UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

MARTIN A. ARMSTRONG Appellant - v - Securities Exchange Commission Appellee	No: 09 - 1260

APPELLANT BRIEF ON APPEAL

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PO Box 2000
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Dated: September 22nd, 2010

Filed Pursuant to Houston v Lack, 487 US 266 (1988)

QUESTIONS PRESENTED

1) In light of Morrison v National Australia Bank, 561 US - (2010) overruling the Conduct & Effects test used to extend the application of the Securities Exchange Act to overseas transactions, and the fact that one may challenge collaterally the jurisdiction of any decision relied upon by a party to seek further enforcement, then is Armstrong entitle to have the judgments of securities fraud overturned when the record has conceded that there was no solicitation within the United States, and the alleged security is private transactions between two foreign corporations not involving any US listed securities on an American exchange?

2) Does Substantive Due Process and 15 USC §78u(d)(1) prohibit the filing of the same allegation AFTER a criminal case begins circumventing the Grand Jury and using equitable jurisdiction to gather evidence for a criminal prosecution by the SEC?

3) Since the SEC filed AFTER a criminal case began and stripped Armstrong of counsel even denying him in forma pauperis status granted by a parallel criminal court in light of a asset freeze and forcing Armstrong to then represent himself pro se giving the government a preview of his defense, deny him due process of law justifying dismissal of any judgment in light of the Sixth Amendment and the holdings of US v Wade, Massiah v US, and US v Gonzalez-Lopez?

4) Did the holding of Morrison rise to a constitutional violation under the Separation or Powers, Diversity Jurisdiction under Article III, and the Fair Warning doctrine of Due Process?

5) Did the failure to serve the corporate defendants deprive the judgment of any validity since there could have been no personal jurisdiction in violation of FRCvP 65(a)?

6) Does Morrison impact the Absolute Territorial Jurisdiction of all legislation rise to the problem of an Article III failure?

7) Did the failure to serve the corporations constitute an illegal taking of property under the Fifth Amendment thought the judicial process or directly by the executive?

8) Did the failure to serve the corporations constitute an illegal seizure under the Fourth Amendment?

9) Because the SEC invaded the parallel criminal prosecution retroactively disgorging counsel of choice, did the SEC by the MOA become part of the criminal prosecution by agent resulting in a improper use of SEC action?

10) Did the SEC engaging in a written contract with a court officer instructing him to withhold all evidence from Armstrong while imprisoning him deny him Brady v Maryland rights to produce all exculpatory evidence?

11) Did the MOA contract linking the receiver with the SEC and the criminal prosecution violate Article III when equity could never be used to assist the King's bench when equitable jurisdiction is confined to known practices as they stood in 1789, denying Armstrong a valid judgment and a fair trial?

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ISSUES PRESENTED

STATEMENT OF THE CASE

Upon discovering that employees of Republic New York Securities (RNYS) in Philadelphia were illegally trading the accounts of divisions of Princeton Economics International, Ltd. (PEI), chartered in Turks & Caicos, British West Indies, Armstrong turned to Richard Altman, Esq who sent an email to Dov Schlien President of Republic National Bank (RNB) on August 29th, 1999 giving them one week to return all missing funds or suit would be filed giving them until about September 2nd or 3rd, 1999 (Tr 4/10/07; p48-49; SDNY 99-Cr-997). By the end of that week, the FBI, SEC, and CFTC were all raiding the office in Princeton, New Jersey, Princeton Economic Institute, Inc ("Institute") that published research. PEI had partnerships in London, Tokyo, Hong Kong, and Australia operating independently employing more than 200 people outside the USA. Armstrong was NOT the sole shareholder nor was he a director or signator on the accounts of these franchise offices. From the outset, the shareholders of the PEI holding company were Armstrong's children ignored by the SEC, who coordinated filings with the US Attorney waiting for Armstrong to be taken into custody BEFORE filing to prevent his appearance at any TRO hearing, to deny Due Process of law.

> **AUSA BRIAN COAD:** ... it is true that Judge Owen is dealing with a case that is actually further along. It is the same case essentially, only in a civil context. The CFTC and the SEC filed actions against Mr. Armstrong for a TRO at the same time that Mr. Armstrong was arrested on the complaint in this case.
>
> (SDNY 99-Cr-997; Tr: 10/15/99, p4, L3-7)

The SEC and CFTC deliberately misled the court to obtain the TRO. They never bothered to serve the corporations depriving the court of ever obtaining Personal Jurisdiction in violation of FRCvP 65(a). Armstrong hired personal counsel but since PEI was not doing business in the USA nor employing anyone they had no US counsel. The alleged fraud concerned private notes issued by foreign corporations in Japan to Japanese corporations via a Japanese registered broker-dealer that PEI also had a 50% interest in, Cresvale, Ltd, that was purchased from a French bank with headquarters in Hong Kong. Each note by law had to be approved individually by the Japanese Ministry of Finance (MOF) and were either (1) a fixed rate note borrowing

Japanese yen and could NOT have involved any trading in the United States whatsoever, or were (2) issued to **PURCHASE** pre-existing portfolios of Japanese stocks that had declined in value substantially between 40-60%, and a note was issued at the original purchase price on an UNSECURED basis. This was acknowledged by the Government in the criminal complaint issued on September 13th, 1999 and again in response to a motion for Declaratory Judgment to establish the UNSECURED nature in 2006 (Exhibit B).

CRIMINAL COMPLAINT

> [5] c. Some of the notes are issued in the name of the purchasers and others are issued in the name of Cresvale-Tokyo as a nominee for the purchaser. Some of the notes pay fixed and others pay variable rates of interest. Although all of the documents I have reviewed to date indicate that the notes are unsecured, repayment of some of the notes are guaranteed by PEI.
>
> (Exhibit A)

Since the notes were UNSECURED, nothing was the property of a noteholder including the trading within the accounts. The Net Asset Value letters (NAV) were issued by RNYS and were to PEI, not noteholders, and were on file at RNYS and audited between 1995 and 1999. RNB try to claim they were "false" to escape liability telling the SEC that Armstrong conspired with their own staff to hide trading losses from the noteholders when no trading belong to them. These were notes not funds management. There were borrowing yen at fixed rates or buying portfolios. NO trading flowed to a noteholder. RNB cleverly used the SEC to seize PEI to prevent a law suit.

At the bail hearing in Trenton, New Jersey on September 13th, 1999, Armstrong was released on $5 million bond because it was pointed out (1) "There are no defaults. There are no complaints," and that AUSA Brian Coad admitted he had never bothered to contact any Japanese noteholder (Tr; 9/13/99, p15, L9-22). The SEC also informed the court "We haven't, in fact, been able to talk to the Japanese investors." (Tr; 9/13/99 SDNY TRO hearing, p11, L10-21). The Government merely relied on the allegation of RNB and ignored the recent ruling that UNSECURED assets cannot be frozen because only a jury can determin the title decided just 3 months before, Grupo Mexicano v Alliance Bond Fund, 527 US 308 (1999).

There is no question the SEC was duty bound to obey the law. They knew Grupo Mexicano prohibited precisely what they were doing. This is why they never served the corporations and moved to deprive Armstrong of counsel to ensure they could manipulate the Judiciary without opposition. This was made obvious when the SEC at the TRO hearing stated "We want the assets to be frozen with ... no money for attorney's fees." (Tr; 9/13/99, SDNY 99-Civ-9667 p24-25). The SEC prevented the corporation from hiring counsel or making an appearance since they cannot appear pro se. Because Armstrong moved for a Speedy Trial, the SEC invaded the parallel criminal case and retroactively disgorged counsel in that proceeding and separate counsel in the SEC case as the court acknowledged the lawyers "were hired to represent Martin Armstrong inidividually." SEC v PEI, 84 FSupp2d 443, 447 (SDNY 2000). Former counsel has provided an affidavit confirming they never represented to corporations (Ehibit D).

