THE THIRD BRANCH:
The Supreme Court of the United States (SCOTUS)
Week 4

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Fall 2023, Jefferson County Library

Themes:

- **Taking on the Administrative State**:
  - Attacking the Chevron deference:
    - ***Loper Bright Enterprises v. Raimondo***
    - ***Relentless, Inc. v. Department of Commerce***
  - Agency Funding:
    - ***Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited***
  - Agency Power: Does administrative SEC enforcement require a jury trial?
    - ***Securities and Exchange Commission v. Jarkesy***
- **The Trump Effect**
  - ***Vidal v. Elster***, "Trump too Small" trademark registration application
  - ***Lindke v. Freed, O'connor-Ratcliff v. Garnier:*** public officials blocking the public on social media
  - ***NRA v. Vullo,*** public officials telling the public to not deal with the NRA

Themes:

- **Social Media Regulation**
  - ***Murthy v. Missouri*:** Administration talking to social media companies about content moderation.
  - ***Moody v. Netchoice LLC, Netchoice, LLC v. Paxton***: do states' content moderation restrictions pass 1st amendment free speech muster?
- **And More!**
- ***Muldrow v. City of St. Louis***: Does Title VII employment discrimination require a showing of harm (significant disadvantage)?
- ***Acheson Hotels, LLC v. Laufer***: How do you obtain standing in an Americans with Disabilities Act case?
- ***Alexander v. South Carolina State Conference of the NAACP:*** Racial v. political gerrymandering.
- ***Devillier v. Texas:*** is the 5th amendment takings clause self executing?

Taking on the Administrative State

- **The Chevron Deference!** No, it's not a bad Robert Ludlum novel…
  - *Chevron, USA Inc. v. Natural Resources Defense Council, Inc.* established a two-step method for review of Federal agency interpretations of US statutes:
    - 1. Is Congress intent clear from ordinary construction of the statute? If yes, you're done, if not:
    - 2. If the statute is silent or ambiguous wrt the issue at hand, a court should defer to the agency's interpretation **if it is reasonable**.
  - Two cases are in front of the court this term attacking this deference to agency interpretations of US law. The Chevron deference has long been criticized as giving too much power to the agencies.
  - Some commentators seem to feel that the Court is poised to overrule the deference.

Taking on the Administrative State

- **The Chevron Deference** (working title, *'The Agency Supremacy!'*)
  - ***Loper Bright Enterprises v. Raimondo***
    - The Magnuson–Stevens Fishery Conservation and Management Act says that the National Marine Fisheries Service may require fishing vessels to "carry" federal monitors on board to enforce the agency's regulations.
    - The Service starts making the *industry* pay for the monitors, sometimes to the tune of $700/day for the monitor. It's a lot of herring to pay for that monitor.
    - Loper, a family herring business, sues in Federal District Court, which finds that the MSA **unambiguously** provides for **industry-funded** monitoring of the herring fishery, and thus concluded its analysis at **the first step** of Chevron.
    - Loper goes to the DC Circuit Court of Appeals which affirmed the district court. But, the Circuit Court finds that the act was ***not completely unambiguous*** about industry-funded monitoring of the herring fishery. Instead, they go to the second step of *Chevron*, stating that the Service ***reasonably interpreted*** the act when it came to what the Court called "silence on the issue of cost of at-sea monitoring."

Taking on the Administrative State

- **The Chevron Deference** (Final title, *'The Supreme Ultimatum!'*)
  - ***Loper Bright Enterprises v. Raimondo***

    Arguments against Chevron:

    - Violates Art. III because the courts are not (under Chevron) saying what the law means;
    - Violates Art. I because it delegates legislative power to the agencies;
    - Violates Due Process because it biases the court in favor of one party in the litigation from the start;
    - Violates the APA because the APA requires courts to decide all relevant questions of law and thus the courts should interpret statutes 'de novo.'
    - Not a workable rule because courts often disagree on what is ambiguous and what is not.

