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Franklin Savings v. Office of Thrift Supervision: A Case of Judicial Interpretation Creating a Due Process Dragon

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Franklin Savings v. Office of Thrift Supervision: A Case of Judicial Interpretation Creating a Due Process Dragon

I. INTRODUCTION

The recent savings and loan (S&L) crisis has brought to light many interesting and important issues concerning the interpretation and application of remedial statutes. Congress and the Judiciary have attempted to act swiftly and carefully to remedy the mistakes of the past. Some new mistakes are being made, however, in the rush to put this problem behind us. This note will look at one such mistake: an interpretation of the "upon the merits" language found in section 1464(d)(2)(E) of the Home Owner's Loan Act (HOLA), as amended by the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The history of the S&L crisis will be briefly outlined, and then particular attention will be given to the case of *Franklin Savings Ass'n. v. Director of Office of Thrift Supervision*[1]. The district court and Tenth Circuit Court of Appeals decisions in *Franklin* will be analyzed, as well as decisions by other courts interpreting the same "upon the merits" language. A final analysis of what Congress meant by "upon the merits" will then be made.

A. History and Background of S&L Fiasco

By the late 1980s, the savings and loan crisis was a part of the daily vocabulary of nearly every American. This crisis did not spring up overnight, however. Indeed, it had a rather long and eventful history, a history spanning decades.[2] The bottom-line cause of the crisis was the inability of savings and loans to make a profit when the interest rates they were charging on long term mortgages fell short of the average cost of funds to the institution.[3]

In an attempt to help the endangered savings and loan industry, Congress passed the Garn-St. Germain Depository

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1. 742 F. Supp. 1089 (D. Kan. 1990), *rev'd*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

2. For an extended look at the history of the Savings and Loan Crisis, see Carl Felsenfeld, *The Savings and Loan Crisis*, 59 FORDHAM L. REVIEW S7 (May 1991).

3. *Id.*

Institutions Act of 1982,[4] allowing S&L's to "explore new areas, both on the liability and asset sides."[5] Such exploration frequently proved dangerous and catastrophic. Interest rates rose, the real estate market fell, and the S&Ls used their newly given powers less-than-wisely. These factors, combined with regulators exercising their now-taboo forbearance,[6] created a disaster with an actual cost that could exceed one trillion dollars.[7]

In response to the S&L crisis, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).[8] Among the purposes for FIRREA were the following:

> To curtail investments and other activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds.
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> . . . .
>
> To put the Federal deposit insurance funds on a sound financial footing.
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> . . . .
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> To strengthen the enforcement powers of Federal regulators of depository institutions.
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> . . . .
>
> [and]
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> To strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.[9]

FIRREA disposed of the Federal Savings and Loan Insurance Corporation (FSLIC)[10] and created both the Office of Thrift Supervision (OTS), which is under the supervision of the Secretary of the Treasury,[11] and the Resolution

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4. Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended at 12 U.S.C. § 226 (1988)).

5. Felsenfeld, *supra* note 2, at S23.

6. *Id.* at S28. Forbearance is a policy previously used by the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation that enabled struggling thrifts to remain open.

7. G. Christian Hill, *A Never Ending Story: An Introduction to the S&L Symposium*, STAN. L. & POL'Y REV. 21, 24. (Spring 1990). Given the delays currently being experienced in Resolution Trust Corporation funding and the resulting claimed daily loss of two million dollars, the total cost could be even higher.

8. Pub. L. No. 101-73, 103 Stat. 183 (codified at 12 U.S.C. § 1811 (1989)).

9. *Id.* at 103 Stat. 187.

10. *FIRREA*, Pub. L. No. 101-73 §703(a), 103 Stat. 415 (1989).

11. 12 U.S.C. § 1462a (Supp. 1992).

Trust Corporation, (RTC),[12] a temporary agency, with scheduled termination on December 31, 1996.[13]

One of the responsibilities of the OTS is to serve as the "teeth" of FIRREA. The OTS has the obligation and authority to place a non-compliant institution into conservatorship,[14] thereby severing the rights of the former owners and directors of the institution.[15] This power, although essential to the proper regulation of the S&L industry, is nonetheless potentially destructive without sufficient limitations. Enter Franklin Savings.