The SEC cleverly acted in violation of its own statutory authority since Congress did not and could not create equitable jurisdiction for the SEC that did not exist in 1789 as exercised in the case at bar. Congress authorized the SEC to gather evidence PRIOR to the filing of a criminal action and to "transmit" to the US Attorney only to "institute" a criminal action 15 USC §78u(d)(1). The SEC used a equity receiver to displace the Grand Jury because these were foreign corporations outside the jurisdiction of the Grand Jury. The receiver was used to usurp internal management of foreign corporations and eliminate the need for grand jury subpoenas. The SEC misled the court knowing the law that "the court of chancery has no power directly to affect property out of bounds of its jurisdiction." Booth v Clark, 58 US 322, 333 (1855). They also knew that ONLY a court of the sovereign who issued a corporate charter has any authority over the internal management of a corporation, Rogers v Guaranty Trust Co, 288 US 123, 130 (1933). What the SEC pulled off was no different than if a Japanese court claimed General Motors violated their law and installed a receiver to run General Motors from Japan. This is absurd. "No law has any effect ... beyond the limits of the sovereignty from which its authority is derived." Hilton v Guyot, 159 US 113, 163 (1895).

The SEC then entered a secret ex parte Memorandum of Agreement ("MOA") with the receiver instructing him to withhold all evidence gather from Armstrong §13(b) while giving it exclusively to the SEC, CFTC & US Atty (Exhibit C) This truly astonishing MOA violated Article III since a receiver is an officer of the court appointed under equity by the court and is no different had the SEC entered a secret ex parte agreement directly with the judge. Additionally, NEVER at common law could a equity receiver be used to circumvent the Grand Jury and feed evidence to the King's Bench for a criminal prosecution. Chancery never had such powers and equity receivers NEVER could feed evidence to a criminal prosecution, Blum v State of Maryland, 56 LRA 322, 94 Md 375, 51 A 26 (1902)(collecting English Cases). Having obtained a receiver, the SEC then had the receiver consent to their permanent injunction against PEI after preventing PEI from hiring counsel.

> HEYL [SEC COUNSEL]: Actually it is a permanent injunction with respect to the SEC, and it is to be consented to by Alan Cohen, as receiver...
>
> (SDNY 99-Civ-9667; Tr: 10/14/99, p9, L18-20)

The SEC and CFTC admitted that nothing took place within the United States. There was no solicitation within the United States, nor was there any listed American shares or securities involved.

> O'KEEFE [CFTC Counsel]: Our focus is silightly different. It focuses on the fact that futures trading is done in those accounts at Republic that you have heard about after the notes were solicited in Japan. So our focus us on what happened to the money after it got to the United States.
>
> (SDNY 99-Civ-9667: Tr; 10/14/99, p33, L6-14)

Likewise, the SEC tries to hang its case on Armstrong's plea. But Armstrong's plea was written by the Government with the SEC participation and it chose the words very carefully trying to dance between the rain drops. Since the solicitation was done by the Japanese broker-dealer in private meetings in Japan, there was no use of mails or wires by Armstrong and needed to claim it was Armstrong's agents.

> ARMSTRONG: Among the things that were represented to investors by my agents in Japan on my behalf and with my knowledge when the investments were solicited ....
>
> SDNY 99-Cr-997: Tr; 8/17/06, p20, L7-14)

The plea was written by the US Attorney, SEC, and CFTC denying Armstrong the right to plea in his own words. They all knew there was no crime yet crafted the plea to dance around the facts. Since they knew that there was no trading that flowed to a noteholder and that the accounts were proprietary not the property of noteholders, and were located in Philadelphia, not even New York, the plea was carefully crafted.

> **ARMSTRONG:** I did conduct trading in commodities futures contracts for the benefit of note holders **generally**. And I conducted that trading and commodity trading accounts **I opened and** which were maintained at Republic New York Securities **based** in New York City.
>
> (Tr; 8/17/07, p19-20)(99-Cr-997 SDNY)

The district court noticed the problem and asked what took place in New York since Armstrong merely stated RNB was based in New York.

> **THE COURT:** Some in Manhattan?
> **ARMSTRONG:** Pardon?
> **THE COURT:** Some in Manhattan?
> **ARMSTRONG:** Well, the exchange is in Manhattan, yes.
> **THE COURT:** Okay, fine. Go ahead.
>
> (SDNY 99-Cr-997; 8/17/06 p19-20)

The SEC knew nothing took place in the United States. No accounts belonged to a noteholder, and no trading belonged to a noteholder anymore than borrowing from a bank constructively transforms the borrower into a fund manager for the bank. To achieve this plea, the SEC engaged in deliberate coercion of an indicted defendant. To obtain the receivership and the receiver's consent to their injunction on behalf of PEI, they subpoenaed Armstrong to depositions in direct violation of FRCrP 15(e)(1) assuming they can operate post-indictment under a secret MOA (Exhibit C). The SEC insisted that court could take an adverse inference because Armstrong asserted his right to remain silent once indicted codified at 18 USC §3481 and secured by the Fifth Amendment given the ONLY authorized type of trial is adversarial, not inquisition. The district court listened to the SEC to support the injunction stating "I do draw an adverse inference from his refusal to testify." SEC v PEI, 73 FSupp2d 420, 423 (SDNY 1999). The SEC knew that was not the law and manipulated the court since the Supreme Court clearly stated that an adverse inference in a civil case is permitted only when

there are "[n]o criminal proceedings ... pending." Baxter v Palmigiano, 425 US 308, 317 (1976). The SEC knew that they could not compel depositions post-indictment, but they cared not and decided that to win at all costs was far more important than their duty as Americans to uphold the Constitution.

Armstrong was then thrown in prison for 7.5 years on civil contempt by the SEC for failure to comply with the very injunction that violated Baxter. They then relied on a pre-indictment case to claim Armstrong had no right to assert the Fifth Amendment privilege even though he was indicted, Braswell v US, 487 US 99 (1988). Yet, the corporations were not doing business in the United States and were foreign, which had previously been recognized as an exception, Application of Daniels, 140 FSupp 322, 327-8 (SDNY 1956). Moreover, 18 USC §3481 states that the right to absolute freedom from any post-indictment coercion applies to "all persons" that includes terrorists, but according to the SEC not corporate officers. Yet, the Framers of the the Constitution rejected trial by inquisition. Armstrong was now denied **Substantive Due Process.**

When it became clear that Armstrong had NOT stolen 10 cents and that RNB lied to the Government to escape liability, they struck a deal with RNB to return the missing money in exchange for ABSOLUTE IMMUNITY for the very directors of RNB who lied to the Government from the outset. On January 7th, 2002, RNB entered a criminal plea agreeing to make everyone whole by a Criminal Restitution of $606 million. If everyone was to be made whole, then there was no rational basis to keep Armstrong in prison on civil contempt to turnover assets for a possible future criminal restitution. The SEC then engaged in a verbal constructive amendment of the complaint and criminal indictment now claiming that there was another fraud BEFORE 1995 when PEI opened accounts at RNYS.