Taking on the Administrative State

- **The Chevron Deference** (Final title, *'The Supreme Ultimatum!'*)
  - ***Loper Bright Enterprises v. Raimondo***

    Arguments for Chevron:

    - *Stare decisis* (more Latin!)
    - Not unconstitutional; major question doctrine is a backstop to agency overreach;
    - Ok w/ APA because Court only defers to the agency after independently deciding that Congress has not clearly resolved the issue.
    - Not really any adverse consequences; the Chevron deference no more difficult to apply than other comparable standards.

Taking on the Administrative State

- **The Chevron Deference** (Final title, *'The Supreme Ultimatum!'*)
  - ***Loper Bright Enterprises v. Raimondo***
    - Predicted to be a close case at the Supreme Court.
    - The vote counting questions where Roberts will go, where Kavanaugh will go. Kavanaugh is said to favor a rule that agency deference should only apply when there is no one 'best' reading of the statute. Commentators suggest that there will always be a 'best' interpretation to a court, which is different than 'reasonable,' and thus this rule would effectively overrule Chevron.
  - ***Relentless, Inc. v. Department of Commerce***
    - This case was added but has essentially the same facts and issues. So if *Loper* will decide the issues anyway, why add it?
    - Justice Jackson was on the original Circuit Court panel in Loper, and had recused herself at the Supreme Court (even though not taking part in the decision). This case allows her participation apparently.

Taking on the Administrative State

- **The Chevron Deference** (Final title, '*The Supreme Ultimatum!*')
  - *Loper* was backed by the anti-regulatory Koch network, which has ties to Justice Thomas as shown by ProPublica reporting. That led to calls for Thomas to recuse himself from Loper Bright, which he hasn't done.
  - The *Relentless* case was also brought by a Koch-backed firm, so the fact that it became the lead case on the Chevron precedent doesn't eliminate that issue.
  - *Relentless* and *Loper Bright* will be argued in tandem during the January session.

Taking on the Administrative State

- **Agency Funding: *Consumer Financial Protection Bureau (CFPB) v. Community Financial Services Association of America, Limited (CFSA)***
  - The basic issue here is whether the statute providing funding to the Consumer Financial Protection Bureau, 12 U.S.C. § 5497, violates the appropriations clause in Article I, Section 9 of the Constitution.
  - As you may recall, Congress created the CFPB in the wake of the 2008 financial crisis, giving it the power to enforce a range of federal consumer finance laws. To help ensure the agency's independence from political control, the CFPB receives its funding from the Federal Reserve, which is in turn funded through the fees that it charges for the services that it provides.
  - As you can see, that does not prevent attempts to defund or outright kill the agency.

Taking on the Administrative State

12 USC s. 5497:

(a)Transfer of funds from Board Of Governors

(1)In general

Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors ***shall transfer to the Bureau*** *from the combined earnings of the Federal Reserve System,* ***the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law****, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).*

(2)Funding cap

(A)In general

Notwithstanding paragraph (1), … the amount that shall be transferred to the Bureau in each fiscal year ***shall not exceed a fixed percentage*** *of the total operating expenses of the Federal Reserve System … equal to—(i)10 percent of such expenses in fiscal year 2011; (ii)11 percent of such expenses in fiscal year 2012; an (iii)****12 percent of such expenses in fiscal year 2013, and in each year thereafter.***

Taking on the Administrative State

- **Article I of the US Constitution, appropriations clause:**

  Section 9, Clause 7:

  No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Taking on the Administrative State

- **Agency Funding: *Consumer Financial Protection Bureau (CFPB) v. Community Financial Services Association of America, Limited (CFSA)***

  So what is CFSA's argument here:

  1. While the appropriations clause requires congress to set the amount of funding, the statute allows the CFPB to *self-determine* the amount of funding it needs each year only subject to an 'illusory' cap.

  2. Congress gave up its appropriations power without any *temporal* limit, which changes the baseline amount under which the President must negotiate with Congress for appropriations.

  3. The funding is available to carry out any part of CFPB's authority, which includes core executive functions like rulemaking etc.

  4. This combination of features is unique and has no historical counterpart.

Taking on the Administrative State

- **Agency Funding: *Consumer Financial Protection Bureau (CFPB) v. Community Financial Services Association of America, Limited (CFSA)***

  The Government's Response:

  1. The appropriations clause does not have a *dollar amount* requirement. And even if there were, the cap would meet that requirement.

