

TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
PRELIMINARY STATEMENT.....	1
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS.....	5
A. Installation Of The Receiver And The "MOA"	6
B. Armstrong Is Indicted	7
C. District Court Issues The Turnover Orders Demanding Items Directly Related To The Subject-Matter Of The Indictment	7
D. The January 7, 2000 <i>Braswell</i> Hearing	8
E. The January 14, 2000 Contempt Hearing	10
F. District Court Invokes Its "Inherent Contempt Power" To Confine Armstrong Indefinitely.....	10
G. District Court's December 11, 2003 Order	11
H. Armstrong Is Denied Appellate Review	12
I. The Superceding Indictment	12
J. District Court Denies Armstrong's Habeas Petition.....	13
SUMMARY OF ARGUMENT	14
STANDARD OF REVIEW	15
ARGUMENT.....	16

I.	THE DISTRICT COURT LACKED AUTHORITY TO JAIL ARMSTRONG INDEFINITELY FOR CIVIL CONTEMPT.....	16
A.	The District Court Erred In Concluding That Section 4001(a) Is Inapplicable To Armstrong's Imprisonment	18
1.	Section 4001(a) Does Not Distinguish Between "Executive" And "Judicial" Branches	18
2.	The Judiciary Act Does Not Authorize Coercive Confinements For Civil Contempt	22
B.	The District Court Erred In Jailing Armstrong Beyond The Eighteen-Month Limit Imposed By Section 1826	24
1.	This Court Has Not Decided Section 1826's Applicability.....	25
2.	Armstrong's Confinement Is Governed By Section 1826.....	25
a.	Armstrong Was A "Witness"	26
b.	The Corporate Assets In This Case Are "Other Information" And "Other Material"	27
3.	Section 1826 Supplants Inherent Authority To Incarcerate Civil Contemnors.....	30
a.	Section 1826 Codifies The Common Law Of Civil Contempt	30
b.	Cases Cited By The District Court To Support Its Use Of "Inherent Power" Are Inapposite.....	32
c.	Section 1826 Sets An Eighteen-Month Limit On Confinement For Civil Contempt.....	34
II.	ARMSTRONG'S INCARCERATION VIOLATES HIS RIGHTS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION	35

A.	Armstrong's Incarceration For Civil Contempt Despite His Assertion Of His Fifth Amendment Privilege Was Improper	35
1.	The District Court's Reliance On <i>Braswell</i> Was Erroneous.....	36
a.	<i>Braswell</i> Does Not Apply Post-Indictment	36
b.	The <i>Braswell</i> Doctrine Has Been Substantially Undermined By <i>Hubbell</i>	38
c.	The District Court Misapplied <i>Braswell</i>	40
i.	Armstrong Was Not A "Custodian" Of The Corporate Defendants.....	40
ii.	<i>Braswell</i> Does Not Authorize "Compelled Testimony" Of The Custodian.....	47
iii.	<i>Braswell</i> Does Not Apply To Personal As Opposed To Corporate Records	52
iv.	The Fifth Amendment Privilege Applies To The "Missing Corporate Assets" Covered By The Turnover Orders	54
2.	Armstrong Did Not Waive His Fifth Amendment Privilege Against Self-Incrimination.....	56
B.	Armstrong's Continuing Incarceration For Civil Contempt Violates The Due Process Clause Of The Fifth Amendment.....	60
1.	Incarceration Beyond Eighteen Months Is Unlawful.....	60
2.	The Value Of "Missing" Assets Cannot Support The Contempt	62

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN
DENYING ARMSTRONG'S BAIL MOTION WITHOUT EVEN
CONSIDERING IT ON THE MERITS63

CONCLUSION65

TABLE OF AUTHORITIES

CASES

<i>Abm. S. See & Depew v. Fisheries Products, Co.</i> , 9 F.2d 235 (2d Cir. 1925).....	43
<i>In re Andrews</i> , 469 F. Supp. 171 (E.D. Mich. 1979)	33, 34, 43, 60, 61
<i>Bank of Bethel v. Pahquioque Bank</i> , 81 U.S. 383 (1871)	42, 43
<i>Bank of Nova Scotia v. United States</i> , 487 U.S. 250 (1988)	31
<i>Beaulieu v. Hartigan</i> , 430 F. Supp. 925 (D. Mass. 1977).....	63
<i>Blakely v. Washington</i> , 124 S. Ct. 2531 (2004)	12
<i>Bothwell v. Republic Tobacco Co.</i> , 912 F. Supp. 1221 (D. Neb. 1995)	23
<i>Boyd v. United States</i> , 116 U.S. 616 (1886)	54
<i>Braswell v. United States</i> , 487 U.S. 99 (1988)	<i>passim</i>
<i>CFTC v. FITC, Inc.</i> , 52 B.R. 935 (N.D. Cal. 1985).....	43, 44
<i>Central Pines Land Co. v. United States</i> , 274 F.3d 881 (5th Cir. 2001)	17
<i>Chambers v. NASCO</i> , 501 U.S. 32 (1991).....	17, 23, 31, 32
<i>Christensen v. Harris County</i> , 529 U.S. 576 (2000)	22
<i>Continental Casualty Co. v. United States</i> , 314 U.S. 527 (1942).....	30
<i>Counselman v. Hitchcock</i> , 142 U.S. 547 (1892).....	35
<i>Curcio v. United States</i> , 354 U.S. 118 (1957)	47, 48, 49, 52, 59
<i>Deadwyler v. Volkswagen of America, Inc.</i> , 884 F.2d 779 (4th Cir. 1989)	63
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	37

<i>Farr v. Pitchess</i> , 409 U.S. 1243 (Douglas, Circuit Justice 1973).....	64
<i>First Sav. & Loan Ass'n v. First Fed. Sav. & Loan</i> , 531 F. Supp. 251 (D. Haw. 1981)	44
<i>In re Ford</i> , 615 F. Supp. 259 (S.D.N.Y. 1985).....	34
<i>Fornos-Lopez v. Figarella Lopez</i> , 929 F.2d 20 (1st Cir. 1991).....	1
<i>In re Grand Jury Investigation (Joseph Braun)</i> , 600 F.2d 420 (3d Cir. 1979)	21, 30, 34, 60, 61
<i>In re Grand Jury Subpoenas Duces Tecum</i> <i>dated June 13, 1983 and June 22, 1983</i> , 722 F.2d 981 (2d Cir. 1983).....	46
<i>Graselli Chemical Co. v. Aetna Explosives Co.</i> , 252 F. 456 (2d Cir. 1918)	43
<i>Grune v. Coughlin</i> , 913 F.2d 41 (2d Cir. 1990).....	2, 64
<i>Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.</i> 527 U.S. 308 (1999).....	16
<i>Gully v. National Credit Union Admin. Board</i> , 341 F.3d 155 (2d Cir. 2003)	19
<i>Hoffman v. United States</i> , 341 U.S. 479 (1951).....	51, 55
<i>Howe v. Smith</i> , 452 U.S. 473 (1981)	20
<i>Iuteri v. Nardoza</i> , 662 F.2d 159 (2d Cir. 1981)	64
<i>In re Jean-Baptiste</i> , No. M 11-188 (PKL), 1985 WL. 1863 (S.D.N.Y. Jul. 5, 1985).....	34
<i>Kastigar v. United States</i> , 406 U.S. 441 (1972).....	35
<i>In re Kitchen</i> , 706 F.2d 1266 (2d Cir. 1983)	30
<i>Lefkowitz v. Turley</i> , 414 U.S. 70 (1973).....	35