II. STORY OF FRANKLIN SAVINGS

A. *Facts*

Franklin Savings was a century-old savings and loan institution, with principal offices in Ottawa, Kansas.[16] With approximately nine billion dollars in assets, it had achieved very high ratings for overall safety and soundness.[17] It invested primarily in securities guaranteed by the federal government and developed a balanced portfolio in order to minimize the impact of interest rate fluctuations.[18]

Franklin was solvent, profitable, and compliant with all capital requirements imposed by FIRREA.[19] However, due to accounting write-downs imposed by the OTS,[20] the Director of the OTS saw fit to appoint the RTC as conservator of Franklin Savings on February 15, 1990.[21] The seizure was premised on the finding that the Association was "in

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12. *Id.* § 1441a(b)(1)(A).
13. *Id.* § 1441a(o)(1).
14. *Id.* § 1464(d)(2)(A).
15. *Id.* § 1464(d)(2)(E). The effect of the appointment of a conservator is much more than the mere loss of control to the directors. It has been estimated that when a bank is closed, the value of its assets drops from 10% to 15%. William Seidman, *The Facts About the FDIC*, WALL ST. J., June 5, 1991, at A12.
16. *Franklin*, 742 F. Supp. at 1099. For an in-depth review of the proceedings from an insider's point of view, see Ernest M. Fleischer, *Back off Feds*, BUS. L. TODAY, May/June 1992, at 28.
17. Franklin Savings Association and Franklin Savings Corporation's Petition for Writ of Certiorari, p.4.; *Franklin*, 742 F. Supp. at 1104.
18. *Franklin*, 742 F. Supp. at 1099.
19. *Id.* at 1110.
20. Write-downs are accounting tools used by the OTS when it feels an institution has overstated its assets. The district court found that these write-downs were imposed "arbitrarily and capriciously." *Id.*
21. *Id.* at 1099.

an unsafe and unsound condition to transact business."[22]

As provided for by statute,[23] Franklin responded within 30 days of the seizure with an action in district court seeking removal of the conservator.[24] The Director of OTS then submitted a copy of the "designated record" to the district court and to Franklin.[25] The "designated record" consisted solely of material selected by the OTS for submission.[26] No opportunity was given to Franklin to participate in the compilation of this information, or to challenge the record's contents.

B. Trial Court Decision

In its analysis of the case, the Kansas District Court first determined the appropriate standard of review. The district court, finding no guidance in the statute with respect to the proper standard of review, looked to the Administrative Procedures Act[27] for direction. The standard of review found appropriate under that act required agency action to be set aside only if the action was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law' or if the action failed to meet constitutional, statutory, or procedural requirements."[28]

The court placed the burden of proof on Franklin Savings as the party attacking the agency action,[29] and then proceeded to determine the scope of evidence to be considered. The OTS consistently argued that the only evidence which could be considered was the administrative record

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22. *Id.* at 1106. The trial court found it significant that the same FHLBB-Topeka staff which was involved in Franklin Savings was highly criticized for its prior handling of the Silverado Savings and Loan, and were "informed by Chairman Danny Wall that their jobs were in jeopardy if their performance did not improve." *Id.*

23. 12 U.S.C. § 1464(d)(2)(E)(Supp. 1992).

24. It may be noted that the judge assigned to the case, Judge Dale E. Saffels, was once president of the Federal Home Loan Bank of Topeka, Kansas, and therefore had a good deal of knowledge concerning bank operations and regulation.

25. *Franklin*, 742 F. Supp. at 1096, 1098.

26. *Id.* The district court noted specific documents missing from the "designated record," including correspondence from Franklin responding to OTS allegations, and notes from meetings between Franklin and OTS.

27. 5 U.S.C. § 706 (1977).

28. *Franklin*, 742 F. Supp. at 1095 (citing the Administrative Procedures Act, 5 U.S.C. § 706(2)(A),(B),(C),(D) (1977)).