> RECEIVER ALAN COHEN: Losses that occurred in the Prudential period and at the period at Republic prior to the first false NA[V] letter are not embraced within the restitution by HSBC because obviously they weren't in the predisposition period, they weren't involved in it, and in the <u>period before the first false NA[V] there is no as description of criminal liability.</u>
>
> (99-Civ-9667 SDNY: Tr 1/7/02, p17, L1-4)

(Emphasis Added)

In the criminal case, Armstrong was superseded in 2004 with no such allegation of any fraud prior to 1995 before doing business with Republic. In 2005, the criminal prosecution admitted that there were no other victims whatsoever and the RNB, which had been bought out by Hong Kong Shanghai Bank Corporation (HSBC), had made all the alleged victims whole.

> ALEXANDER SOUTHWELL AUSA: So to be clear, in the event of a conviction, we will request, your Honor, that there be an order of contribution reimbursing ultimately HSBC, who basically made good and paid out these losses for whatever reasons that they did. They compensated the victims ... We frankly think that there is money available, which is part of the reason why Mr. Armstrong has been held in civil contempt.
>
> (99-Cr-997 SDNY; Tr: 6/24/05, p11-12)

Armstrong was falsely imprisoned on the pretense of civil contempt to compel the turnover of assets on an UNSECURED issue of notes for a POSSIBLE future criminal penalty of restitution. Once Congress codified restitution as a criminal penalty, it ceased to be an equitable remedy, Kelly v Robinson, 479 US 36, 53 (1986); US v Weichert, 836 F2d 769, 772 (2d Cir 1988). The SEC cannot change labels calling it disgorgement since the Supreme Court made it clear there was no separate disgorgement order at common law and thus "[s]uch an action [for disgorgement] is a remedy only for restitution - a more limited form of penalty than a civil fine." Tull v US, 481 US 412, 424 (1987). The SEC held Armstrong in prison for 5 years AFTER the restitution made all victims whole as alleged and at Sentence, Armstrong was given full credit for everything paid by RNB and thus Armstrong owed nothing in restitution. Because this was a criminal penalty of restitution, it was part of the criminal sentence over which the SEC had no standing to interfere. The denial of counsel rendered the entire proceedings simply reversible error without any showing of prejudice, US v Gonzalez-Lopez, 548 US 140 (2006).

The SEC knew what it was doing by falsely claiming there was anew fraud before 1995 without providing any complaint keeping Armstrong in prison until he would break. Since RNYS issued any NAV letters, not Armstrong, there could be no fraud before 1995 when the accounts were opened with RNYS since some unknown party would need to issue the NAVs.

The SEC had previously instructed the court that it was entitled to the injunction based upon their claims of fraud that did not stand in the end.

> **HEYL [SEC COUNSEL]:** So if you consider the misrepresentations about his track record, about the segregation of accounts, about the net asset value of the accounts and the disappearance of about $900 million, with only $350 million, it appears, are trading losses, and put this together with him taking the Fifth [Amendment Privilege post-indictment] you should find that the Commission has presented a well-documented case for the need for emergency relief.
>
> (SDNY 99-Civ-9667; Tr: 10/14/99, p32, L1-7)

The SEC obtained documents from MOF and translated them to English to make their allegations, yet Armstrong has never seen the originals, nor has he been told who did such translation. The SEC told Judge Kaplan, "we have based our analysis on this document we obtained from the Japanese through a translator." (SDNY 99-Civ-9667; Tr: 9/13/99, p11, L10-21). They misrepresented just about everything. They tried to claim that Armstrong promised to segregate the accounts, when no such promise was made. The only segreation was to run excess funds in securities to prevent the bank from lending out funds without notice in the REPO market. At the criminal plea, the Government also had Armstrong state.

> **ARMSTRONG:** ... my agents also told investors that their monies in those accounts would be separate and segregated from Republic's own accounts and would not be available to Republic for its own benefit.
>
> (SDNY 99-CR-997; Tr: 8/17/06, p20, L7-14)

None of the SEC allegation survived. There was no commingling, no solicitation for managed accounts, disappearing $900 million, false track record and no trading eliminating claims of a false track record. The notes were UNSECURED and no accounts belonged to a noteholder showing there was NEVER any such standing to have brought the complaint under Morrison v National Australia Bank, Ltd, 561 US - (2010). The SEC knew the US Attorney filed a Civil Asset Forfeiture 10 days before their filing and there could be no concurrent jurisdiction over the same assets, Republic National Bank v US, 506 US 80 (1992). Despite all of this, the SEC proceeded with no regard for law. (Exhibit E)

J U R I S D I C T I O N

This Court has jurisdiction on an appeal from an agency administrative order in this District of Columbia. Since the Second Circuit never adjudicates jurisdiction be it subject, personal, Article III or equitable, when the SEC relies upon a judgment by another court, it is fundamental that Armstrong may challenge that jurisdiction in any collateral proceeding, Ex Parte Nielsen, 131 US 176, 182 (1889). The SEC participated post-indictment is using equity to circumvent the Grand Jury violating Due Process and now seeks to rely upon its judgment irrespective of how it was obtained.

> "[For it is also] well settled that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings in the former are related upon and brought before the latter by a party claiming the benefit of such proceedings..."

Old Wayne Mutal Life Ass'n v McDonough, 204 US 8, 16 (1907)

Not even the "Full Faith and Credit" principle bars inquiry into the jurisdiction of the judgment being relied upon Thorman v Frame, 176 US 350, 356 (1900). "[W]e think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in collateral proceedings ..." Durfee v Duke, 375 US 106 (1963). The SEC has ignored its own jurisdiction under §10(b) and §30(b) knowing they do not extend to transactions between foreign corporations not involving any US listed securities and 15 USC §78u(d)(1) that restricted its jurisdiction to pre-indictment cooperation. The SEC ignores the lack of Personal Jurisdiction for it deliberately failed to serve the corporations to prevent an appearance or any defense. They assumed the jurisdiction to use equity to circumvent the Grand Jury, supersede the Federal Rules of Criminal Procedure obstructing justice and denying Armstrong a fair trial, and stripped Armstrong of counsel while seeking to impose a criminal penalty of restitution covertly by civil means violating the Sixth Amendment. The SEC deliberately coerced Armstrong post-indictment subpoenaing him to depositions twice in violation of FRCrP 15(e)(1) and refused to accord him the right to an adversary system of justice codified at 18 USC §3481 imprisoning him without statute for 7.5 years to force him to settle. Now the SEC seeks to claim nothing is reviewable.

I.) THE SUPREME COURT HAS OVERRULED THE CONDUCT AND EFFECTS TEST USED BY THE SEC TO EXTEND THE APPLICATION OF THE SECURITIES EXCHANGE ACT TO OVERSEAS TRANSACTIONS VACATING ANY AUTHORITY WHATSOEVER TO SUSTAIN ANY JUDGMENT AGAINST ARMSTRONG

The Supreme Court has now overruled the application of the Securities Exchange Act back to inception insofar as it application to foreign transactions. Based upon the holding of Morrison et al v National Australia Bank, Ltd, 561 US - (6/24/10), the **"Conduct & Effects Test"** used by the SEC in the case at bar, SEC v PEI, 73 FSupp2d 420 (SDNY 1999) has now been squarely overruled rendering the judgment unconstitutional. A unanimous decision in **Morrison** has made it clear that courts may not "extend [statutes] to admirable purposes it might be used to achieve." Id/Slip at 21. In the instant case, the Government has conceded that all notes were solicited in Japan by a registered Japanese broker-dealer in accordance with Japanese law. The notes were between two foreign corporations and did not involve American listed securities on any exchange.