<i>Lono v. Fenton</i> , 581 F.2d 645 (7th Cir. 1978) (en banc).....	22
<i>Maldonado v. Scully</i> , 86 F.3d 32 (2d Cir. 1996).....	15
<i>Malone v. Voges Mfg. Co.</i> , 271 F.2d 230 (2d Cir. 1959).....	43
<i>Manhattan Rubber Mfg. Co. v. Lucey Manufacturing Co.</i> , 5 F.2d 39 (2d Cir. 1925).....	43
<i>Mapp v. Reno</i> , 241 F.3d 221 (2d Cir. 2001).....	2, 64
<i>Michaelson v. United States ex rel. Chicago</i> , 266 U.S. 42 (1924).....	17
<i>Ohio v. Reiner</i> , 532 U.S. 17 (2001) (per curiam).....	35
<i>Ostrer v. United States</i> , 584 F.2d 594 (2d Cir. 1978).....	64
<i>Padilla ex rel. Newman v. Bush</i> , 233 F. Supp. 2d 564 (S.D.N.Y. 2002), <i>rev'd on other grounds</i> 124 S. Ct. 2711 (2004).....	19, 20
<i>Padilla v. Hanft</i> , No. Civ. A. 2:04-2221-26A, 2005 WL 465691 (D.S.C. Feb. 28, 2005).....	21
<i>Padilla v. Rumsfeld</i> , 352 F.3d 695 (2d Cir. 2003), <i>rev'd on other grounds</i> 124 S. Ct. 2711 (2004).....	17, 19, 21
<i>Palmer v. United States</i> , 530 F.2d 787 (8th Cir. 1976) (per curiam).....	28
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979).....	60
<i>Rumsfeld v. Padilla</i> , 124 S. Ct. 2711 (2004).....	17
<i>SEC v. HealthSouth Corp.</i> , 261 F. Supp. 2d 1298 (N.D. Ala. 2003).....	16
<i>SEC v. Spence & Green</i> , 612 F.2d 896 (5th Cir. 1980).....	44
<i>Sanchez v. Winfrey</i> , No. Civ.A.SA 04CA0293RFNN, 2004 WL 1118718 (W.D. Tex. Apr. 28, 2004).....	64
<i>Shillitani v. United States</i> , 384 U.S. 364 (1966).....	32, 33
<i>Sigety v. Abrams</i> , 632 F.2d 969 (2d Cir. 1980).....	32, 33

<i>Societe Internationale v. Rogers</i> , 357 U.S. 197 (1958).....	31
<i>(Suppressed) v. (Suppressed)</i> , 109 F. Supp. 2d 902 (N.D. Ill. 2000)	55
<i>In re Three Grand Jury Subpoenas</i> , 191 F.3d 173 (2d Cir. 1999)	<i>passim</i>
<i>United States v. Daisart Sportswear, Inc.</i> , 169 F.2d 856 (2d Cir. 1948)	59
<i>United States v. Doss</i> , 563 F.2d 265 (6th Cir. 1977)	37, 38, 60
<i>United States v. Edgerton</i> , 734 F.2d 913 (2d Cir. 1984).....	49, 50, 51, 52
<i>United States v. Hubbell</i> , 530 U.S. 27 (2000).....	<i>passim</i>
<i>United States v. Hudson</i> , 11 U.S. (7 Cranch) 32 (1812)	23
<i>United States v. Kordel</i> , 397 U.S. 1 (1970)	54
<i>United States v. Lawn</i> , 115 F. Supp. 674 (S.D.N.Y. 1953), <i>aff'd</i> , 355 U.S. 339 (1958).....	59
<i>United States v. Mitchell</i> , 556 F.2d 371 (6th Cir. 1977)	21, 27
<i>United States v. Payner</i> , 447 U.S. 727 (1980).....	31
<i>United States v. Rylander</i> , 460 U.S. 752 (1983)	50, 58, 59, 60
<i>West v. Janing</i> , 449 F. Supp. 548 (D. Neb. 1978).....	63
<i>In re Younger</i> , 986 F.2d 1376 (11th Cir. 1993)	26
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).....	60

STATUTES

U.S. Const., art. III, § 2.....	16
18 U.S.C. § 401	24
18 U.S.C. § 401(1).....	19

18 U.S.C. § 3481.....	62
18 U.S.C. § 4001(a)	<i>passim</i>
18 U.S.C. § 4001(b)(1)	20
18 U.S.C. § 6002.....	37
18 U.S.C. § 6003.....	37
28 U.S.C. § 566(d).....	19
28 U.S.C. § 1292.....	2
28 U.S.C. § 1826(a)	<i>passim</i>
28 U.S.C. § 1826(b)	64
28 U.S.C. § 2241.....	1
28 U.S.C. § 1331.....	1
28 U.S.C. § 2253(a)	1

LEGISLATIVE RECORD

116 Cong. Rec. 35291 (Oct. 7, 1970).....	30
H.R. Rep. No. 92-116, 92 Cong., 1st Sess. (Apr. 6, 1971), <i>reprinted in</i> 1971 U.S.C.C.A.N. 1435	20
H.R. Rep. No. 91-1549, 91 Cong., 2d Sess. 46, <i>reprinted in</i> 1970 U.S.C.C.A.N. 4007	26, 27, 30
S. 30, 91st Cong. 1st Sess. § 301 (1969).....	34

TREATISES

William N. Eskridge <i>et al.</i> , <i>Legislation and Statutory Interpretation</i> (Found. Press 2002).....	20
-----------------------------------------------------------------------------------------------------------------	----

PRELIMINARY STATEMENT

Martin A. Armstrong ("Armstrong") appeals from a December 23, 2004 order of the United States District Court for the Southern District of New York, Honorable Richard Owen, United States District Judge ("District Court"), denying his petition for a writ of habeas corpus, *Armstrong v. Guccione*, 351 F. Supp. 2d 167 (S.D.N.Y. 2004), and from the District Court's September 23, 2004 denial of his motion for release on bail from his confinement for civil contempt pending a ruling on his habeas petition.

JURISDICTIONAL STATEMENT

Sections 1331 and 2241 of Title 28 of the United States Code conferred upon the District Court subject-matter jurisdiction over Armstrong's habeas petition because Armstrong is incarcerated within the Southern District of New York. Jailed for civil contempt, Armstrong is "in custody" for habeas jurisdiction purposes. *See SEC v. Armstrong*, Nos. 03-6080(L), 03-6084, 2004 WL 362318, at *2 (2d Cir. Feb. 26, 2004) ("*Armstrong IV*"); *Fornos-Lopez v. Figarella Lopez*, 929 F.2d 20, 23 (1st Cir. 1991) (per curiam). Armstrong timely appealed from the denial of his petition on January 11, 2005. (A.-1027).¹ This Court has appellate jurisdiction pursuant to 28 U.S.C. § 2253(a).

¹ References to the Appendix are designated "(A.-_.)"

The District Court had authority to admit Armstrong to bail pending habeas corpus review. *See Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). Armstrong timely appealed from the denial of his bail motion on October 13, 2004. (A.-945). This Court has appellate jurisdiction pursuant to *Grune v. Coughlin*, 913 F.2d 41, 43-44 (2d Cir. 1990), and 28 U.S.C. § 1292. This consolidated appeal is from final orders that disposed of all of Armstrong's claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The primary issue in this case is whether the District Court erred in denying Armstrong's habeas corpus petition seeking release from his unlawful confinement (constitutionally and statutorily) for civil contempt. More specifically:

1. Did the District Court err in relying on its "inherent contempt powers" to imprison Armstrong for civil contempt, even though the Non-Detention Act, 18 U.S.C. § 4001(a) ("Section 4001(a)", forbids imprisonment of U.S. citizens unless expressly authorized by an "Act of Congress?"