  2. The appropriations clause also does not restrict Congress' authority to choose the duration of appropriations (in this case, in effect until it changes the law).

  3. The appropriations clause does not draw any distinctions between agencies exercising core executive powers and those that do not.

  4. This combination of features is in fact similar to the Federal Reserve Board, the Office of the Comptroller of the Currency, and the FDIC.

Taking on the Administrative State

- **Agency Funding: *Consumer Financial Protection Bureau (CFPB) v. Community Financial Services Association of America, Limited (CFSA)***
  - Commentators believe that the Court is likely to have an aversion to the independence Congress gave the CFPB.
  - But they also believe that the arguments above will be a difficult case to make, esp. with respect to the 'illusory' cap and distinctions with other agencies.
  - Oral argument was held right at the beginning of the term. Scotusblog (Amy Howe) reports that it may be difficult to get to five votes, as Kavanaugh and Barrett were both skeptical of CFSA's arguments.

Taking on the Administrative State

- **Agency Power: Does administrative SEC enforcement require a jury trial?**
  - ***Securities and Exchange Commission v. Jarkesy***
    - The SEC act authorizes the SEC to adjudicate claims of securities fraud and impose *civil* penalties for violations. Is this a violation of a person's 7th Amendment right to a jury trial?

'In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'

- The 5th Circuit said that the ***public rights doctrine***, covering matters between the federal government and persons subject to its authority, which otherwise authorizes the SEC adjudication, is not applicable: SEC actions resemble common law actions for fraud, and jury trials would not dismantle the statutory scheme.
- Commentators' prediction: a majority in favor of the SEC.

The Trump Effect

Vidal v. Elster, "Trump too Small" trademark registration application

- Elster applied for registration of the trademark "**TRUMP TOO SMALL**". The US PTO refused, stating that the use of the word "TRUMP" in the mark requires his permission.
- The CAFC reversed the US PTO; the application of the law to Elster's mark restricted his speech in violation of the First Amendment. The content-based restriction contained within the Lanham Act would typically trigger either intermediate or strict scrutiny. Absent an important or compelling state interest in privacy or the public interest, it does not meet the high bar set by these standards of judicial review.
- Sotomayor emphasized the limited effect of the Lanham Act. The only question here is whether Elster can register the mark. Even though the PTO has refused to register it, he remains free to use the mark, and well might obtain an exclusive right to use the mark under common-law doctrines enforceable under state law.
- Nils' bold prediction: 9-0 reversing the CAFC.

The Trump Effect

Lindke v. Freed, O'Connor-Ratcliff v. Garnier: public officials blocking the public on social media

- These two cases present similar fact patterns and issues.
- In both, public employees (city manager, school board members) **blocked** members of the public from their personal social media accounts because the members of the public had left critical comments on their social media pages.
- The members of the public argue that even though these are personal social media pages, they were used in a way so as to constitute ***state action***.
- But at the circuit level, Lindke lost at the 6th (Freed not performing actual or apparent duty of his office or invoking state authority) but Garnier won at the 9th (O'Connor-Ratcliff identified themselves as public officials and communicated about their official duties to the public).

The Trump Effect

Lindke v. Freed, O'Connor-Ratcliff v. Garnier: public officials blocking the public on social media

- Oral argument on both was held on Halloween, and many different tests balancing the interests were discussed. Scotusblog has a nice summary which you can find here: https://www.scotusblog.com/2023/10/justices-weigh-rules-for-when-public-officials-can-block-critics-on-social-media/
- Justice Elena Kagan pressed one lawyer about the implications of his proposed rule that the test is whether the account is used to exercise any duties of the office. 'Would that mean that former President Donald Trump could not be held liable for violating the First Amendment when he blocked his critics on X, formerly known as Twitter?' Note, in 2021, the Supreme Court threw out a lower-court ruling against the former president in a lawsuit brought by several people whom he had blocked.
- Kagan noted that Trump appeared to be "doing … a lot of government on his Twitter account," sometimes "announcing policies." Trump's Twitter account, Kagan said, "was an important part of how he wielded his authority. **And to cut a citizen off from that is to cut a citizen off from part of the way that government works**."