> "When a statute gives no clear indication of an extraterritorial application, it has none." Id./ **Morrison**, Slip at 6

The SEC will claim that a criminal plea somehow trumps the **Morrison** decision. It is also fundamental that the same statute cannot be used different in a civil and criminal context. Thus, **Morrison** applies with equal force in both forums.

> "[I]f a statute has criminal application, 'the rule of lenity applies' to the court's interpretation of the statute ... '[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal of noncriminal context."
>
> Clark v Martines, 543 US 371, 160 Led2d 734, 746 (2005)

The **Morrison** Court squarely rejected ANY extraterritorial application od the Securities Exchange Act to foreign transactions not concerning US listed securities.

> "[W]e reject the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad..." Id./Slip at 20

The **Morrison** Court rejected the idea that courts may extend statutes to assist the SEC. The Court expressly stated

> "It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." Id./Slip at 21

The Supreme Court has made it explicit that "if §10(b) is not extraterritorial, neither is Rule 10b-5." The Morrison decision also states that §30(b) only applies to transactions "abroad that might conceal a domestic violation to escape on a technicality." Id./Slip at 15. Judge Bork made that very point "that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets." Zoelsch v Arthur Anderson & Co, 824 F2d 27, 31-32 (DC Cir 1987). The Zoelsch decision made it clear that the SEC NEVER at any time has promulgated any rules under §30(b).

The **Morrison** Court made it explicit that "[i]n short, there is no affirmative indication in the Exchange Act that §10(b) applies extraterritorially, and we therefore conclude that it does not." Id./Slip at 16. It elaborated:

> "[W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States. Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.' 15 U.S.C. §78j(b)."

Id./ **Morrison**, Slip at 17

The SEC allegation were Armstrong wholly owned a Japanese broker-dealer and all private notes were solicited in Japan through the broker-dealer and each note was individually approved by MOF. Hence, under §30(b) of the 1934 Act (15 USC §78dd(b)), they knew the law as set forth bu Judge Bork and this Court, yet ignored it.

> "[E]ven aside from this presumption, it is quite clear that the Securities Echange Act of 1934 had as its purpose the protection of American investors and markets. ... That is the inference to be drawn from [§]30(b) as well, for it states that the statute does not apply to persons transacting business in securities abroad unless the Securities and Exchange Commission issues rules and regulations making the statute applicable to such persons because that is 'necessary or appropriate to prevent the evasion' of the statute. That rather clearly implies that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets."

Zoelsch v Arthur Anderson & Co, 824 F2d 27, 31-32 (DC Cir 1987)

Both the Zoelsch Court and the Second Circuit admitted that "[n]o rules have been promulgated by the SEC under §30(b)." Fidenas AG v Compagnie Int'l, 606 F2d

5, 9 (2d Cir 1979). Under §32(a) of the Exchange Act, Armstrong could not even be criminally prosecuted under §30(b) without notice and rules being promulgated. Pursuant to §32(a) of the 1934 Act (15 USC §78ff), Congress prohibited criminal prosecution of anyone for securities fraud UNLESS they were aware of the RULES promulgated by the SEC, which has declined to do so under §30(b) covering all extraterritorial application of the entire Exchange Act.

The **Morrison** Court rejected any liberal construction of §10(b) and expressly limited the application that applied in the case at bar.

> "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase of sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. This case involves no securities listed on a domestic exchange and all aspects of the purchases complained of by those petitioners ... occurred outside the United States. Petitioners have therefore failed to state a claim on which relief can be granted. We affirm the dismissal of petitioner's complaint on this ground."

Id./**Morrison**, **Slip** at 24

It has been conceded that "the notes were solicited in Japan" (99-Civ-9667 SDNY; TR;10/14/99, p33, L6-14). Even in Armstrong's plea he stated "my agents in Japan" made all representations (SDNY 99-Cr-997; Tr: 8/17/06, p20, L7-14). Given the notes were not listed American securities and most even remained as book entries at the Japanese broker-dealer never actually being issued, NOTHING took place within the United States. Under the holding of **Morrison**, there can be no violation of the Securities and Exchange Act.

II.) THE MORRISON DECISION IS CONSTITUTIONALLY REQUIRED FOR IT RESTS UPON THE SEPARATION OF POWERS MAKING IT A STRUCTURAL DECISION UNDER ARTICLE III

Circuit Judge Posner made it very clear that "[i]issues thus are treated as jurisdictional when the Constitution, statutes, or rules evince a purpose to limit judicial power whether or not a party objects to its exercise." Troelstrup v Index Futures Group, 130 F3d 1274, 1276 (7th Cir 1997). "A court does not have the power by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators." Stoll v Gottlieb, 305 US 165, 171 (1938).

The **Morrison** Court made it very clear that this is also a Constitutional issue of the Separation of Powers. The Second Circuit "believed that, because the Exchange Act is silent as to the extraterritorial application of §10(b), it was left to the court to 'discern' whther Congress would have wanted that statute to apply." Id./at 6

> "The criticisms seem to us justified. The results of judicial-speculation-made-law-diving what Congress would have wanted if it had thought of the situation before the court-demonstrate the wisdom of the presumption against extraterritorialty."
>
> Morrison, Id./Slip at 12

The Separation of Powers is a structural issue constitutionally. "There are no constructive offenses." McNally v US, 483 US 350, 360 (1987). Courts cannot liberally construe statutes expanding them to cover facts that Congress did not intend. This violates the entire structure of a Democracy transforming the state into an authoritative state eliminating the people completely. This is not within the powers of Art III. Consequently, Morrison holding is constitutionally required.

III. THE MORRISON DECISION ALSO IMPLICITLY INCORPORATES ARTICLE III DIVERSITY JURISDICTIONAL REQUIREMENTS THAT PREVENTS THE SEC FROM ASSUMING ANY SUCH STANDING TO INTERVENE INTO A TRANSACTION BETWEEN TWO ALIENS WHO COULD NOT HAVE STANDING UNDER ARTICLE III INDEPENDENTLY

Two aliens conducting a transaction is France have no standing under Article III to invoke an American court to settle a dispute in France. Likewise, Congress could not have created such jurisdiction for the SEC intentionally or unintentionally that affords it with standing to roam the world and charge aliens in the United States for transactions that do not involve American listed securities. Article III jurisdiction was limited to "citizens of different States."

> "the presence of aliens on two sides of a case destroys diversity jurisdiction."
>
> Venezolana de Fomento v Ventera Sales Corp, 629 F2d 786, 790 (2d Cir 1980)

It is clear that in the instant case, two foreign corporations were on both sides of the contracted private notes. Under the ancient doctrine that the king interjected himself into private disputes on the theory that it violated or disturbed his "peace" required two subjects in dispute. In the case at bar, the

corporations on both sides of the contracts were foreign and there could be no standing for the US Government in any capacity to interject itself into a wholly foreign transaction that could not be supported in the United States by either party since not even a consent can create Article III jurisdiction.

> "That even if a corporation organized under the laws of a foreign nation maintains its principal place of business in a state, and is considered a citizen of that state, diversity is nonetheless defeated if another alien party is present on the otherside of the litigation."

Int'l Shipping v Hydra Offshore, 875 F2d 338, 391 (2d Cir 1989)

The government in no possible incarnation had any standing under Article III to file any action between two aliens not involving American listed securities.

