

### **Rakoff Clip 3 Transcript**

TODD RAKOFF: All right. The holding of the case, if you want to see what Ben just said in the opinion, on page 390, the last sentence of the paragraph that begins just below the middle of the page. And the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. So Kareem, you're closest to the microphone. Ben seems content with that. Are you content with that?

STUDENT: I am also, I think.

TODD RAKOFF: Well then, if we turn the page to 392, we get one of the great dissents in the Supreme Court report. I mean, if nothing else this is terrific writing. So Jackson and Frankfurter go on.

Now, let's just remember, Jackson and Frankfurter are core New Dealers. The core people who think that government power should be used to regulate exactly people like Public Utility Holding Company, right. So this isn't just a bunch of conservative eyewash. This is people who actually believe in this stuff. So what do they have to say?

STUDENT: Well, I think Justice Jackson in the dissent is saying that he's especially frustrated with how much deference the majority gives to the agency. He thinks it's kind of absurd that the agency gets to make the determination.

TODD RAKOFF: The determination, let's be clear, it's the determination as to the procedure.

STUDENT: Right. And then the court must only hold the agency to the procedure that they determined.

TODD RAKOFF: And that seems to Jackson to be the absence of law.

STUDENT: Right.

TODD RAKOFF: Well, aren't we in favor of the law?

STUDENT: We are. But then again, you can go back to the argument that Congress didn't necessarily set out anything different from this procedure.

TODD RAKOFF: Congress gave them both powers, the power to hear cases and the power to decide rules, that's right. That's right. They wouldn't be in this position if they didn't have both. But Jackson says-- this is on 393, middle of the last paragraph-- that this is administrative authoritarianism. That the power to decide without law is what the court is approving. Well as I say, he knows how to write. But is he correct? Hannah.

STUDENT: I guess my opinion would turn on--

TODD RAKOFF: Wait, you can't have an opinion until you have a microphone.

[LAUGHTER]

STUDENT: I guess my opinion partially turns on whether the rule that is created by the SEC subsequently has precedential effect or not. So does the rule only apply in this specific instance. That if they wanted it to apply broadly would they have to go back and go through a more formal proceeding?

TODD RAKOFF: No.

STUDENT: --or now this is rule.

TODD RAKOFF: No. Case law like this would operate similarly to a common law precedent. It will be the governing precedent the next time the issue comes up. Of course, precedents are sometimes overturned. And precedents are sometimes distinguished. But it would be the governing precedent.

STUDENT: Then I would say I'm not OK with that.