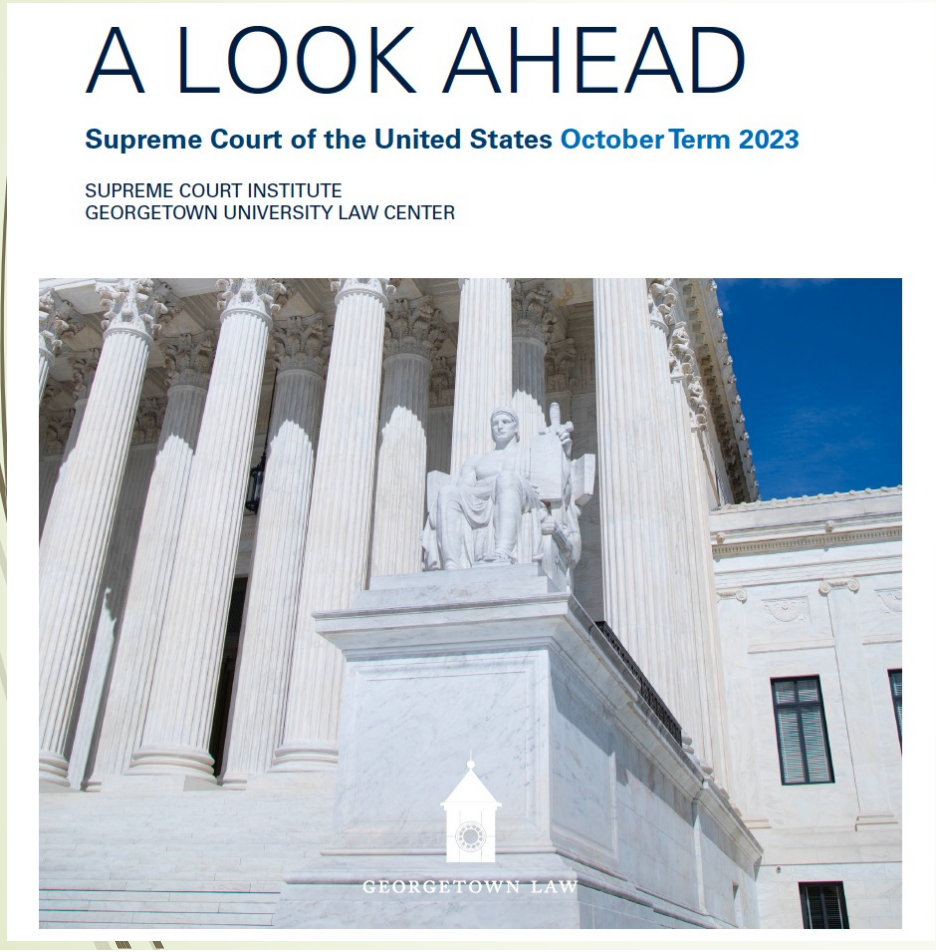
Social Media Regulation

- ***Murthy v. Missouri*:** Administration talking to social media companies about content moderation.
  - Epidemiologists, consumer and human rights advocates, academics, and media operators claim that federal agencies and officials engaged in censorship, targeting conservative-leaning speech on topics such as the 2020 presidential election, COVID-19 origins, mask and vaccine efficacy, and election integrity. The plaintiffs argue that the defendants used public statements and threats of regulatory action to induce social media platforms to suppress content, thereby violating the plaintiffs' First Amendment rights. The States of Missouri and Louisiana also alleged harm due to the infringement of the free speech rights of their citizens.
  - Question: Did the federal government's request that private social media companies take steps to prevent the dissemination of purported misinformation transform those companies' content-moderation decisions into state action and thus violate users' First Amendment rights?
- ***Moody v. Netchoice LLC, Netchoice, LLC v. Paxton***: do *states'* content moderation restrictions pass 1st amendment free speech muster?

And More!

