

SUBJECT: Petition For Writ of Certiorari  
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22-6689

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

No. (Clerk To Supply)

ANDREW JAMES JOHNSTON,

Petitioner,

v.

UNITED STATES,

Respondent.

Originating Case Information: U.S. Court of Appeals, Seventh Circuit, Appeal No. 22-1558

PETITION FOR WRIT OF CERTIORARI

Date: 01/23/23

Andrew Johnston

Mr. Andrew James Johnston  
Prisoner ID No. 22712424  
U.S. Penitentiary  
P.O. Box 24550  
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QUESTION PRESENTED

Are the separation of powers violated by the sweeping construction of FDIC insurance as a substantive jurisdictional element in eight federal courts of appeals in opposition to another federal court of appeals precedent?

JURISDICTION

The jurisdiction of the district court was founded upon 18 U.S.C. Section 3231. The jurisdiction of the court of appeals was founded upon 28 U.S.C. Section 1291. The jurisdiction of this Court is founded upon 28 U.S.C. Section 1254(1) and the following particulars:

Date of USCA Order: November 10, 2022;

Date of Rehearing En Banc Order: January 12, 2023.

TABLE OF AUTHORITIES

ORGANIC

RECEIVED

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OFFICE OF THE CLERK  
SUPREME COURT, U.S.

U.S. Constitution, Separation of Powers

CASES

United States v. Brunson, 907 F.2d 117, 119 (CA10 1990)

United States v. Davis, 735 F.3d 194, 199-201 (CA5 2013)

United States v. Harris, 108 F.3d 1107, 1109 (CA9 1997)

United States v. Kluver, 2000 U.S. App. LEXIS 29302 (CA8 2000)

United States v. Mojica-Baez, 229 F.3d 292, 299 (CA1 2000)

United States v. Peay, 972 F.2d 71, 75 (CA4 1992)

United States v. Robinson, 389 F.3d 582, 594 (CA6 2004)

United States v. Sliker, 751 F.2d 477, 484 (CA2 1984)

United States v. Spinello, 265 F.3d 150, 158 (CA3 2001)

United States v. Watts, 256 F.3d 630, 634 (CA7 2001)

West Virginia v. EPA, 142 S. Ct. 2587 (2022)

STATUTES

5 U.S.C. Section 552, et seq.

18 U.S.C. Section 2113, et seq.

18 U.S.C. Section 3231

OTHER

Federal Rule of Criminal Procedure 33(b)(2)

Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 583 (1984)

STATEMENT OF THE FACTS/CASE

On December 8, 2021, the Federal Deposit Insurance Corporation (FDIC) issued a written statement in response to petitioner's request under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, et seq., stating it did not provide insurance coverage for "theft, robbery or embezzlement" of the Byline Bank. See, Appendix-A, Page 2, *Id.*

On or about March 15, 2022, petitioner filed a motion for a new trial, Case No. 1:17-cr-517, R. 424, based on the FDIC's December 8, 2021 written statement. On March 29, 2022, the district court denied that motion. See, Appendix-B, *Id.* On November 10, 2022, the court of appeals affirmed the district court's order. See, Appendix-C.

Petitioner's petition to recall the mandate was granted, and the petition for rehearing en banc asking the full court of appeals to overrule United States v. Watts, 256 F.3d 630, 634 (CA7 2001) was filed on December 28, 2022. On January 12, 2023, the court of appeals denied rehearing en banc. See, Appendix-D. This petition follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Under Watts, *supra*, *Id.* at 633-634, the construction of the FDIC insurance element in 18 U.S.C. Section 2113 is sweeping, if not limitless. As a result, several non-federal acts have been federalized, instead of being prosecuted locally under available State laws.

The First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth circuits have upheld the overbroad construction of FDIC insurance set out in Watts, *supra*. However, the Fifth, United States v. Davis, 735 F.3d 194, 199-201 (CA5 2013), and Tenth, United States v. Brunson, 907 F.2d 117, 119 (CA10 1990), circuits have required a much higher standard.

Particularly, the Fifth Circuit has maintained the highest standard of all the courts of appeals for determining whether there is sufficient evidence beyond a reasonable doubt of FDIC insurance. *Davis, supra*, *Id.* at 199-201. The Fifth circuit's approach comports with the notion that Congress did not enact FDIC insurance as an all-expansive jurisdictional drag net.

Indeed, if Congress didn't want a rigorous standard to determine federal jurisdiction based on FDIC insured status, it could have omitted the element entirely and incorporated 18 U.S.C. Section 3231, but it didn't do that. Instead, eight out of ten courts of appeals have done that for Congress without Congress's approval in violation of the separation of powers.

The principles of separation of powers prohibit judicial activism and rogue regulatory agencies. See, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) and Strauss, *The Place of Agencies In Government: Separation of Powers And the Fourth Branch*, 84 Colum. L. Rev. 573, 583 (1984). Those principles should apply equally in the FDIC insurance context.

If petitioner's case originated in the Fifth Circuit, his conviction would have been reversed based on the insufficient evidence of FDIC insurance presented at trial, in combination with the December 8, 2021 newly discovered written statement from the FDIC that would have caused reasonable doubt among jurors.

Accordingly, this Court should grant certiorari and hold the Fifth circuit's standard is controlling, and reverse the Seventh Circuit's November 10, 2022 order affirming the district court's March 29, 2022 order denying a new trial.

#### CONCLUSION

Wherefore petitioner prays the Court grants issuance of a writ of certiorari for the foregoing reasons.

Respectfully Submitted,

x  Date: 01/23/23

Mr. Andrew James Johnston