2. Did the District Court err in relying on "inherent contempt powers" rather than the Recalcitrant Witness Statute, 28 U.S.C. § 1826(a)

("Section 1826"), to confine Armstrong beyond the eighteen-month period authorized by Congress?

3. Did the District Court err in disregarding Armstrong's proper assertion of his Fifth Amendment privilege against self-incrimination?

4. Did the District Court's contempt orders violate Armstrong's rights under the Due Process Clause of the Fifth Amendment?

5. Did the District Court abuse its discretion in summarily denying Armstrong's bail motion without even considering the merits of it?

STATEMENT OF THE CASE

In January 2000, the District Court jailed Armstrong for civil contempt at the Metropolitan Correctional Center in New York City, for a period not to exceed eighteen months, for his noncompliance with "turnover orders" to produce corporate property to a Receiver, notwithstanding Armstrong's insistence that he did not have it. Eighteen months later, Armstrong had not turned over the items sought and again denied having possession of them or knowledge of their whereabouts. Rather than release him, however, the District Court, defying well-settled constitutional principles and clear congressional mandates, ordered that Armstrong be sent back to his prison cell, this time, indefinitely. The sobering result of the District Court's usurpation of

authority is that Armstrong, unable to purge his contempt, remains imprisoned *after more than five years* -- the longest incarceration for civil contempt of a federal court order in history.

Although Congress has spoken, the District Court refuses to listen. Article III of the Constitution limits the power of the federal district courts to those which have been expressly conferred by Congress. Section 4001(a), which commands unequivocally that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," forbids detentions that are not expressly authorized by statute. In addition, Section 1826, the only federal statute that authorizes coercive confinements in court proceedings, sets an eighteen-month limit on incarceration. To bypass the eighteen-month limitation, the District Court through *ipse dixit* invoked its inherent "general contempt powers." But, a district court may not exercise "general inherent power" that Congress has revoked or when Congress has enacted a statute that governs the same subject matter. There simply is no credible argument that Sections 4001(a) and 1826 are inapplicable to Armstrong's imprisonment -- this is precisely the type of judicial abuse that Congress intended these statutes to proscribe, and, indeed, these enactments

reflect Congress' recognition that, in a civilized society, fundamental principles of justice and decency dictate that no one should be treated this way.

Moreover, even though the District Court had appointed a Receiver to marshal the corporate assets and exclusively exercise all corporate powers, the District Court treated Armstrong as a "custodian" of those entities. Indulging that fiction, the District Court not only rejected Armstrong's assertion of his Fifth Amendment privilege against self-incrimination and ordered him to deliver corporate (and personal) property to the Receiver, but also ordered him to testify about the existence and whereabouts of items he did not have, even though Armstrong was under indictment and the items sought were critical to the subject matter of the criminal charges pending against him. The District Court even permitted inquiry into the location of Armstrong's personal documents and assets. The Fifth Amendment does not countenance such blatant disregard of a criminal defendant's privilege and due process rights. Neither should this Court.

STATEMENT OF THE FACTS

On September 13, 1999, the Government commenced parallel criminal and civil proceedings against Armstrong. The Government filed a sealed criminal complaint charging Armstrong with securities fraud in the sale

of promissory notes ("Notes") issued by two corporations for which he served as an officer and director, Princeton Economics International, Ltd. ("PEI") and Princeton Global Management, Ltd. ("Corporate Defendants"). (A.-94). The same day, the SEC and CFTC also commenced twin enforcement suits against Armstrong and the Corporate Defendants alleging securities and commodities fraud. (A.-131, 148).

A. Installation Of The Receiver And The "MOA"

The SEC and CFTC immediately obtained an *ex parte* temporary restraining order ("TRO"), freezing all of the Defendants' assets and appointing a Receiver over the Corporate Defendants. (A.-190, 205). The TRO empowered the Receiver "to take and retain immediate possession, custody, and control of all assets and property and the books and records of original entry of the Corporate Defendants, including, without limitation, all assets and property described in [the preceding paragraph] of this Order." (A.-213). It also directed that the Receiver shall "manage, control, operate and maintain their businesses" and "commence, maintain, defend or participate in legal proceedings." (A.-213).

Because Defendant PEI is domiciled in the Turks and Caicos ("T&C"), a T&C court appointed joint provisional liquidators ("JPLs") over

PEI. The Receiver and the JPLs entered into a Memorandum of Agreement ("MOA") outlining their respective responsibilities. (A.-223). The MOA provided that the JPLs and the Receiver are to help the United States Attorney's Office, SEC and CFTC collect evidence for use in Armstrong's criminal and civil prosecutions. (A.-228).

B. Armstrong Is Indicted

After surrendering voluntarily to authorities in Trenton, New Jersey and being released on a \$5 million personal recognizance bond (A.-183-85), on September 29, 1999, the United States Attorney's Office for the Southern District of New York indicted Armstrong ("First Indictment"). (A.-110). In pertinent part, the First Indictment alleged that Armstrong had "spent millions of dollars obtained from the sale of [the] Notes to purchase rare coins and antiquities." (A.-112-13).

C. District Court Issues The Turnover Orders Demanding Items Directly Related To The Subject-Matter Of The Indictment

As part of the TRO and preliminary injunction orders issued on October 14, 1999 ("October PI Order") and November 11, 1999 (collectively, "Turnover Orders"), the District Court ordered Armstrong to turnover to the Receiver both personal and corporate documents and assets. (A.-368, 371). These orders also divested Armstrong of authority and control over the

Corporate Defendants and transferred all such authority and control to the Receiver. (A.-365-67).

In a January 6, 2000 Amended Order ("January 2000 Amended Order"), the District Court expanded the scope of the receivership by granting the Receiver exclusive control over four-hundred and sixty corporate subsidiaries and affiliates of the Corporate Defendants.² (A.-378). The business of Defendant PGM had ceased operations when the Receiver took over on September 13, 1999. In February 2004, the other Corporate Defendant, PEI, was ordered to be wound-up. (A.-1043). And, Armstrong (while in custody) has been powerless to act over any entity since January 2000.

The items Armstrong was ordered to produce fell squarely within the subject matter of the First Indictment that specifically alleged that he had obtained corporate property by misappropriating proceeds from sales of the Notes. (A.-112-13). Accordingly, beginning at an October 14, 1999 preliminary injunction hearing ("October 1999 PI Hearing") and consistently thereafter, Armstrong invoked his Fifth Amendment privilege. (A.-336).

² In October 2000, the District Court, at the Receiver's request and over Armstrong's objection, also wound-up and ceased the operations of one of the
(Cont'd on following page)

D. The January 7, 2000 Braswell Hearing

At a January 7, 2000 hearing ("*Braswell* Hearing"), even though Armstrong had been indicted almost four months earlier, the District Court rejected his invocation of the Fifth Amendment privilege. (A.-489, 493-94). The District Court ruled that under *Braswell v. United States*, 487 U.S. 99 (1988), Armstrong was a "corporate custodian" of the Corporate Defendants to whom the privilege is unavailable, even though the District Court had stripped him of all authority over the Corporate Defendants and vested it in the Receiver alone. (A.-488).