- ***Muldrow v. City of St. Louis***: Does Title VII employment discrimination require a showing of harm (significant disadvantage)?
  - The plaintiff could apparently show sex discrimination without actual harm to her career an unwanted transfer.
- ***Acheson Hotels, LLC v. Laufer***: How do you obtain standing in an Americans with Disabilities Act case? A self proclaimed 'tester' visits hotel sites to see if they follow the ADA Reservation Rule. Is this sufficient for standing when she had no intention to book a room?
- ***Alexander v. South Carolina State Conference of the NAACP:*** Racial v. political gerrymandering; 14th amendment claim, apparently not under the voting rights act.
- ***Devillier v. Texas:*** is the 5th amendment takings clause self executing, or was executing legislating required?

PREVIEW – OT 2023



Each year, the Supreme Court Institute at Georgetown University Law Center publishes this preview report, **available in PDF format on the Jefferson County Library Website's SCOTUS class calendar page for November. 9.**

At the time of publication, the Court had accepted 22 cases for review. Another 20 have since been added. Information about all cases is available at https://www.scotusblog.com

2nd AMENDMENT - GUN CONTROL

United States v. Rahimi (argued Tuesday)

2nd AMENDMENT:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

TIMELINE:

- **2019** – Zackey Rahimi of Arlington, TX, was found **guilty of domestic assault** against his girlfriend and a **restraining order** was issued against him, **barring him from possessing a gun**. He was warned that **violation** of the order **would be a federal felony**.
- **2020-21** – Rahimi was again arrested for a series of violent incidents. Police searched his home and **found a rifle and a pistol**, leading to **his indictment for violating federal law** 18 U.S.C., Sec 922(g)(8).

2nd AMENDMENT - GUN CONTROL
United States v. Rahimi (cont.)

TIMELINE (cont.):

- **~2021** – Rahimi **challenged the federal statute as a violation of the 2nd Amendment.** When the District court denied the challenge, Rahimi **pleaded guilty** and was sentenced to 6+ years in prison plus 3 years of supervised release. However, he **reserved his right to challenge.**
- **~2021** – 5th Circuit upheld the conviction, citing *District of Columbia v.* ***Heller*** (2008), which **affirmed the right of *"law-abiding, responsible citizens"* to possess a handgun in the home for self-defense, while casting no doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.**

2nd AMENDMENT - GUN CONTROL
United States v. Rahimi (cont.)

- **2022 – In the meantime,** SCOTUS ruled 6:3 in *New York State Rifle v.* ***Bruen***, in which Thomas's opinion:
  - Affirmed *Heller* **but adding** ***"…the government must … justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."***
- **2022/23 – Citing *Bruen*, the 5th Circuit reversed itself**, finding the statute unconstitutional because the **government hadn't shown any analogous historical tradition. Biden administration appealed to SCOTUS.**

2nd AMENDMENT - GUN CONTROL
United States v. Rahimi (cont.)

RAHIMI'S ARGUMENTS:

- The 2nd Amendment's plain **text protects the right of "the people,"** not some subset such as "law-abiding, responsible citizens."
- Congress is addressing a general **societal problem that the framing generation addressed through different means**, such as divorce and criminal sanctions other than disarming the abuser.
- The government has **failed to identify any historical analogue** to the statute, as required by *Bruen*.

Thus, the tradition of **disarming dangerous persons should narrowly encompass only those who pose a danger to the public generally**, not those who threaten private violence.

2nd AMENDMENT - GUN CONTROL

United States v. Rahimi (cont.)

GOVERNMENT'S ARGUMENT:

- The line between protecting society generally and protecting identified individuals is a **false dichotomy**.
- **Crimes against individuals destroy the peace of the community**, and **armed domestic abusers** not only pose a threat to their partners, but also **endanger society generally**.