29. *Id.* at 1096.

which it had prepared and filed with the court.[30] In contrast, Franklin argued that the court should consider evidence outside of this record in determining the appropriateness of OTS actions.[31]

The court received evidence outside of the administrative record, and took the question under advisement. The court found that evidence outside of the administrative record was appropriate for consideration. In support of this position, the court cited FIRREA's mandate that the court review the agency action "upon the merits."[32] The district court found that courts were divided on the correct interpretation of the "upon the merits" language. Some courts hold that the phrase only allows for a review of the administrative record.[33] In contrast, others hold that de novo review is appropriate,[34] while still others hold that a hybrid was required with the arbitrary and capricious standard applied to an expanded evidence base consisting of more than the administrative record.[35]

The district court found the expanded evidence base approach more correct, stating that:

> To allow the government to seize control of plaintiffs' business and assets in an ex parte nature without a previous adversarial hearing would deny plaintiffs any meaningful opportunity to present their position. The court finds that to allow this sort of seizure of property without at least allowing plaintiffs a post-seizure opportunity to present evidence supporting their case in opposition of the conservatorship, would definitely raise serious constitutional due process concerns.[36]

The court then chose to interpret the language of

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30. *Id.*
31. *Id.*
32. 12 U.S.C. § 1464(d)(2)(E) (Supp. 1992).
33. *Franklin*, 742 F. Supp. at 1096 (citing Woods v. Federal Home Loan Bank Bd., 826 F.2d 1400, 1406-07 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir.1986)).
34. *Id.* at 1096 (citing Fidelity Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 540 F. Supp. 1374, 1377 (N.D. Cal. 1982); Telegraph Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp., 564 F. Supp. 862, 869-70 (N.D. Ill. 1981)).
35. *Id.* (citing Collie v. Federal Home Loan Bank Bd., 642 F. Supp. 1147, 1150-52 (N.D. Ill. 1986)).
36. *Id.* at 1097.

FIRREA so as to allow it to withstand such a constitutional due process attack. It found that the ex parte seizure procedure was required "in light of the necessity that the regulator must act quickly and decisively in reorganizing, operating and dissolving failed institutions."[37] It found, however, that this procedure could only withstand constitutional challenge if the "upon the merits" language was interpreted to allow post-seizure presentation of evidence by the institution.[38]

The district court further buttressed its position by citing a Ninth Circuit Court of Appeals decision defining the administrative record as follows:

> [The Administrative record is] . . . not necessarily those documents that the *agency* has compiled and submitted as the "administrative record." The whole administrative record, therefore, consists of all documents and materials directly or indirectly considered by the agency decision-makers and includes evidence contrary to the agency's position.[39]

The district court also held that evidence outside of the administrative record was necessary to understand the technical nature of the case,[40] and to aid in the interpretation of regulations.[41] It concluded that the administrative record supplied by the OTS was a "selective compilation", and did not contain all documents and materials considered by the OTS in making their decision to appoint a conservator.[42]

The district court, after considering all of the evidence presented, found that the OTS regulators involved "appeared to lack adequate training and understanding to evaluate the nature of Franklin's operation."[43] The court held that "no statutory ground for the imposition of a conservatorship existed and . . . [that] the OTS's action in imposing the RTC as conservator lacked any basis in fact and was arbi-

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37. *Id.* (citation omitted).
38. *Id.*
39. *Id.* at 1097-98 (emphasis added) (quoting Thompson v. United States Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989)).
40. *Id.* at 1098.
41. *Id.*
42. *Id.*
43. *Id.* at 1106.

trary and capricious . . . ."[44]

C. Tenth Circuit Decision

The United States Court of Appeals for the Tenth Circuit disregarded the experienced and well-reasoned analysis of the trial court judge and reversed. It found that FIRREA granted extremely broad powers to the director of the OTS including the power to appoint a conservator "if, in his [the director's] opinion, a statutory ground for the appointment exists."[45] The court of appeals, quoting Webster's dictionary, stated that an opinion was "a belief held with confidence, not substantiated by direct proof or knowledge."[46] It went on to find that Congress intended to give the director broad powers to act on opinion and expertise. According to the court, Congress wanted to prevent potential losses to taxpayers by giving the OTS the power of swift and responsive action against mismanaged savings institutions.[47] Such discretion, according to the court, mandates a limited scope of review.[48]

This review, according to the Tenth Circuit, was limited to the administrative record alone.[49] The court decided that evidence outside the administrative record could be considered only in specific instances, such as where the record fails to disclose the factors relied upon by the agency,[50] where background information is necessary for a determination of whether the agency considered all relevant factors,[51] or where necessary to explain technical terms.[52]

This discretion allows the Director of the Office of Thrift Supervision powers heretofore forbidden any government agent. It allows the director to take government action on little more than a whim, requiring no knowledge or

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44. *Id.* at 1127.