IV.) THE DUE PROCESS OF LAW CLAUSE FORBIDS HOLDING FOREIGN CORPORATIONS LIABLE IN THE UNITED STATES WHEN THEY HAVE NOT TARGETED THE US MARKETS OR CITIZENS AS A CONSUMER OF ANY OF THEIR PRODUCTS

It is fundamental to the Due Process Clause that one cannot be held liable in the United States for any product that it did not market to the US Markets and American citizens.

> "We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections."

Lauritzen v Larsen, 345 US 571, 590 (1953)

"A judgment rendered in violation of due process is void in the rendering State and is not entitled to Full Faith and credit elsewhere." Worldwide Volkswagen v Woodson, 444 US 286, 291 (1980).

> "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"

Burger King v Rudzewicz, 471 US 462, 471-472 (1985)

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III ... and the statutes enacted by Congress..."

Bender v Williamsport Area School District, 475 US 534, 541 (1986). The Supreme Court has made it very clear that the Due Process Clause itself forbids any such extraterritorial application of US Law without American markets being targeted.

> "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who **has not** consented to suit there, this 'Fair Warning' requirement [of due process] is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities, thus the forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state and those products subsequently injure forum consumers."

Burger King v Rudzewicz, 471 US 462, 472-473 (1985)
(quotations, cites & footnotes omitted)

In Asahi Metal Industry v Superior Court, 480 US 102 (1987), it was squarely rejected that there was any jurisdiction when Asahi Metals merely manufactured a valve stem and sold it in Taiwan to a tire company who incorporated that valve into its tires it sold in the United States. It was made clear that Asahi Metal had taken no steps to sell its product into the US forum and thus it could not be subject to US action.

> "The Due Process Clause ... limits the power ... to exert personal jurisdiction over a nonresident defendant. The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established minimum contacts in the forum state ... [T]hat minimum contacts must have a basis in some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws ... Jurisdiction is proper where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state."

Asahi Metal Industry v Superior Court, 480 US 102, 109 (1987)

In the instant case, the foreign corporations entered into contracts in Japan that could NOT be executed anywhere else since they were NOT valid until MOF approved each note. There was nothing that took place in the United States from the solicitation to the execution of the contract. The notes involving borrowing yen, completed the transaction in Japan where the yen was then converted to dollars AFTER the contract was executed. Where portfolios were purchases, the Japanese equities were then sold in Japan, yen was obtained, and then the broker dealer converted the yen to dollars. No sale of a portfolio took place under AFTER the contract was executed or otherwise the noteholder would have had to report the loss when the portfolio was sold, but did not.

There was no **FAIR WARNING** under Due Process that such transactions would be later construed by the SEC to be within their jurisdiction. This is as absurd as Japan or another country charged an American broker-dealer for violating its law by selling American listed securities it purcjased from another American. Congress never intended such an expansive view of the Securities Exchange Act under §30(b) of the 1934 Act where the SEC never promulgated any rules and §32(a) (15 USC §78ff(a) prohibits even criminal charges without notice of such rules. Thus, the criminal plea relied upon by the SEC has also no validity.

Consequently, Armstrong was denied Due Process of Law and therefore, any such "judgment rendered in violation of due process is void in the rendering State and is not entitled to Full Faith and credit elsewhere." Worldwide Volkswagen v Woodson, 444 US 286, 291 (1980).

V.) **MORRISON** IS CONSTITUTIONALLY REQUIRED FOR IMPLICIT WITHIN ITS HOLDING IS THE DOCTRINE OF **ABSOLUTE TERRITORIAL JURISDICTION** & INTERNATIONAL LAW

From the American Revolution, what emerged was the **DOCTRINE OF ABSOLUTE TERRITORIAL JURISDICTION** where no longer would people violating a law be sent back to their king for punishment. Justice Frankfurter made this point very clear that the Constitution ONLY ordained the power to prosecute offenses that took place within

ABSOLUTE TERRITORIAL JURISDICTION of the United States. Transactions between two foreign corporations not involving American listed securities cannot be prosecuted within the United States by any stretch of the imagination.

> "By the Constitution a government is ordained and established 'For the United State of America' not for countries outside of their limits ."

Reid v Covert, 354 US 1, 60 (1957)(J.Frankfurter concurring in result)

In a number of decisions, it was held that Article III and the Sixth Amendment "do not apply to territory belonging to the United States which has not been incorporated into the Union." Hawaii v Mankichi, 190 US 197 (1895); Dorr v US, 195 US 138 (1904)

> "We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article 4, §3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated."

Balzac v People of Porto Rico, 258 US 298, 305 (1926)

If the Constitution has no force outside the actual Union of the United States and has no force even over owned territory, it cannot possibly have any force over making acts in other sovereign nations crimes in the US. "The Constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory." Galpin v Page, 85 US 350 (1874). "The courts of no country execute the penal laws of another." The Antelope, 23 US 66, 123 (1825). "Acts of Congress do not ordinarily apply outside our borders." Sale v Haitian Centers Council, 509 US 155, 125 Led2d 128, 146 (1993).

In the Declaration of Independence, Thomas Jefferson listed the injury "For transporting us beyond Seas to be tried for pretended offenses." ABSOLUTE TERRITORIAL jurisdiction is a structural requirement for it is throughout the Constitution and is implicit within the Sixth Amendment requiring venue because if one is tried for

any offense removed from the nation in which it was alleged to have taken place, one is also denied a fair trial for the court would have no power to compel witnesses to appear especially in the case at bar when Japan was NOT a member of any treaty that allowed deposing witnesses in Japan.

Without the DOCTRINE OF ABSOLUTE TERRITORIAL JURISDICTION, the United States could NOT prosecute terrorists and would still be required to return them for trial in their country of origin. In Ross v McIntyre, 140 US 453 (1891) and American had committed murder on board an American ship in a Japanese harbor. He was tried by a consular tribunal in Japan and sentenced to death. Ross was a crew member The court made it clear "[i]f Ross had been a passenger on board ... or if, residing in Yokohama, he had come on board temporarily and had then committed the murder, the question of jurisdiction would have been very different." Id./140 US at 473. Justice Frankfurter explained regarding jurisdiction:

> "The emergence of the nation-state in Europe and the growth of the doctrine of absolute territorial sovereignty changed the nature of extraterritorial rights. No longer were strangers to be denied the advantages of local law. Indeed, territorial sovereignty meant the exercise of sovereignty over all residents within the borders of the state, and the system of extraterritorial consular jurisdiction tended to die out among Christian nations in the 18th and 19th Centuries."

Reid v Covert, 354 US 1, 60 (1957)(concurring in result)

It was made perfectly clear in Ross v McIntyre, 140 US 453 (1891) that if the act took place within Japan rather than on the high seas, there would have been no crime under the law of the United States. Constitutionally, Morrison dictates the same result. The Constitution reflects our American Revolution that ended the principle that a citizen was the property of their sovereign. Any attempt by courts or the executive to prosecute crimes within other sovereign nations and not the high seas, is patently UNCONSTITUTIONAL and is outside the scope of ABSOLUTE TERRITORIAL JURISDICTION embodied within the Constitution including, but not limited to, Article III.

> "[T]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute ... All exceptions, therefore, to the full and complete power of a nation, within its own territories must be traced up to the consent of the nation itself."