Even though he was an indicted defendant, the District Court ordered Armstrong to explain the non-production of any item sought and warned him that he could not assert the Fifth Amendment privilege:

I am observing now to Mr. Armstrong and his lawyers that if there is nonproduction of any of the items that have been listed by the court as having been demonstrated to be produced by him, *if there is any nonproduction, I'm going to want a competent explanation. I don't want a Fifth Amendment explanation. I don't want a rank hearsay explanation.* I want something where even the lawyers, if necessary, say "We went here and we went there and we looked at this and we did that," and then *you swear to it.* So if

(Cont'd from preceding page)

Corporate Defendants' businesses, the Princeton Economic Institute, Inc. ("*Princeton Institute*"). (A.-1097).

there is nonproduction on any item, I want an explanation of how come no production. (A.-493-94 (emphasis added)).

E. The January 14, 2000 Contempt Hearing

One week later, at a January 14, 2000 hearing ("First Contempt Hearing"), the District Court adjudged Armstrong in civil contempt. (A.-668). Armstrong had given the Receiver items that were in his possession and control but testified -- at the District Court's insistence, despite Armstrong's assertion of his Fifth Amendment privilege -- that he could not turn over other items (*i.e.*, rare coins, gold bars, antiques, a computer and a computer hard drive) because he did not have them. (A.-580 *et seq.*). The District Court did not believe him. (A.-668-73). The District Court ordered Armstrong to be incarcerated immediately until he either complied with the Turnover Orders or provided further testimony demonstrating his inability to do so. (A.-674).

F. District Court Invokes Its "Inherent Contempt Power" To Confine Armstrong Indefinitely

The District Court stated at the First Contempt Hearing, and noted in an August 25, 2000 order, that the confinement had "an outside limit of 18 months," implicitly referring to Section 1826 as the maximum time allowed for coercive confinement. (A.-671, 711-12). But, at a July 6, 2001 hearing ("Second Contempt Hearing"), shortly before the expiration of Armstrong's initial

eighteen months of confinement, the District Court jettisoned its reliance on the eighteen-month limitation in Section 1826 and invoked its "general and inherent equitable powers" to continue Armstrong's confinement indefinitely. (A.-736, 747).

In a July 17, 2001 order ("July 2001 Order"), the District Court insisted that Armstrong's incarceration always had been predicated on its "inherent authority" and that its statement at the First Contempt Hearing that the confinement was limited to eighteen months was "unintentional." (A.-750-51). On January 29, 2003, the District Court again extended Armstrong's incarceration after he served his second eighteen-month period of imprisonment. (A.-774).

G. District Court's December 11, 2003 Order

In a December 11, 2003 order ("December 2003 Order"), the District Court concluded that the Turnover Orders did not violate Armstrong's Fifth Amendment privilege, even though the items sought were directly related to the criminal charges pending against him. (A.-775). Remarkably, the District Court determined that the items lacked any probative value that the Government could use to convict Armstrong. (A.-776).

H. Armstrong Is Denied Appellate Review

Armstrong appealed the original contempt order and each of the subsequent orders continuing his incarceration ("Contempt Orders"). Each time, however, this Court dismissed the appeal for lack of jurisdiction without addressing the merits of the underlying constitutional and statutory issues.³

I. The Superseding Indictment

After the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), a superseding indictment was returned against Armstrong in July 2004 ("Second Indictment"). The Second Indictment makes even more explicit that which is evident from the First Indictment -- that the items sought by the Turnover Orders go to the very heart of the Government's theory of Armstrong's alleged criminality. (A.-855). The Second Indictment refers to Armstrong's acquisition and possession of the property as not only acts of the purported fraud, but also as the fruits and motive of Armstrong's alleged crimes. (A.-864, 894). It further alleges that computer equipment Armstrong failed to produce contains information that is "amongst the *most incriminating* [evidence

³ See *Armstrong IV*, 2004 WL 362318 at *2; *CFTC v. Armstrong*, 284 F.3d 404 (2d Cir. 2002) (per curiam) ("*Armstrong III*"); *CFTC v. Armstrong*, 269 F.3d 109 (2d Cir. 2001); *SEC v. Princeton Econ. Int'l., Ltd.*, Nos. 00-6076, 00-6156, 2001 WL 300550 (2d Cir. Mar. 27, 2001) ("*Armstrong I*").

against Armstrong], and which clearly reflected his fraudulent activity." (A.-888-89 (emphasis added)).

The civil contempt also forms the basis of the Government's request for a sentencing enhancement under the United States Sentencing Guidelines due to Armstrong's alleged obstruction of justice in not complying with the Turnover Orders. (A.-888-89, 905). The Government represented to the District Court that "Armstrong's obstructive conduct in connection with th[e] civil action has been alleged in the [Second] Indictment as one of a number of acts constituting direct evidence that Armstrong knowingly and willfully participated in the fraudulent scheme charged." (A.-909).

J. District Court Denies Armstrong's Habeas Petition

At the urging of the panel in *Armstrong IV*, 2004 WL 362318, at *1-2, Armstrong challenged the legality of his confinement in a habeas corpus petition. In denying it, the District Court ruled that (1) Section 4001(a) is inapplicable to Armstrong's situation because that section is addressed only to the executive branch, not the judiciary; (2) Section 1826 is inapplicable to Armstrong's contempt; (3) *Braswell* requires Armstrong to comply with the Turnover Orders, even post-indictment and notwithstanding his assertion of the

Fifth Amendment privilege; and (4) Armstrong's indefinite confinement does not violate due process. (A.-1020).

SUMMARY OF ARGUMENT

The District Court erred in not granting the writ because Armstrong's imprisonment is indisputably unlawful. The District Court had no "inherent contempt power" to jail Armstrong, let alone to continue his confinement beyond the congressionally-mandated eighteen-month limit, because Section 4001(a) requires that all detentions be grounded in an act of Congress that specifically authorizes detention. In addition, Section 1826, which Congress said codifies the common law of civil contempt, is the only statute pursuant to which Armstrong could have been lawfully incarcerated for civil contempt. Section 1826 prohibits incarceration beyond eighteen months. Armstrong's continuing confinement, now in its *sixty-second month*, is thus illegal.

Moreover, the Contempt Orders themselves are the product of constitutional error. Relying on the Supreme Court's decision in *Braswell*, the District Court improperly rejected Armstrong's assertion of his Fifth Amendment privilege and ordered him to produce documents and assets in his possession or under his control, and to testify about the location of items not in

his possession. The District Court erred, however, in its application of *Braswell*, the continued validity of which has been undermined by *United States v. Hubbell*, 530 U.S. 27 (2000).

The District Court erred by deeming Armstrong a "corporate custodian" of the Corporate Defendants after the appointment of the Receiver who was given unfettered control over them, and by ordering Armstrong to testify about the location of documents and assets (both corporate and personal) not within his custody. Moreover, *Braswell* does not authorize compelled testimony and does not apply to a witness's personal property. Further, *Braswell* does not apply to a criminal defendant, like Armstrong, under a parallel indictment.

The District Court's disregard of the congressionally-mandated eighteen-month limit for incarcerating civil contemnors also implicates due process concerns.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision on a petition for habeas corpus. See *Maldonado v. Scully*, 86 F.3d 32, 35 (2d Cir. 1996). Parallel criminal and civil prosecutions, both of which the Government controls, pose a "special danger" that the Government may effectively utilize the civil

proceeding to undermine a defendant's constitutional rights. *See SEC v. HealthSouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003). This case presents this type of "special danger" that necessitates heightened judicial scrutiny.