45. Franklin Sav. Ass'n. v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1136-7 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

46. *Id.* at 1137 (citing Webster's II, New Riverside University Dictionary (1988)).

47. *Id.*

48. *Id.*

49. *Id.* at 1138.

50. *Id.* at 1137 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)).

51. *Id.* (citing Thompson v. United States Dep't of Labor, 885 F.2d 551 (9th Cir. 1989)).

52. *Id.* (citing Animal Defense Council v. Hodel, 867 F.2d 1244 (9th Cir. 1989)).

direct proof, but merely a "belief held with confidence".[53] Due process requires more.

The Tenth Circuit went on to find that the administrative record was sufficiently voluminous to enable a meaningful review of the agency's actions. It found that the trial court erred in its determination that the record was incomplete, and found that even if it were, the "appropriate remedy for this defect would have been for the trial court to call for any missing documents or require Director to testify or provide further explanation."[54] The court of appeals held further that a district court should confine its review to the information before the director at the time he decides to appoint a conservator, and that the director has an obligation to produce for the district court only the information "that he relied upon in making his decision."[55]

The court looked to decisions in the United States Court of Appeals for the Fifth[56] and Eighth[57] Circuits, which concluded that the "upon the merits" language does not set a standard of review, and that the de novo standard is inappropriate in these cases.[58]

The Fifth Circuit came to this conclusion after finding that "the absence of pre-deprivation process heightens the need for post-deprivation procedures . . . ,"[59] and that while the private interests involved were important, they were "subordinate to those of the government."[60] The Fifth Circuit reasoned that the arbitrary and capricious standard, as applied to the administrative record alone, was sufficient post-deprivation process to meet due process requirements. Such review comes dangerously close to allowing the director unfettered discretion and removing any semblance of due

53. *Id.* (citing Webster's II, New Riverside University Dictionary (1988)).
54. *Id.* at 1139.
55. *Id.* at 1140.
56. Woods v. Federal Home Loan Bank Bd., 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).
57. Guaranty Sav. & Loan Ass'n. v. Federal Home Loan Bank Bd., 794 F.2d 1339 (8th Cir. 1986).
58. *Woods*, 826 F.2d at 1406; *Guaranty*, 794 F.2d at 1342. *Franklin*, however, does not argue that a de novo review is appropriate. Indeed, the district court in *Franklin* also held that the arbitrary and capricious standard was appropriate. *Franklin*, 742 F. Supp. at 1095. It merely found that this standard should be applied to more than one side of the case. *Id.*
59. *Woods*, 826 F.2d at 1411.
60. *Id.*

process.

The Tenth Circuit found that the district court in *Franklin* had erred in improperly expanding the scope of its review.[61] The Tenth Circuit went on, however, to agree with the arbitrary and capricious standard of review used by the district court.[62] The court then followed the Fifth Circuit ruling and applied the arbitrary and capricious standard to the limited administrative record, and upheld the OTS' appointment of a conservator. The Tenth Circuit's factual findings, utilizing the administrative record alone, were in strong contrast to those of the district court which relied on a great deal of testimony and outside evidence.[63]

The Tenth Circuit ignored Franklin's challenge to the deprivation of meaningful post-deprivation process, finding that the "availability of this post-deprivation hearing precludes any due process violations."[64] A hearing examining only one side of the record seems to be sufficiently meaningful for the Tenth Circuit's due process analysis.

D. Petition for Writ

In response to the Tenth Circuit decision, Franklin Savings filed a petition for a writ of certiorari in the Supreme Court. This petition was denied.[65] Due to the constitutional implications, the issues raised by this petition merit review and analysis.

III. JUDICIAL INTERPRETATION

A. "Upon the Merits"

The issue of what constitutes a review "upon the merits" in examining OTS seizure decisions under 12 U.S.C. § 1464(d)(2)(E) (Supp. 1992) can be addressed through an analysis of both prior case law and statutory construction.