The Exchange v M'Faddon, 11 US 116, 156 (7 Cranch) (1812)

Therefore, "[n]o law has any effect, of its own force beyond the limits of the sovereignty from which its authority is derived." Hilton v Guyot, 159 US 113, 163 (1895). "Legislation is presumptively territorial and confined to limits over which the lawmaking power has jurisdiction." Sandberg v McDonald, 248 US 185, 195 (1918).

> "Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction, a purpose so wholly futile is not to be attributed to Congress."

Sandberg, 248 US at 196

The SEC was ONLY given TERRITORIAL JURISDICTION. Congress withheld extraterritorial subpoena power in the 1934 Act, 15 USC §78u(b). "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply within the territorial jurisdiction of the United States." Foley Brothers v Filardo, 336 US 281, 285 (1949); EEOC v Arabian Am Oil Co, 499 US 244, 248 (1991). Additionally, the "Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it." Kline v Burke Construction, 260 US 226, 234 (1922). Armstrong contends that this is a Article III jurisdictional question. "Congress may not expand the jurisdiction of the Federal courts beyond the bounds established by the Constitution." Verlinden B.V. v Central Bank of Nigeria, 461 US 480, 491 (1983). Congress cannot even create jurisdiction over registered foreign broker-dealers selling notes in foreign currencies to non-Americans in other sovereign lands. Unless there is a listed American security traded on an American exchange, or the sale takes place domestically, there is NO jurisdiction and Congress could never create such a law that allows the executive or the courts to grab such persons and charge them in the United States.

VI.) THERE WAS NEVER ANY IN PERSONAM JURISDICTION OVER THE CORPORATIONS TO FREEZE ALL ASSETS AND PREVENT THE HIRING OF COUNSEL TO ENTER AN APPEARANCE TO EVEN DEFEND RENDERING THE ENTIRE JUDGMENT UNCONSTITUTIONAL

The Supreme Court made it perfectly clear that "[h]istorically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him." Int'l Shoe Co v Washington, 326 US 310, 316 (1945). In the instant case, neither the SEC nor the CFTC bothered to try to serve the foreign corporations and in fact moved to seize the internal management by petitioning equity to appoint a receiver outside the territorial jurisdiction of the court violating Article III from the outset. All equitable jurisdiction is confined to the known jurisdiction as it stood in 1789, Grupo Mexicano v Alliance Bond Fund, 527 US 308, 318-19 (1999), which had just been handed down 3 months before this action began against the same district court. NEVER at common law did a equity receiver EVER have jurisdiction outside the territorial jurisdiction of the court, for "the court of chancery has no power directly to affect property out of the bounds of its jurisdiction." Booth v Clark, 58 US 322, 333 (1855). The Booth decision remains the seminal controlling decision regarding equity receivers and it made it crystal clear that the court "can give him" absolutely no power "upon principle of comity, a privilege to sue in a foreign court or another jurisdiction." Id./58 US at 338. The seminal decision on comity among nations further warns "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." Hilton v Guyot, 159 US 113, 163 (1895).

Surely, the claimed power of the SEC and CFTC to seek a receiver over a foreign corporation illustrates their arrogance of international law and their desire to subjugate the entire world as if there were endowed with some imperial power. It would be ABSURD if Japan seized General Motors, installed a receiver, and usurped its internal management taking it to Tokyo. This would create international discord

if there was no such restraint or comity and the global economy would collapse in economic trade wars.

Where Federal Rules of Civil Procedure 4(h)(2) authorize service upon a foreign corporation "in a place not within any judicial district of the United States," they made no such effort to even try to serve the corporations. Consequently, the FRCvP make it explicit, that there can be no judgment that has any validity whatsoever.

> **Federal Rules of Civil Procedure 65**
>
> **(a) Preliminary Injunction**
>
> **(1) Notice.** No preliminary injunction shall be issued without notice to the adverse party.

A corporation CANNOT be represented pro se but only by attorney, Rowland v Calif. Men's Colony, 506 US 194 (1993). Counel who represented Armstrong, were NEVER hired to represent the corporations (Exhibit D) nor did any American counsel previously represent PEI since it was not doing business in the United States. When counsel were retroactively disgorged of all fees earned and unearned, the court itself acknowledged the lawyers "were hired to represent Martin Armstrong individually." SEC v PEI, 84 FSsupp 2d 443, 447 (SDNY 2000). Therefore, it is impossible for any judgment to stand or for the corporations to have consented to any settlement when they never made an appearance.

"It has long been the rule that a valid judgment ... may be entered only by a court having jurisdiction over the person of the defendant." Kulko v Superior Court 436 US 84, 91 (1978). Failure to obtain "jurisdiction of both subject and person" renders the court's actions in the "clear absence" of all jurisdiction, Bradley v Fisher, 80 US 335, 352 (1872).

> "The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."

Insurance Co of Ireland v Compagnie Des Bauxites, 456 US 694, 701 (1982)

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." Old Wayne Mutual Life Asso'n v McDonough, 204 US 8, 15 (1907). "[W]hen a court has no judicial power to do what

it purports to do - when its action is not mere error but usurpation of power" it is completely unlawful, DeBeers Consol. Mines v US, 325 US 212, 217 (1945). The SEC knew precisely what it was doing and the record shows their requests:

> HEYL [SEC COUNSEL]: We want the assets to be frozen with a reasonable carve-out for living expenses and no money for attorney's fees.
>
> (99-Civ-9667 SDNY: Tr 9/13/99, p24-25)

Later, Armstrong was denied even reasonable living expenses. He was denied funds even to sustain life itself - NOTHING! When counsel entered an appearance, they did so ONLY for Armstrong, not the corporations. "Martin Unger. I represent Martin Armstrong." (TR; 10/13/99, p3, L16-17).

Armstrong respectfully submits that there NEVER was any Personal Jurisdiction and thus there could have been no appointment of a receiver who then use the court to imprison Armstrong for more than 7 years coercing him into a settlement by claiming civil contempt has no limitation and can last for life.

VII.) THE SEC DELIBERATELY VIOLATED THE FIFTH AMENDMENT **TAKING CLAUSE AND** THE FOURTH AMENDMENT BY ILLEGALLY SEIZING THE CORPORATIONS USING THE COURT

There can be no question that the Constitution that prohibits the taking of private property applies to the Judiciary, although this has not yet been decided. "The question of whether courts, as opposed to legislative bodies, can ever 'take' property in violation of the Fifth Amendment is an interesting and by no means a settled issue of law." Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v Hodel, 830 F2d 374, 381 (DC Cir 1987); noting: Hughes v Washington, 389 US 290, 296-97 (1967)(J.Stewart concurring); Robinson v Ariyoshi, 441 FSupp 559 (D.Haw 1977) aff'd 753 F2d 1468 (9th Cir 1985).

The SEC deliberately did not serve the corporations violating FRCvP 65(a) in order to illegally seize them installing a receiver over the internal management of foreign corporations to circumvent the Grand Jury limitations. This violated both the Fifth Amendment **Taking Clause** and the Fourth Amendment constituting an illegal seizure when the assets were UNSECURED with no EQUITY Jurisdiction, Grupo Mexicano, supra.

> "[I]f the record discloses that the lower court was without jurisdiction [the reviewing] court will notice the defect, although the parties make no contention concerning it."