ARGUMENT

I. THE DISTRICT COURT LACKED AUTHORITY TO JAIL ARMSTRONG INDEFINITELY FOR CIVIL CONTEMPT

The District Court had no inherent power to confine Armstrong indefinitely. As an Article III court, the District Court's power extends "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ." U.S. Const., art. III, § 2. The power of the district courts is therefore limited to that which has been expressly conferred by Congress. Through the Judiciary Act of 1789 ("Judiciary Act"), Congress conferred on the federal district courts "authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (collecting cases). It is beyond cavil, however, that "the exercise of the inherent power of the lower federal courts can be limited by statute and rule, for

'[t]hese courts were created by act of Congress.'" *Chambers v. NASCO*, 501 U.S. 32, 47 (1991) (citation omitted). Although lower federal courts may be free to exercise inherent contempt power where Congress has not spoken, they may not do so where Congress has defined or limited it. *See Michaelson v. United States ex rel. Chicago*, 266 U.S. 42, 66 (1924) ("Congress retains the exclusive and absolute power to regulate any power of contempt exercised in the federal judiciary.").

The confluence of Sections 4001(a) and 1826 is an explicit denial of judicial inherent power to jail civil contemnors for more than eighteen months. Section 4001(a), by its plain terms, is a sweeping reclamation by Congress of all federal governmental authority to detain American citizens absent "precise and specific [statutory] language authorizing the detention." *Padilla v. Rumsfeld*, 352 F.3d 695, 720 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).⁴ Section 1826 grants the district courts power to

⁴ The Supreme Court reversed the panel opinion in *Padilla* on a jurisdictional ground (not present here) and was careful to point out that it did not reach, let alone disturb, this Court's analysis of Section 4001(a). *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004). The panel's interpretation of Section 4001(a) in *Padilla* is still binding authority in this circuit. *See Central Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001) (unaffected portion of a panel opinion reversed on other grounds is binding precedent).

confine contemnors, but expressly limits the duration of confinement to eighteen months. Section 1826 is the only statute in the United States Code containing "precise and specific language" authorizing coercive detention in court proceedings. The District Court therefore had no "inherent power" to jail Armstrong for more than eighteen months.

A. The District Court Erred In Concluding That Section 4001(a) Is Inapplicable To Armstrong's Imprisonment

1. Section 4001(a) Does Not Distinguish Between "Executive" And "Judicial" Branches

The District Court concluded that Section 4001(a) is inapplicable to Armstrong's imprisonment because, according to the District Court, the statute is addressed only to the executive branch, not the judicial branch. (A.-1023). This is wrong for several reasons.⁵

⁵ At a hearing on Armstrong's petition, the District Court posed the following hypothetical to Armstrong's counsel regarding Section 4001(a)'s applicability to the judiciary:

THE COURT: Let's take an absolutely hypothetical case where you have a defendant in front of you, and you happen to have a United States Marshal sitting out in the back. And the next thing you know, that defendant is doing a hundred-yard dash for that door. Okay? Do you mean that I need an act of Congress to scream out, "Marshal, grab him?" (A.-1024).

Of course, this hypothetical has nothing to do with the case at bar. In any event, consistent with Section 4001(a)'s requirement that detention authority
(Cont'd on following page)

First, the District Court's narrow reading of Section 4001(a) as applying only to the executive branch is belied by the unambiguous language of the statute itself that makes no distinction between executive and judicial detentions -- indeed, the words "executive branch" appear nowhere in Section 4001(a). By its terms, Section 4001(a) reaches *all* detentions "by the United States" government without qualification or limitation to a particular branch thereof.⁶ If Congress had intended to address Section 4001(a) only to the

(Cont'd from preceding page)

must be derived from statute, a court may punish by imprisonment "[m]isbehavior of any person in its presence" pursuant to 18 U.S.C. § 401(1), which would apply to a prisoner fleeing from the courtroom. Also, a deputy U.S. Marshal has independent statutory authority to detain an escapee. *See* 28 U.S.C. § 566(d) (marshal's deputy can "make arrests without warrant for any offense against the United States committed in his or her presence").

⁶ The Receiver argued below (as we anticipate the Government will argue here) that "legislative history" -- *i.e.*, statements by two members of Congress during the floor debates prior to Section 4001(a)'s enactment -- indicates that the statute is not intended to constrain inherent judicial contempt powers. (A.-1126-27). But this so-called legislative history may not be used because in *Padilla* this Court, in holding that Section 4001(a) applies to all detentions, determined "that the statute is unambiguous." 352 F.3d at 721; *see also Padilla ex rel. Newman v. Bush*, 233 F. Supp.2d 564, 597 (S.D.N.Y. 2002) ("There is no ambiguity here. The plain language of [Section 4001(a)] encompasses all detentions of United States citizens."), *rev'd on other grounds*, 124 S. Ct. 2711 (2004). Where, as here, a statute is unambiguous, "it is well settled that [a court] cannot resort to legislative history to glean a statute's meaning." *Gully v. National Credit Union Admin. Bd.*, 341 F.3d 155, 164 (2d Cir. 2003).

(Cont'd on following page)

executive branch, it would have done so expressly as it did elsewhere in the statute, *see* 18 U.S.C. § 4001(b)(1) (vesting power to control and manage federal prisons to the "Attorney General"), and in countless other provisions of the United States Code.⁷

Second, the District Court's determination that Section 4001(a) reaches only the executive branch flies in the face of Supreme Court and Second Circuit precedent. In *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981), the Supreme Court stressed that "the plain language of § 4001(a) proscribe[es] detention of

(Cont'd from preceding page)

In any event, the statements by congressional members cited by the Receiver are unreliable sources of legislative intent because they represent only the personal views of the legislators themselves, not Congress as a whole. *See* William N. Eskridge *et al.*, *Legislation and Statutory Interpretation* 304 (Found. Press 2002) ("There is less reason to think that such material reflects the view of the enacting coalition and more reason to worry that it might have been strategically planted in the record."). Moreover, this legislative history should be ignored because the view that the Receiver attributed to these two legislators *i.e.*, Section 4001(a) was not intended to delimit inherent contempt power, (1) is a mischaracterization of their statements and inconsistent with views expressed by other congressional members (whose statements the Receiver omitted from his brief), and (2) appears nowhere in the final committee report, *see* H.R. Rep. No. 92-116, 92 Cong., 1st Sess. (Apr. 6, 1971), 1971 U.S.C.C.A.N. 1435 -- which is "the most useful legislative history," Eskridge, *supra*, at 302 -- or in Section 4001(a) itself.

⁷ In any event, Armstrong *is* being detained by agents of the executive branch, the United States Marshals Service and the Bureau of Prisons. (A.-674). And, the Bureau of Prisons' computerized "inmate profile" for Armstrong has
(Cont'd on following page)

any kind by the United States, absent a congressional grant of authority to detain." (Emphasis in original.) This Court reiterated the literal language of the statute in *Padilla*, emphasizing that it prohibits *all* detentions of citizens absent "precise and specific" congressional authorization, 352 F.3d at 720, and that "no exception to section 4001(a) otherwise exists," *id.* at 699; *see also Padilla v. Hanft*, No. Civ. A. 2:04-2221-26A, 2005 WL 465691, at *9 (D.S.C. Feb. 28, 2005) ("In clear and unambiguous language, [Section 4001(a)] forbids *any kind* of detention of an [sic] United States citizen, except that which is specifically allowed by Congress.").