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61. Franklin Savings Ass'n. v. Director of Office of Thrift Supervision, 742 F. Supp. 1089, 1140 (D. Kan. 1990), *rev'd*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).
62. *Id.* at 1127.
63. *Franklin*, 742 F. Supp. at 1099-1124; *Franklin*, 934 F.2d at 1143-1149.
64. *Franklin*, 934 F.2d at 1140.
65. 112 S. Ct. 1475 (1992).

1. Lower court cases

Several courts have addressed the "upon the merits" issue. The first, *Collie v. Federal Home Loan Bank Board*,[66] was relied upon by the lower court in *Franklin*. In *Collie*, suit was brought against the Federal Home Loan Bank Board under a statute substantially identical to the one in question in *Franklin*. The court addressed the "upon the merits" language and reached the following conclusion:

> First, [upon the merits] means that the court should be satisfied that the association has had a meaningful opportunity to make a case in opposition to the appointment of a receiver at some point during the process leading to the appointment. If it has not, then the court should provide that opportunity. If it has, however, the court need not offer another.
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> Secondly, the Board should be able to show a reasonable factual basis for its action.[67]

In another case, *Marietta Franklin Sec. Co. v. Muldoon*,[68] the court applied the arbitrary and capricious standard of review, and took a middle ground approach to the expansiveness of the evidence to be heard. It decided that "upon the merits" required something between a full evidentiary hearing and a mere perusal of the administrative record.[69] Accordingly, it allowed the parties to supplement the administrative record "to the extent that said supplementation would augment or clarify the Administrative Record to reflect evidence the Director had before him at the time of making his decision."[70]

The *Marietta* court specifically rejected the same Supreme Court precedents used by the Tenth Circuit to overturn the *Franklin* decision.[71] The *Marietta* court reasoned that those Supreme Court precedents do not establish the rule that a review "upon the merits" means a review of the

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66. 642 F. Supp. 1147 (N.D. Ill. 1986).
67. *Id.* at 1152.
68. 770 F. Supp. 1212 (S.D. Ohio 1991).
69. *Id.* at 1220-21.
70. *Id.* at 1221.
71. Woods v. Federal Home Loan Bank Bd., 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Guaranty Sav. & Loan Ass'n. v. Federal Home Loan Bank Bd., 794 F.2d 1339 (8th Cir. 1986).

administrative record as submitted by the agency and that alone. They simply state that a de novo review is improper in cases where a court is reviewing S&L seizures.[72] In voicing a plea for uniformity, the *Marietta* court stated:

> It has also become readily apparent that a uniform resolution is needed for these statutory sections. To the extent that this Country continues to face more and more failed savings associations, more and more challenges to the appointment of receivers, or conservators will be maintained . . . . To have such a range of disagreement as to what standard should be applied in reviewing the record is unproductive. The review accorded a saving association's challenge to the appointment of a receiver or conservator should be uniform and consistent. The review afforded the challenging association should not be predicated upon where the association happens to be located or where they happen to bring suit.[73]

Another case, brought in the District Court for the District of Columbia, the alternative statutory venue for § 1462(d)(2)(E) actions, reached a similar conclusion. In *Lincoln Savings & Loan Ass'n. v. Wall*,[74] the court applied the usual arbitrary and capricious standard of review, but also stated that "the Fifth Amendment of the Constitution and the statutory language 'upon the merits' require the reviewing Court to undertake a level of inquiry beyond a simple review of the administrative record."[75] The court then proceeded to an evidentiary hearing lasting some twenty-nine days.[76] A similar conclusion was reached previously in the same district,[77] and in other district courts.[78]

Relying heavily on the Tenth Circuit's decision in *Franklin*, another D.C. district court later found that the "upon the merits" language limits the scope of review to the administrative record. The court found that the "upon the

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72. *Marietta*, 770 F. Supp. at 1221-22.
73. *Id.* at 1221 n.8.
74. 743 F. Supp. 901 (D.D.C. 1990).
75. *Id.* at 904 n.3.
76. *Id.*
77. Haralson v. Federal Home Loan Bank Bd., 721 F. Supp. 1344 (D.D.C. 1989).
78. *See* San Marino Sav. & Loan Ass'n. v. Washington Fed. Sav., 605 F. Supp. 502 (C.D. Cal. 1984); Washington Fed. Sav. & Loan Ass'n. v. Federal Home Loan Bank Bd., 526 F. Supp. 343 (N.D. Ohio 1981).

