dr. Hieronymus’s “speculation-is-a-thing-of-beauty” speech delivered to members of Congress some years earlier.

And even such a modern-day populist as George McGovern could declare, as he did in 1974 during Senate hearings on the CFTC Act: “Futures trading in a wide range of commodities—agricultural and nonagricultural—is vital to the economic well-being of our Nation.”

So there clearly is an improvement. The most responsible members of Congress responsible for futures regulation generally accept speculation as at least amoral. The markets now have a far broader constituency, as new types of futures are developed, and that helps you in Congress. And as of this last Tuesday, November 4, 1980, it appears that what we call liberalism—but what Mr. Ellis, I think, would have called populism—has lost some of its most vocal proponents, in Congress at least. Last, but not least, I am told that Senator Jesse Helms will be Chairman of the Senate Agriculture Committee for the next CFTC reauthorization.

So there are some obvious pluses. But let us not forget in our current state of euphoria that the Grain Futures Act—now called the Commodity Exchange Act—was the product of a Republican Congress, actually written by a Republican administration, and blessed by a Republican Chief Justice.

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69 Hearings Before the Subcommittee on Domestic Marketing and Consumer Relations of the House Agriculture Committee on H.R. 17788, 89th Cong., 2d Sess. 145-46 (1966) (testimony of T.A. Hieronymus). Assistant Secretary of Agriculture George Mehron restated the following year: “Speculation may not be evil, but neither is it a thing of beauty and a joy forever as one academician last year testified.” Hearings Before the House Agriculture Committee on H.R. 11930 and H.R. 12317, 90th Cong., 1st Sess. 42 (1967).
71 As G.O. Virtue observed in 1923: “In spite of the fact that the present administration went into office on a pledge of ‘less government in business and more business in government,’ it has given its assent to legislation that carries the government into business in two important fields. . . . Reference is made to the livestock business [the Packers and Stockyards Act of 1921] . . . and the grain business done through the grain exchanges at the great terminal markets [the Grain Futures Act of 1922].” G.O. Virtue, “Legislation for the Farmers: Packers and Grain Exchanges,” 37 Quar. J. of Econ. 687 (1923).
that note, I do thank you for indulging me in this history lesson. May we not be condemned to relive it.

Larry Hunt: I thought you might want to clarify one point for some of the economists in the audience. When Justice Taft declined to question the findings of facts made by the Congress in upholding the Grain Futures Act of 1922, and did not really take a very careful look at the affidavits, he was, in fact, acting according to established jurisprudence. The important issue is to present to the elected representatives an accepted body of economic thought about how economics works in this area. Once Congress makes findings of fact in the preamble or a part of the legislation, it is generally not susceptible to a successful challenge in the courts.

John Stassen: Well, that’s certainly the law now. It has certainly been the law since the Grain Futures Act was declared constitutional. At that time, members of the opposition seriously thought there would be a chance to bring the economic issues before a trial court and build a record as to whether the Congress’s economic declarations were right or wrong. They thought this, based upon their perception of the case law of that time which is radically changed now.¹

Larry is absolutely right. Courts do not second-guess Congress when it makes declarations of fact. In 1922, they thought the courts might, and there were dissenters in Olsen. Justices McReynolds and Sutherland did dissent to the Chief Justice’s opinion, I assume, after having looked at the facts themselves. That was the approach of those two justices. I think the Board of Trade people would have hoped that the Chief Justice would be true to his colors and do the same, but I guess he was sent adrift in a wave of progressivism. From modern perceptions, of course, it appears inconceivable that anyone could ever have thought the Commodity Exchange Act was unconstitutional, or that Congress would ever find it necessary to make such ridiculous declarations in order to obtain Supreme Court approval.

Congress does not have to do that now. In 1936 it just prohibited options by saying: “We prohibit options.” They did not make any declarations in the statute vis-à-vis options, though they had held hearings on the issue.

As Larry observed, Congress has to be your forum. I think this is clear from the little historical excursion we just embarked upon. And again, the really fundamental questions were never carefully analyzed. One should never assume that because something says so in the statute, it is so or has any basis in fact. This is the lesson to be learned from this.

Statutes have an Alice-in-Wonderland flavor. It is true with the law generally, and it is also true with Washington generally. The law is what Washington says it is, basically; and they can construe words any way they fancy. If commodities can be defined as including everything but onions—and I recall there is a statute on the books where livestock is defined to include honeybees—it is clear that our legislators enjoy playing word games with us—word games that affect many people and the economy as well.

Tom Hieronymus: How do economists get heard—not in the legislature because that’s extraordinarily difficult—but how do they get heard in the courts? Very specifically, on that Sunday afternoon in March 1979—

John Stassen: You were heard, sir!

Tom Hieronymus: I heard the judge explain the long, tedious part of the decision why he could consider this matter. He went so far as to say he could not challenge the wisdom, etc. of the government in these sophisticated matters, etc. Now you seem to be saying that the courts simply cannot challenge the expertise of the government.

¹ See particularly notes 60 and 62 of the Stassen paper, supra.
John Stassen: The principle is that the courts show great deference to the regulator. After all, Congress has created an “expert agency” to be staffed by “experts,” and the courts only occasionally are involved in commodity-related issues. Thus, the principle of the law is that courts defer, unless there is an abundance of evidence to suggest that the regulator is absolutely crazy. In the case you are referring to—the March wheat case—the Board of Trade put forth an affirmative case on economic terms. Dr. Hieronymus did a superb job in explaining markets to a federal district judge, and I commend his testimony to you. It was very informative and most eloquent.

The Commission at that point decided to rely upon an untested principle of law and refused to put any evidence forward. It was one of those cases where the judge had no alternative. All he had to rely on was the CFTC’s bare assertion. Every federal district judge, when pushed, will refuse to rely on bare assertions. You have to give the judge something to hang his hat on. But they didn’t give Judge Grady anything.

Later on, however, the United States Court of Appeals turned around and said: “Dr. Hieronymus, you should not have been in that courtroom. All the other people—trade witnesses, experts, etc.—should not have been there. The Court should not have even listened to you, because Congress in its wisdom has vested that expert agency with sole, unbridled, plenary, unreviewable power to close the markets.” That is what the case law says now.²

Tom Hieronymus: Are you telling me that the courts are not in a position to intercede?

John Stassen: I would say that the courts are in a position to hear Dr. Hieronymus and act accordingly on virtually every issue involving an action of the CFTC, with the exception of an emergency action. I cannot think of another instance where the court would say it is not reviewable. Dealing with congressional findings is one thing, but the courts historically do review administrative actions. There are all kinds of principles of deference that have been constructed, of course. It is largely result-oriented. The courts’ canons of interpretation are such that if a judge wants to decide what the agency can do, he can. It depends on which way the judge wants to go. And then the court throws up these smoke screens, either way.

I would say that the only instance where no judge is going to listen to you—at least in the Seventh Circuit here in Chicago—is in the area of emergencies. But I’m sure when we have the next emergency declaration and you are testifying in, say, Washington, Dr. Hieronymus, the court might listen. It is not over yet.

² See Board of Trade v. CFTC, 605 F. 2d 1016 (7th Cir. 1979), cert. denied, 446 U.S. 928 (1980). See also Comm. Fut. L. Rep. (CCH), ¶ 20,780 (N.D. Ill. 1979).
Research on Speculation Seminar Report

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