Section 1826 is the only federal statute with the requisite "precise and specific language" authorizing coercive confinements in court proceedings. But, Armstrong's continued confinement, now in its *sixty-second month*, is unlawful under Section 1826, which abolished the district courts' inherent power to imprison contemnors beyond eighteen months. *See, e.g., In re Grand Jury Investigation. (Joseph Braun)*, 600 F.2d 420, 427 (3d Cir. 1979); *United States v. Mitchell*, 556 F.2d 371, 384-85 (6th Cir. 1977) ("Before the enactment of [Section 1826], there was no limitation on the length of confinement for civil

(Cont'd from preceding page)

continued recording his confinement in eighteen-month intervals, implicitly recognizing that Section 1826 is the only legal basis to detain him. (A.-1105).

contempt," but now "Congress [has] imposed an 18-month maximum on the length of confinement for civil contempt relating to either a court or a grand jury proceeding"); *cf. Christensen v. Harris County*, 529 U.S. 576, 583 (2000) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

To circumvent the eighteen-month restriction, the District Court in July 2001 disavowed its reliance on Section 1826 and now insists that Armstrong's confinement is premised on its inherent contempt power. (A.-750-51). But if so, Armstrong's incarceration violated Section 4001(a) *from day one* because a confinement order pursuant to a court's "inherent power" is not predicated upon, nor a substitute for, an "Act of Congress" that Section 4001(a) demands. *See Lono v. Fenton*, 581 F.2d 645, 648 (7th Cir. 1978) (*en banc*) ("Congress [in Section 4001(a)] has forbidden non-statutory confinement in federal prisons"). The District Court therefore cannot not lawfully resort to "inherent authority" to jail Armstrong and violated Section 4001(a) in doing so.

2. The Judiciary Act Does Not Authorize Coercive Confinements For Civil Contempt

The Receiver argued below that Armstrong's confinement is lawful because the District Court's inherent power to coerce by incarceration is derived

from an "Act of Congress," the Judiciary Act. (A.-1127-28). This is wrong for at least two reasons.

First, inherent contempt powers are *not* derived from statute. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (inherent power to "imprison for contumacy" is "not immediately derived from statute"); *see also Chambers*, 501 U.S. at 43 (inherent powers "are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs"); *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221, 1225 (D. Neb. 1995) ("Since its inception the federal judiciary has maintained that federal courts possess inherent powers which are not derived from statutes or rules."). Even the District Court itself eschews any suggestion that its inherent power is derived from statute. (A.-736-37, 750-51).

Second, the Judiciary Act does *not* authorize coercive confinement in the manner required by Section 4001(a), as is evident from the Receiver's failure to cite any provision of the Judiciary Act to support his contention. (A.-1127-28). The only potentially relevant provision of the Judiciary Act is Section 17, which provides in part:

And it be further enacted, That all the said courts of the United States shall have the power . . . to ***punish*** by . . . imprisonment, at the discretion of said courts, all

contempts of authority in any cause or hearing before the same (Bold added)

The foregoing text is *not* "precise and specific" authorization to incarcerate civil contemnors -- indeed, Section 17 (now codified, as amended, at 18 U.S.C. § 401), has nothing to do with *civil* contempt, only *criminal* contempt. To be sure, it empowers a court only to "*punish*" contumacious conduct by imprisonment. But the District Court maintains that the aim of Armstrong's imprisonment is *coercion*, not *punishment*. See *Armstrong I*, 2001 WL 300550, at *1. (A.-750-51). Devoid of "precise and specific" authorization to order coercive confinements, the Judiciary Act does not override Section 4001(a)'s prohibition.⁸

B. The District Court Erred In Jailing Armstrong Beyond The Eighteen-Month Limit Imposed By Section 1826

The District Court ruled that Armstrong's continuing incarceration is not unlawful under Section 1826 because (1) the statute is inapplicable to Armstrong's contempt and (2) *this Court* had rejected Armstrong's Section 1826 argument in earlier appeals. (A.-1023-24). The District Court is wrong on both counts.

⁸ For a detailed discussion of the Judiciary Act and the historical evolution of the contempt power, see Armstrong's Habeas petition at pp. 14-22.

1. **This Court Has Not Decided Section 1826's Applicability**

This Court has *not* decided whether Section 1826 governs Armstrong's contempt. Although Armstrong argued Section 1826's applicability in prior appeals, this Court did not consider, let alone determine, the issue on the merits. Instead, each time the panel dismissed the appeal for lack of jurisdiction. *See supra* note 3. Indeed, the very reason the panel in *Armstrong IV* invited Armstrong to raise his Section 1826 claim and other challenges to his incarceration for civil contempt in a petition for habeas corpus was so that this Court could address the merits of those claims. *See* 2004 WL 362318, at *1-2.

2. **Armstrong's Confinement Is Governed By Section 1826**

The District Court wrongly concluded in its July 2001 Order that Section 1826 does not govern Armstrong's contempt sanction because it is inapplicable to a "court order to produce missing corporate assets." (A.-750). That conclusion is belied by the language of the statute itself.

Section 1826(a) provides:

Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide *other information*, including any book, paper, document, record, recording or *other material*, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time

as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of --

- (1) the court proceeding, or
- (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

28 U.S.C. § 1826(a) (emphasis added).⁹

a. Armstrong Was A "Witness"

The Government and the Receiver have asserted in the District Court and this Court that Armstrong was not a "witness." Their assertion, however, is belied by the District Court's acknowledgement that Armstrong *was* a "witness" (A.-990). Moreover, it is well-settled that a "witness" is anyone called upon to perform a testimonial act, including furnishing evidence. *See Hubbell*, 530 U.S. at 50 (Thomas and Scalia, JJ., concurring). Courts also have

⁹ Although the eighteen-month restriction appears in subparagraph (2) of Section 1826(a) that refers to grand juries, the legislative history clarifies that it applies to court proceedings referenced in subparagraph (1) as well. *See* House H.R. Rep. No. 91-1549, 91 Cong., 2d Sess. 46, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4022 ("House Report") ("As amended by the committee confinement is, therefore, limited to the life of *the court proceeding or* the term (including extensions) of the grand jury . . . but in no event shall confinement exceed 18 months." (emphasis added)); *see also In re Younger*, 986 F.2d 1376, 1378 (11th Cir. 1993) (Section 1826 "includes within its scope any proceeding before any court of the United States").

made clear that a "witness" within the meaning of Section 1826 includes parties (like Armstrong) to the underlying suit. *See Mitchell*, 556 F.2d at 384-85 (parties are "witnesses" for Section 1826 purposes). In any event, Armstrong falls within the ambit of Section 1826 as one who was ordered to "testify" *or* to "provide other information."

b. The Corporate Assets In This Case Are "Other Information" And "Other Material"

By its terms, Section 1826 encompasses refusals to provide "other information" and "other material." The legislative history explains that the phrase "other information" is all-encompassing:

[The Act] defines "other information" to include books, papers, and other materials. The phrase is used in contradistinction to oral testimony. It would include, for example, *electronically stored information on computer tapes*. Its scope is intended to be *comprehensive*, including *all information* given as testimony, but not orally.[¹⁰]

House Report, 1970 U.S.C.C.A.N. at 4017 (emphasis and footnote added).