merits" language "merely means that the district court's decision to either dismiss the action or remove the appointed receiver should be based upon the merits of the action (i.e. whether statutory grounds for a receiver exist) rather than on procedural or policy oriented grounds."[79] This analysis rewrites the statute so that it reads "upon the record" instead of "upon the merits." The clear meaning of the statutory scheme is written out of the text.

In order to avoid this misinterpretation, some courts have gone to the other extreme and interpreted the "upon the merits" language as requiring de novo review. In *Telegraph Savings & Loan Ass'n. v. Federal Savings & Loan Ins. Corp.*,[80] the court stated: "In defining our proceeding as one 'upon the merits' rather than one 'on the record,' the statute seems to require not an appellate-type proceeding but rather an exercise of this court's de novo jurisdiction."[81] The court went on to state that "providing an association with anything less than an adversarial hearing in the wake of an ex parte seizure offends the principles of due process."[82]

Similarly, in *Fidelity Savings and Loan v. Federal Home Loan Bank Board*,[83] the court found that the phrase "upon the merits" "necessarily implies that the court's power to review the FHLBB's determination is not bound by the normal limitations applicable to an administrative review of an agency's previous adjudication."[84] The court continued, "If it means nothing more, the term 'upon the merits' reveals that a proceeding under this statute is more in the nature of a de novo review than an appellate review."[85]

2. *Statutory construction*

The rules of statutory construction also lead to a con-

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79. Gibraltar Sav. v. Ryan, 772 F. Supp. 1290, 1293 (D.D.C. 1991) (citing Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986)).

80. 564 F. Supp. 862 (N.D. Ill. 1981), *aff'd sub. nom.* Telegraph Sav. & Loan Ass'n v. Schilling, 703 F.2d 1019 (7th Cir. 1983).

81. *Id.* at 869.

82. *Id.*

83. 540 F. Supp. 1374 (N.D. Cal.), *rev'd on other grounds*, 689 F.2d 803 (9th Cir. 1982).

84. *Id.* at 1377.

85. *Id.*

clusion that Congress intended review "upon the merits" to mean something other than "on the record." First, the Supreme Court has held that whenever possible, statutes should be construed to avoid constitutional problems.[86] Allowing "upon the merits" to take on a meaning which fails to provide closed savings institutions with an opportunity for a meaningful hearing, either prior to or subsequent to the deprivation, leads to serious due process difficulties.[87]

In addition, when Congress intends a review "on the record," it traditionally indicates that intention "either expressly or by use of a term like 'substantial evidence,' which has 'become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court.'"[88] In this case, Congress chose terms which, on their face, indicate more than a review of the record alone. The term "upon the merits" indicates a judicial inquiry into the merits of the entire case, not a superficial glance at one side of the case.

When Congress intends merely a review of the record, rather than additional fact-finding, it generally gives jurisdiction to a federal circuit court rather than to a federal district court.[89] In fact, it did so in another area of FIRREA. When a holding company appeals an action taken under 12 U.S.C. § 1467a(j), such review takes place in the court of appeals, and the review is "on the record".[90] That Congress knew how to provide for review "on the record" and chose not to should go far to show its intent in using the "upon the merits" language.

Furthermore, allowing the review to go beyond the record does not hinder the Congressional intent that the ap-

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86. *See* Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1989); Ellis v. Brotherhood of Ry., 466 U.S. 435 (1984).

87. Franklin Savings Ass'n. v. Director of Office of Thrift Supervision, 742 F. Supp. 1089, 1126-27 (D. Kan. 1990), *rev'd*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1475 (1992).

88. Chandler v. Roudebush, 425 U.S. 840, 862 n.37 (1976) (quoting United States v. Carlo Bianchi & Co., 373 U.S. 709, 715 (1963)).

89. *See* McNary v. Haitian Refugee Ctr., Inc., 111 S. Ct. 888 (1991); Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985); Washington Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 526 F. Supp. 343 (N.D. Ohio 1981).