US v Corrick, 298 US 435, 440 (1936)

Such issues may even be challenged "collaterally" Ex Parte Nielsen, 131 US 176, 182 (1889). Since the Securities Law "§27 of the 1934 Act does not provide a basis for personal jurisdiction," Leroy v Great Western United Corp, 443 US 173, 180 (1979). The SEC knew the law, and deliberately never served the corporations to prevent entering any appearance, and then illegal seized the corporations in violation of the Fourth Amendment that "applies in a civil context" Soldal v Cook County, 506 US 56, 121 Led2d 450, 462 (1992), that also violated the Fifth Amendment **Taking Clause** to prevent and defense whatsoever.

> "Certain wrongs affect more than a single right, and accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominat' character. Rather, we examine each constitutional provision in turn."

Soldal v Cook County, 506 US 56, 70 (1992)

The ONLY court having any jurisdiction over the internal management of a corporation, is the court of the sovereign where the coprporation was chartered."It has long been settled ...[courts will] decline to interfere ... or control by injunction ... the management of the internal affairs of a corporation organized under the laws [of another sovereign] ... leav[ing] controversies as to such matters to the courts of ... the domicle." Rogers v Guaranty Trust Co, 288 US 123, 130 (1933).

VIII.) THE SEC WAS NOT AUTHORIZED TO FILE CIVIL ACTIONS POST-INDICTMENT USING EQUITY TO CIRCUMVENT THE GRAND JURY CIRCUMVENTING ITS EXCLUSIVE POWERS

The SEC knew that it was authorized ONLY to investigate pre-indictment and to transmit such evidence to the Attorney General to "institute" a criminal case, 15 USC §78u(d)(1). The SEC routinely files in parallel to circumvent the FRCrP and to displace the Grand Jury. In another case, the SEC was using evidence gathered by the criminal prosecution to try to freeze assets that would have deprived a indicted defendant of his counsel of choice in the parallel criminal case. This clever abuse

was rejected stating that §78u(d)(1) did not authorize the reverse flow of evidence. SEC v Healthsouth Corp, 261 FSupp2d 1298, 1312, n.23 (ND Ala 2003). The criminal prosecution instructed the SEC to take deposition in a certain district to create jurisdiction. This resulted in all criminal charges arising from such machinations being dismissed, US v Scrushy, 266 FSupp2d 1134, 1140 (ND Ala 2005). The SEC summoned Armstrong TWICE to depositions post-indictment violating FRCrP 15(e)(1) to create the injunction and then to create a contempt for violating that injunction.

The SEC knows the law and it simply acts in its own self-interest turning the Constitution on its head eliminating any NEGATIVE restraint and shifting it into a positive entitlement forcing the burden to Armstrong to prove he even has any rights. The Constitution is NEGATIVE not POSITIVE, Harris v McRae, 448 US 297 (1980), and the SEC has slit all cords that bind it to ensure America remains a free society. Article II, §3 requires that the SEC "faithfully" executes all laws. It ignores that Constitutional command. It also knows that it must file actions "in good faith and prior to a recommendation for criminal prosecution." Donaldson v US, 400 US 517, 536 (1971). The SEC filed AFTER the criminal case began, which violated **SUBSTANTIVE DUE PROCESS** that has been not merely codified by §78u(d)(1), but has been constantly restated by numerous courts, Abel v US, 362 US 217, 226 (1960)("the deliberate use ... of an administrative warrant for the purposes of gathering evidence in a criminal case"); US v Powell, 379 US 48, 58 (1964)("Such an abuse ... if the summons had been issued ... to put pressure on him to settle a collateral dispute..."); Reisman v Caplin, 375 US 440 (1964)("improper purpose of obtaining evidence for use in a criminal prosecution."); Black v US, 534 F2d 524, 527 (2d Cir 1976)(summons by SEC must be issued "prior to a recommendation for criminal prosecution."); US v Parrott, 248 FSupp 196, 202 (DC 1965) ("may not bring a parallel civil proceeding and avail itself of the civil discovery devices to obtain evidence for subsequent criminal prosecution.").

In the instant case, the SEC entered into a written agreement with the receiver known as the MOA (Exhibit C) and fed such civil discovery to aid the criminal case all post-indictment as evidenced by former criminal counsel (Exhibit F). Agencies cannot

engaged in such practices, Feldman v US, 322 US 487, 494 (1944). The SEC has simply ignored this Court's own authority on the subject, Silver v McCamey, 221 F2d 873, 875-6 (DC Cir 1955). Even the Sixth Amendment prohibits what was done to Armstrong by the SEC for there can be NO **"deliberate elicitation"** of indicted defendants, Massiah v US, 377 US 201 (1964), which has been reaffirmed in Fellers v US, 540 US 519 (2004). The SEC has assumed the power to now filed POST-INDICTMENT and circumvent the Grand Jury using civil means to prosecute criminal cases, stripping Armstrong of counsel and then keeping him in prison for more than 7 years under the pretense of civil contempt.

> "Congress could not have intended the statute to trench on the power of the grand jury or to broaden the Government's right to discovery in a criminal case ..."

US v Morgan Guaranty Trust Co, 572 F2d 36, 41-42 (2d Cir 1978)

The SEC has circumvented the Grand Jury and engaged in using a receiver to gather all evidence withholding it from Armstrong while inprisoning him in violation of Brady v Maryland, 373 US 83 (1963) when NEVER could equity ever be used to gather evidence by a receiver to further a criminal prosecution, Blum v State of Maryland, 56 LRA 322, 94 Md 375, 51 A 26 (1902)(collecting England cases).

IX.) THE DENIAL OF COUNSEL AND THE DENIAL OF COUNSEL OF CHOICE REQUIRES THE DISMISSAL OF ANY JUDGMENT WITH PREJUDICE AS REVERSIBLE ERROR

The SEC deliberately removed not just counsel for Armstrong civilly, but also invaded the parallel criminal court and retroactively disgorged counsel in that action as well, and denied counsel of choice when imprisoning Armstrong for more than 7 years on civil contempt. "[A]ny amount of actual jail time has Sixth Amendment significance." Glover v US, 531 US 198, 203 (2001). The mere threat of a loss of liberty requires counsel, Alabama v Shelton, 535 US 654, 674 (2002). The failure to appoint counsel in civil contempt is reversible error, Dole Fresh Fruit Co v United Banana Co, 821 F2d 106, 110 (2d Cir 1987). Civil contemnors are entitled to counsel and are covered by the Sixth Amendment, In re Sadin, 509 F2d 1252 (2d Cir 1976) and are entitle to the same effective assistance of counsel protection, In re DiBella, 518 F2d 855, 959 (2d Cir 1975).

The right to counsel does not depend upon a request, Brewer v Williams, 430 US 387, 404 (1977). The failure to provide counse is a "unique constitutional defect." Curtis v US, 511 US 485, 496 (1994). The failure to appoint counsel renders that action without constitutional support, Daniels v US, 532 US 374 (2001); Lackawana Country Dist Atty v Coss, 532 US 394 (2001). This deprives the SEC judgments of any validity whatsoever since it deprived the court of jurisdiction.

> "A court's jurisdiction at the beginning of trial may be lost in the course of the proceedings due to failure to complete the court - as the Sixth Amendment requires - by providing counsel."