PANELIST'S PREDICTION:

*"It seems unlikely in the extreme that the **center block of conservatives** (Roberts, Kavanaugh, and Barrett) will sign on to a decision that says domestic abusers have a 2nd Amendment right to keep their guns to threaten and possibly kill their domestic partners because the Framers didn't care all that much about domestic abuse. **None of them has expressed a preference for originalism run amok.**"*

2nd AMENDMENT - GUN CONTROL

Garland v. Cargill - Accepted Friday

HISTORY:

- In the **2017 mass shooting** at a music festival in Las Vegas, the gunman used **semi-automatic rifles equipped with a bump-stock to kill 60 people and wound 500.**
- The Bureau of Alcohol, Tobacco, Firearms, and Explosives **(ATF)** issued a **new rule** concluding that **all bump stocks are machineguns (illegal under federal law)** and directing anyone who possessed one to **destroy it/turn it into to ATF or face federal penalties.**

MULTIPLE CHALLENGES ENSUED:

- **5th & 6th CIRCUITS** – **Overturned**, ruled that **bump stocks do not fit the federal definition of a machine gun**, and the **"rule of lenity" doctrine** instructs courts to **apply ambiguous criminal laws so as to favor the defendant**.
- **DC CIRCUIT** – **Upheld** the ban on bump stocks.
- **SCOTUS accepted 5th Circuit challenge.**

1st & 2nd AMENDMENT - GUN CONTROL & FREE SPEECH

NRA v. Vullo - Accepted Friday

RESPONDENT MARIA VULLO:

- Head of New York's Department of Financial Services
- After Parkland, FL, school shooting which killed 17 students & staff, Vullo urged banks and insurance companies that did business in NY to **consider the "reputational risks" of doing business with gun-rights groups like the NRA and encouraged cutting ties.**
- **NRA won in district court,** arguing that Vullo had violated its free speech rights.

2nd CIRCUIT – Overturned the lower court, concluding that **NRA had not shown that Vullo *"crossed the line between attempts to convince and attempts to coerce."***

BANKRUPTCY
Harrington v. Purdue Pharma

TIMELINE:

- **1996** – Purdue Pharma (owned by Sackler family) **released painkiller OxyContin**.
- **NEXT TWO DECADES** – Painkiller **generated >$35 billion** in revenue for Purdue Pharma while 250,000 people died from overdoses.
- **2004** – **Purdue's board** entered into an expansive Indemnity Agreement **protecting its directors and officers from financial liability**.
- **2007→ Sackler family** stepped away from board and **began selling/transferring $11 billion in assets overseas.**
- **2007 & 2020** – **Purdue twice pleaded guilty to federal criminal charges** of its marketing, and Purdue **faced thousands of civil suits**.
- **2019** – **Purdue filed for bankruptcy**, though NOT the Sacklers.

BANKRUPTCY

Harrington v. Purdue Pharma (cont.)

- **MAY 2023** – After much legal wrangling, the **2nd Circuit approved Purdue's proposed reorganization plan** to remake itself into a **nonprofit dedicated to addressing the problems** created by the opioid epidemic. The **Sacklers agreed to fund $4.5 billion** (later increased to $6 billion) **in exchange for release from all liability, which would enjoin all "shareholder claims" against the Sacklers.**
- **JULY, 2023 – Acting for the U.S. Trustee**, the division of the Department of Justice that oversees the administration of federal bankruptcy cases, **government appealed to SCOTUS and was granted a temporary stay**.

NOTE – The estate of Purdue is estimated at $1.8 billion

Claims against Purdue & Sacklers estimated > $40 trillion.

BANKRUPTCY
Harrington v. Purdue Pharma (cont.)

QUESTION – Does the Bankruptcy Code authorize a court to approve, as part of a plan of reorganization under Chapter 11, **a release that extinguishes claims without the claimants' consent?**

GOVERNMENT'S ARGUMENTS: Allowing the plan to stand:

- **offers the Sacklers broader relief than they would have obtained by declaring bankruptcy themselves,**
- **creates a back door that will allow the wealthy and powerful to evade liability** for wrongdoing without having to declare bankruptcy themselves, and
- **raises serious process questions** by releasing claims against Sacklers without claimants' input.

BANKRUPTCY
Harrington v. Purdue Pharma (cont.)

RESPONDENT'S ARGUMENTS: (includes Purdue, some victims & creditors)

- **The vast majority of the claimants approve** the plan as the only viable path to producing a mass settlement.
- Settlement offers billions of dollars in **relief that might not otherwise be available** (sheltered overseas by Sacklers).
- **Alternative is likely liquidation of Purdue.**
- Further litigation will only **delay needed payment.**

Case set for oral argument in December.

Thanks for your interest.

Hope to see you next October!