90. 12 U.S.C. § 1467a(j) (Supp. 1992); Administrative Procedures Act, 5 U.S.C. § 554(a) (1977).

pointment of a conservator be swift and immediate,[91] since such review takes place while the conservator, not the prior administration, is operating the institution.

By granting jurisdiction to the district court, and by specifying a review "upon the merits", Congress clearly indicated an intent that judicial review under § 1646(d)(2)(E) be something more than "on the record". The Tenth Circuit has not followed this intent, and since the Supreme Court has declined to hear the case, Congress must once again clarify its intent.

B. The "Designated Record"

The Tenth Circuit also found that "[w]hile the director has an obligation to produce for judicial review a designated administrative record, such record does not have to be needlessly elaborate, nor as detailed as the district court here required."[92] The court reasoned that the Director need submit only "sufficient data to allow the reviewing court to determine whether the director had a rational basis for the appointment decision."[93]

This analysis is clearly contrary to prior Supreme Court precedent. In fact, the Supreme Court has stated that review of the administrative record "is to be based on the full administrative record that was before the secretary at the time he made his decision."[94] The Supreme Court has further held that "the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence . . . ."[95] The record to be considered is the "whole record,"[96] and not merely evidence "which in and of itself justified [such action], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn . . . ."[97]

The Ninth Circuit has followed this line of reasoning and held that "[t]he whole administrative record, however,

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91. *See Franklin*, 742 F. Supp. at 1097; *Franklin*, 934 F.2d at 1137.
92. *Franklin*, 934 F.2d at 1139.
93. *Id.*
94. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).
95. *Id.*
96. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). *See also* Administrative Procedures Act, 5 U.S.C. § 706 (1977) ("In making the foregoing determinations, the court shall review the *whole record* . . . .") (emphasis added).
97. *Universal Camera*, 340 U.S. at 487.

'is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record . . . . The 'whole' administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position.'"[98] Other circuits have also followed this line of reasoning,[99] which the Tenth Circuit seems to have avoided, thus allowing the OTS to provide a one-sided basis for reviewing any conservatorship appointment. The Tenth Circuit has created a due process dragon that Congress did not intend to create.

IV. IMPLICATIONS OF THE ISSUES

The scope and importance of these issues cannot be overemphasized. They affect not only the savings and loan industry, but also the entire banking industry, since there are corresponding provisions affecting commercial banks.[100] Although the banking industry has not experienced conservatorship to the same extent that the savings and loan industry has, there are indications that this may change in the near future.[101] Accordingly, an interpretation of the "upon the merits" language of the savings and loan provisions would be persuasive in application to banking regulations as well.

V. CONCLUSION

It is clear that Congress intended "upon the merits" to mean something other than "on the record." It is also clear that there is a serious lack of uniformity among the courts as to the scope of a review "upon the merits." The Tenth

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98. Thompson v. United States Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted) (quoting Exxon Corp. v. United States Dep't of Energy, 91 F.R.D. 26, 32-33 (N.D. Tex. 1981)).

99. *See, e.g.*, Public Power Council v. Johnson, 674 F.2d 791 (9th Cir. 1982); Dopico v. Goldschmidt, 687 F.2d 644 (2d Cir. 1982); Natural Resources Defense Council, Inc. v. Train, 519 F.2d 287 (D.C. Cir. 1975); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973).

100. Administrative Procedures Act, 5 U.S.C. § 554(a) (1977); 12 U.S.C. § 1821 (1988).

101. *See* Neil Barsky & Kenneth H. Bacon, *FDIC Rejects Two Bids for Crossland, Puts Up $1.2 Billion of Its Own Capital*, WALL ST. J., Jan. 27, 1992, at A5.

Circuit's decision in *Franklin* imposes a serious deprivation without any opportunity for a meaningful hearing. The increased number of thrift and bank closures and threatened future closures magnifies the importance of a proper resolution to these issues.

Without Supreme Court review, the solution to the Judiciary's obvious misinterpretation of the "upon the merits" language is simple. Congress should amend the statute to more clearly define the phrase and clarify their intent. This will allow failed savings and loans their constitutionally guaranteed right to adequately present evidence in their defense.

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