Courts have construed "other information" and "other material" in Section 1826 broadly to include evidence that is not communicative in nature. *See Mitchell*,

¹⁰ This text appears in the House Report's discussion of the phrase "other information" in proposed Section 6001(2) of Title II, which is incorporated by reference into the House Report's discussion of "other information" in Section 1826. *See House Report*, 1970 U.S.C.C.A.N. at 4017, 4022.

556 F.2d at 384 (voice exemplars); *Palmer v. United States*, 530 F.2d 787, 789 (8th Cir. 1976) (per curiam) (handwriting exemplars). Computers, coins, gold bullion and antique busts must be accorded the same treatment under Section 1826 as handwriting and voice exemplars.

It is beyond doubt that Section 1826 applies to the "corporate assets" in this case. First, the House Report's explicit reference to "electronically stored information on computer tapes" as an example of "other information" contemplated by Section 1826 shows that the computer and computer hard drive sought by the Turnover Orders are covered by Section 1826. (A.-707). This conclusion is buttressed by the fact that the Second Indictment alleges that they contain information that is "amongst the most incriminating" evidence against Armstrong. (A.-888).

The remaining assets demanded by Turnover Orders (*i.e.*, rare coins, gold bars and antiquities) also meet the definition of "other information" and "other material" in Section 1826. Contrary to the District Court's mischaracterization of these items in its December 2002 Order, they are not "things" with no probative or evidentiary value; rather, they are critical to the prosecution. The First and Second Indictments identify these assets as key evidence of Armstrong's alleged offenses (A.-112-13, 864, 888-89, 894), and the

Government characterizes Armstrong's purported failure to produce them as "direct evidence" of his guilt, (A.-909). Moreover, pursuant to the MOA, the Government (acting through the Receiver) is seeking to compel Armstrong to turn over these items post-indictment to be used in his criminal and civil prosecutions. (A.-228). As such, these assets clearly constitute "other information" and "other material" within the meaning of Section 1826, because just like a "book, paper, document, record [or] recording" in Section 1826, these assets have the same probative evidentiary value (*i.e.*, "information").

The illogic of the District Court's position that the phrases "other information" and "other material" in Section 1826 do not include these "corporate assets" flies in the face of Section 4001(a)'s prohibition against non-statutory confinements. The District Court's view would lead to an absurd result: a district court could jail a recalcitrant witness to coerce him to produce a corporate "book, paper, document, record [or] recording," 28 U.S.C. § 1826(a), but could *not* jail the witness for refusing to produce other "corporate assets." Neither Section 1826 nor its legislative history so much as hints that this is what Congress intended.

3. Section 1826 Supplants Inherent Authority To Incarcerate Civil Contemnors

The District Court lacked inherent authority to jail Armstrong beyond eighteen months because Section 1826 supplants the district courts' inherent power to incarcerate for civil contempt.

a. Section 1826 Codifies The Common Law Of Civil Contempt

At the time of its enactment in 1970, Section 1826 was described "as codifying the existing practice governing civil contempt for a refusal to comply with a court order to testify or to produce documents." *Braun*, 600 F.2d at 425-26 (citing House Report, 1970 U.S.C.C.A.N. at 4022); *In re Kitchen*, 706 F.2d 1266, 1271 (2d Cir. 1983) ("The enactment of § 1826 in 1970 has always been characterized as a codification of existing law, both procedural and substantive, on civil contempt."); *see also* 116 Cong. Rec. 35291 (Oct. 7, 1970) (Section 1826 "codifies the present law of contempt"). The codification of the common law supplants the inherent power for the subject matter covered by the statute, *i.e.*, the inherent power is extinguished once it is codified. *See Continental Cas. Co. v. United States*, 314 U.S. 527, 533 (1942) ("Whatever may have been the power of the courts of the United States before the statute,

those powers are now regulated by statute."). Thus, Section 1826 replaces inherent civil contempt power for all conduct that falls within its purview.

Because Section 1826's eighteen-month limitation cannot co-exist with an "inherent power" to coerce the same intransigence by indefinite confinement, the inherent power must yield. To conclude otherwise, *i.e.* to countenance at-will circumvention of the statutory restriction by resort to "inherent power," would disregard Article III of the Constitution and render Section 1826 a nullity.

This is consistent with the Supreme Court's admonition that district courts should be particularly circumspect in recognizing an inherent power when it provides a means to circumvent a statute or rule. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980). Accordingly, a "district court should rely on text-based authority derived from Congress rather than inherent power in every case where the text based authority applies." *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting) (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 207 (1958), and *Bank of Nova Scotia*, 487 U.S. at 254).

Because Section 1826 was enacted specifically to remove the maximum duration of civil contempt confinements from judicial discretion, the District Court erred in refusing to abide by this constitutionally and congressionally-mandated limitation.

b. Cases Cited By The District Court To Support Its Use Of "Inherent Power" Are Inapposite

The District Court relied on *Chambers*, 501 U.S. at 44, and *Shillitani v. United States*, 384 U.S. 364 (1966), to support its invocation of “general and equitable contempt powers” to jail Armstrong indefinitely. (A.-750-51). Neither decision countenances rejection of Section 1826 in favor of general contempt powers.¹¹

In *Chambers*, the district court *assessed attorney’s fees* as a sanction for bad-faith conduct during the course of litigation. *See* 501 U.S. at 40-41. The conduct forming the basis for contempt did not fall within the purview of Section 1826 and the sanction imposed did not result in the contemnor's incarceration. *See id.* at 41-42. Unlike this case, in *Chambers* there

¹¹ The District Court also relied on *Sigety v. Abrams*, 632 F.2d 969, 976 (2d Cir. 1980). (A.-750-51). There, the contemnor was jailed pursuant to a warrant of commitment for civil contempt issued by a *state* court, not a *federal* district court subject to Section 4001(a), for failure to produce records pursuant to a subpoena. The issue reached the district court on a writ of habeas corpus. *See*

(Cont'd on following page)

was no statutory authority encompassing the subject matter of the inherent power exercised by the district court.

More significantly, the District Court's reliance on *Shillitani* is misplaced because that case predates the enactment of Section 1826. At the time *Shillitani* was decided, there was no statutory basis for the imposition of a civil contempt sanction against a recalcitrant witness; thus, the court's reliance on its general equitable powers was not inappropriate. However, the *Shillitani* court's holding, that a witness could be incarcerated indefinitely for refusing to testify, was a significant factor in Congress's ultimate decision to curtail that power by establishing an eighteen-month limit in Section 1826. *See In re Andrews*, 469 F. Supp. 171, 175 (E.D. Mich. 1979). Thus, Section 1826 supplants *Shillitani*.

The District Court thus had no “general inherent contempt powers” to invoke in the face of both Section 1826 that governs the same conduct, and the unambiguous language of Section 4001(a), which proscribes all non-statutory detentions.

(Cont'd from preceding page)

id. at 971. Because *Sigety* arose from a New York *state* (not federal) court's incarceration of an alleged contemnor, Section 1826 did not apply. *See id.*

**c. Section 1826 Sets An Eighteen-Month Limit On
 Confinement For Civil Contempt**

As originally proposed by the Senate, Section 1826 placed no limitation upon the period for which an intransigent witness could be confined. *See In re Andrews*, 469 F. Supp. at 174 (citing S. 30, 91st Cong. 1st Sess. § 301 (1969)). The absence of any limitation on the period during which a witness could be incarcerated created a firestorm of opposition from those who considered the provision “unduly harsh.” *Braun*, 600 F.2d at 426. The eighteen-month outer limit for incarcerating a civil contemnor was adopted by a House subcommittee and ultimately passed by both houses. *See id.* at 426, n.24.

