

SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Discussion in Case: **SEC v. Jarkesy**

Docket Number: 22-859

Date Argued: 11/29/23

JUSTICE GORSUCH: So, Mr. Fletcher, with respect to your argument that Congress can move something from courts into agencies and the Seventh Amendment doesn't speak to that because it's not a suit, I think Noel Webster described a suit as any action or process for the recovery of a right or a claim before any tribunal, which would seem to be a problem. That's a pretty contemporaneous definition. And then Justice Brennan in *Granfinanciera* I think addressed your argument pretty squarely when he said Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action and placing jurisdiction in an administrative agency. Thoughts?

MR. FLETCHER: Yeah. So I -- I guess I think that's still inconsistent with what the Court has said in *Granfinanciera*.

JUSTICE GORSUCH: I just quoted from *Granfinanciera*.

MR. FLETCHER: I -- I'm sorry. I -- I misspoke. I don't think that's what the Court held in *Granfinanciera*. It's inconsistent with what the Court said.

JUSTICE GORSUCH: Are you saying I misread it, Mr. Fletcher?

MR. FLETCHER: No, Justice Gorsuch. I'm saying --

JUSTICE GORSUCH: You said -- you said that that's a purely taxonomic change.

MR. FLETCHER: Yes.

JUSTICE GORSUCH: And that that's not enough to render it no longer a suit for purposes of the Seventh Amendment, right?

MR. FLETCHER: Yes. I think, in context, *Granfinanciera* is talking about a proceeding that was in a bankruptcy court in the Article III setting. I think the Court's subsequent cases, including *Oil States*, have *Heritage Reporting Corporation* said, if you're permissibly in an Article III tribunal, then the Seventh Amendment doesn't have independent work to do. I apologize for misidentifying the case I was relying on.

JUSTICE GORSUCH: All right. But it -- it would seem strange. And we don't usually say the government can avoid a constitutional mandate merely by relabeling or moving things around. It's -- it's as much a violation to do something indirectly as it is directly we usually say, right?

Maxim: Maxim of Law 4b. He who does a thing by another is considered as doing it himself [i.e., the acts of an agent are the acts of the principal.] Broom, Max. 817, 818, et seq.; A Collection Maxims of Law by Charles A. Weisman

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Maxim: "Judicial notice is a form of evidence."

Mann v Mann, 172 P. 2d 369, 375, 76 Cal. App. 2d 32.