Johnson v Zerbst, 304 US 458, 468 (1938)

The SEC not merelt froze all assets and stripped Armstrong of any counsel in the civil actions, denied ever allowing the corporations to hire counsel and make an appearance, but they then moved to deny Armstrong in forma pauperis status to prevent the appointment of counsel in the civil actions, which was granted by the district court in SEC v Princeton Economics International Ltd, 2001 US Dist Lexis 2427 (March 9, 2001). Armstrong was granted that status in the criminal case and appointed counsel who was not allowed to defend Armstrong in the civil actions, see affidavit David Cooper, Esq (Exhibit F). Armstrong's requests for counsel were ignored, (99-Civ-9667 SDNY; Tr: 2/23/04, p23, L6-9). The SEC had no such standing to seek in parallel equitable jurisdiction to invade a criminal prosecution

> "To assume such jurisdiction, or to sustain a bill in equity to restrain ... against proceedings for the punishment of offenses ... is to invade the domain of the courts of common law ... Any jurisdiction over criminal matters that the English court of chancery ever had became obsolete long ago."

In re Sawyer, 124 US 200, 209-210 (1888)

By moving to deny Armstrong of in forma pauperis status to prevent counsel, the SEC deliberately circumvented the Sixth Amendment. The Sixth Amendment guarantees Armstrong was "not [to] stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the

accused's right to a fair trial." US v Wade, 388 US 218, 226 (1967). In the Wade case, the indicted defendant was taken to a line-up for identification without counsel. Here in the instant case, the SEC dragged Armstrong out repeatedly over the course of more than 7 years denying him counsel when the criminal prosecution admitted "[i]t is the same case essentially, only in a civil context." (99-Cr-997; SDNY TR: 10/15/99, p4, L3-7). The denial of counsel of choice is reversible error and this court now has the authority to vacate all judgments with prejudice.

> "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' ... the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds.'"

US v Gonzalez-Lopez, 548 US - , 165 Led at 420 (2006)

Armstrong need not even show prejudice under Gonzalez-Lopez, He moves for the dismissal with prejudice because this court cannot return him to where he would have been since the SEC did everything in its power to deny counsel to prevent any defense whatsoever.

X.) ARMSTRONG WAS NOT REGISTERED WITH THE SEC FOR HE WAS NOT ENGAGED IN ISSUING SECURITIES, SOLICTING MONEY FOR MANAGEMENT FROM ANYONE IN AMERICA AND THE TRANSACTIONS CENTRAL TO THIS CASE AT BAR WERE NOT MANAGED ACCOUNTS

Armstrong withdrew his SEC registration AFTER Lowe v SEC, 472 US 181 (1985) since he did analysis for public publication and was NEVER a stock broker, never solicited funds for management in stocks, but had been registered simply because he forecasted the stock indexes as part of the overall economic outlook, not even individual stocks (except a few selected gold stocks back in 1985). Armstrong did not solicit funds for management in these notes, and they were simply borrowing yen at fixed rates or purchasing pre-existing damaged toxic portfolios of Japanese stocks at their original face value. Armstrong NEVER solicited funds for investment in stocks and objects to and injunction to bar him from doing what he did not do originally.

XI.) THE MEMORANDUM OF AGREEMENT ENTERED INTO BY THE SEC WITH THE EQUITY RECEIVER INSTRUCTING HIM TO WITHHOLD ALL EVIDENCE FROM ARMSTRONG WHILE SUPPLYING IT ONLY TO THE SEC AND THE PARALLEL CRIMINAL PROSECUTION VIOLATED ARTICLE III SINCE ALL EQUITABLE JURISDICTION IS CONFINED TO THAT WHICH WAS KNOWN TO EXIST IN 1789 RENDERING THE JUDGMENT VOID

The SEC negotiated ex parte with the impartial equity receiver who was a court officer to withhold all evidence gather from Armstrong even when he was seeking to imprison him indefinitely on a pretended civil contempt to turnover assets for a possible future criminal restitution and penalty violating Brady v Maryland, 373 US 83 (1963) in addition to his sworn oath of impartiality under the Judicial mantle. All equitable jurisdiction is confined to the known practices and remedies at they stood in 1789, Grupo Mexicano, supra. Therefore, equity receivers could NEVER assist one party against another, nor could they feed evidence to a parallel criminal prosecution, Blum, supra (collecting English case law). Equity cannot supersede leagl legal rights, and Armstrong seeks as part of this appeal, a permanent injunction against the SEC from using the appointment of equity receivers to expand their own statutory powers and abuse the Article III command of impartiality.

Armstrong maintains that the MOA was enforced, improperly withheld all evidence from Armstrong denying him the ability to even present a defense for the contempt hearing assuming that such an equitable remedy could be imposed post-indictment when never could there have been any such "deliberate elicitation" under the Sixth Amendment, Massiah, supra.

C O N C L U S I O N

Armstrong maintains there was was no subject matter jurisdiction under §30(b) Zoelsche, supra, no personal jurisdiction under FRCvP 65(a) to have ever created a receivership when the notes were UNSECURED under Grupo Mexicano, there was no Art III jurisdiction between foreign corporations involving no listed American securities, and these was confirmed by the holding in **Morrison**. Armstrong thus further koves

there was no equitable jurisdiction under Article III to have frozen the assets of UNSECURED notes pursuant to Grupo Mexicano, and the MOA violated Article III impartiality and called into question the integrity of the judicial proceedings as a whole. Armstrong was denied **Substantive Due Process, Procedural Due Process,** and the very foundation of an Adversarial System of justice, the ONLY such system authorized by the Constitution. The SEC deliberately denied counsel for the corporations and stripped all counsel from Armstrong yet continued to prosecute him post-indictment. The SEC was NEVER authorized to file AFTER a criminal case began under 15 USC §78u(d)(1) and Congress certainly would not have so authorized for it allowed the SEC to circumvent the entire Grand Jury investigative practice.

Armstrong thus contends that the judgments in whole must be dismissed with prejudice for it is impossible after more than 11 years to return Armstrong to a position where he would have stood in 1999. This case is an outrage and a disgrace reducing the American judicial process to an indistinguishable status with some third world dictatorship where courts do nothing but rubber stamp whatever the dictator desires. If there is no corrective relief that Armstrong will ever be able to obtain to vindicate the Constitution, then there is truly no interest of justice and no rule of law worth pretending still exists. Property has ceased to have any value once courts no longer defend the rule of law.

The SEC has deliberately removed counsel forcing Armstrong to study law to defend himself. Despite the fact that Armstrong's father was a judge, that does not justify the removal of counsel. Armstrong has suffered because courts do not regularly respect pro se defendants, which is the very reason to deny counsel at every stage and to support the denial of in forma pauperis contrary to every other court.

Armstrong has been denied the dignity to earn any funds to hire counsel even for this appeal. Armstrong thus requests that this Court construe all such arguments liberally with that in mind, given the SEC claims all evidence was destroyed in the World Trade Center Attack 911. (Exhibit B).

Respectfully submitted;

Dated: September 21st, 2010
Fort Dix, New Jersey

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CERTIFICATE OF SERVICE

I, Martin A. Armstrong, hereby declare under penalty of perjury, pursuant to 28 USC §1746, that a true and correct copy of this brief has been served upon the following party by first class mail, postage prepaid.

Jeffrey Berger, Esq
Securities Exchange Commission
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Respectfully submitted;

Dated: September 22nd, 2010
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TABLE OF EXHIBITS

FOR APPEAL BRIEF 09 - 1260

ARMSTRONG V SECURITIES EXCHANGE COMMISSION

(A) Criminal Complaint 9/13/99

(B) SEC Letter saying evidence destroyed in 911

(C) Memorandum of Agreement

(D) Affidavit of Martin Ungar

(E) Affidavit of former counsel Steven Legon

(F) Affidavit of former counsel David Cooper