The legislative history of Section 1826 demonstrates that Congress clearly considered, and squarely rejected, the notion that a “recalcitrant witness” could be incarcerated for longer than eighteen months. *See In re Ford*, 615 F. Supp. 259, 260 (S.D.N.Y. 1985) (“By enacting § 1826(a), Congress determined that confinement for up to eighteen months is coercive rather than punitive in nature.”); *In re Jean-Baptiste*, No. M 11-188 (PKL), 1985 WL 1863, *4 n.6 (S.D.N.Y. Jul. 5, 1985) (“The eighteen month provision of § 1826(a) was enacted as a limit on the length of sentences for civil contempt, which until then had been within the discretion of the district judge.”). The District Court therefore could not incarcerate Armstrong for more than eighteen months.

II. ARMSTRONG'S INCARCERATION VIOLATES HIS RIGHTS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION

The District Court erred in denying Armstrong's habeas petition because the District Court's incarceration of Armstrong violates both the Self-Incrimination and Due Process Clauses of the Fifth Amendment.

A. Armstrong's Incarceration For Civil Contempt Despite His Assertion Of His Fifth Amendment Privilege Was Improper

The very basis of Armstrong's contempt rests on faulty constitutional ground. The Supreme Court has long recognized that the Fifth Amendment privilege against self-incrimination ensures that "a person cannot be compelled to disclose facts before a court . . . which might subject him to a criminal prosecution or his property to forfeiture." *Counselman v. Hitchcock*, 142 U.S. 547, 559 (1892). The privilege may be asserted in civil proceedings, *see Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Kastigar v. United States*, 406 U.S. 441, 445 (1972), even when a witness has nothing to hide, *see Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam). Despite these clear constitutional principles and Armstrong's timely (and repeated) assertions of his Fifth Amendment privilege, the District Court directed Armstrong to produce documents and assets or to testify about their location, even though they were directly related to the subject matter of his criminal indictment. This

unconstitutional predicate for Armstrong's contempt mandates Armstrong's release from confinement.

1. The District Court's Reliance On *Braswell* Was Erroneous

The District Court relied on *Braswell* as the basis for its order compelling Armstrong to produce or to testify about the assets. (A.-488, 776). *Braswell* held that "a custodian of corporate records may not resist a subpoena for corporate records on Fifth Amendment grounds," for the simple reason that, as a custodian and representative of the corporation, his act of production is deemed that of the corporation, which enjoys no privilege against self-incrimination. 487 U.S. at 106, 110. The District Court's misapplication of *Braswell* to Armstrong's situation was plain error because "*Braswell* is not coextensive with a Fifth Amendment privilege." *In re Three Grand Jury Subpoenas*, 191 F.3d 173, 182 (2d Cir. 1999).

a. *Braswell* Does Not Apply Post-Indictment

Braswell's mitigating evidentiary privilege cannot reasonably apply after a witness has been indicted. The *Braswell* Court juxtaposed the "collective entity" doctrine over the rights of the individual, but only because he had not been indicted. Armstrong, on the other hand, was an indicted criminal defendant when he was ordered to produce documents and assets on behalf of

the Corporate Defendants. Once an indictment is returned, a defendant enjoys absolute immunity from compelled testimony. Indeed, in *Hubbell*, 530 U.S. at 29, the Court held that a grant of immunity under 18 U.S.C. §§ 6002 or 6003 must be provided to defendant subject to an outstanding criminal indictment.

The reasons for prohibiting compelled testimony post-indictment are at least three-fold. First, *Braswell* affords insufficient protection in a post-indictment setting because the *Braswell* act-of-production mitigating privilege "is not coextensive with the Fifth Amendment privilege." *In re Three Grand Jury Subpoenas*, 191 F.3d at 182. Second, any other result would "allow the revival of a modern version of the ancient English Star Chamber."¹² *United States v. Doss*, 563 F.2d 265, 277 (6th Cir. 1977) (en banc). Third, "the government's advantage in seeking wide-ranging discovery through this mechanism would be very great." *Id.* at 277. As the Sixth Circuit explained:

The tremendous advantage which the prosecution could gain by subjecting an indicted defendant to such a private inquisition just before trial would make a fundamental change in the American constitutional system of adversarial trial as set forth in the Fifth and Sixth Amendments. Nor could such abuse be cured by the trial court's sustaining objections to grand jury evidence thus procured. . . . [T]he knowledge gained by the prosecutor

¹² For a discussion of the the Star Chamber, see *Hubbell*, 530 U.S. at 35 n.8; *Fareta v. California*, 422 U.S. 806, 821-27 & nn.17-18 (1975).

from the defendant's own mouth as to sensitive areas and potential witnesses would be invaluable to him even if the prosecutor never tendered a line of grand jury testimony for admission at the subsequent trial.

Id. at 277.

The District Court thus erred in applying *Braswell* post-indictment and precluding Armstrong from asserting his right to absolute immunity from compelled testimony.

b. The *Braswell* Doctrine Has Been Substantially Undermined By *Hubbell*

The reasoning of *Braswell* has been called into question by the Supreme Court's decision in *Hubbell*.¹³ In *Hubbell*, the Court recognized that the act of producing documents in response to a subpoena "may have a compelled testimonial aspect" that implicates the Fifth Amendment privilege against self-incrimination. 530 U.S. at 36. The Court reasoned:

We have held that the "act of production" itself may implicitly communicate "statements of fact." By

¹³ At least two Justices are willing to reconsider *Braswell*'s act of production doctrine. See *Hubbell*, 530 U.S. at 49 (Scalia and Thomas, JJ., concurring) (noting that "[a] substantial body of evidence suggests that the Fifth Amendment privilege protects against compelled production not just of incriminating testimony but of any incriminating evidence" (emphasis added)). Moreover, the majority opinion in *Hubbell* relies on the *dissenting opinion* in *Braswell* for its conclusion that production of documents may have a testimonial aspect to it. See *id.* at 37 n.19 (citing *Braswell*, 487 U.S. at 122 (Kennedy, J., dissenting)).

producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control and were authentic. Moreover, as was true in this case, when the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena. The answer to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody and authenticity of the documents.

Id. at 36-37. *Hubbell's* acknowledgement that a custodian's act of production has testimonial significance directly undercuts *Braswell's* blanket pronouncement to the contrary.

Here, the act of producing assets, even if Armstrong had them, implicitly would communicate statements of fact about their existence, custody and location. More importantly, Armstrong was compelled to take the stand on pain of contempt, as purported co-custodian of the Corporate Defendants' documents and assets, and forced to answer questions designed to determine whether he had produced everything demanded. But, the mere taking of the stand was wrongful because it could lead to questions about their existence, his custody and control of them, or otherwise disclose further information about their whereabouts. *See Hubbell*, 530 U.S. at 37 n.19 (remarkably, citing as

authority the *dissenting* opinion in *Braswell*, 487 U.S. at 122 (Kennedy, J., dissenting)).

c. The District Court Misapplied *Braswell*

Notwithstanding *Hubbell*, the Contempt Orders are nonetheless erroneous because the District Court misapplied *Braswell* to the facts in this case.

i. Armstrong Was Not A "Custodian" Of The Corporate Defendants

The “act of production doctrine” set forth in *Braswell* only applies to documents held by a “corporate custodian.” *See* 487 U.S. at 118. However, by the time the District Court issued its Turnover Orders, Armstrong ceased to be a corporate custodian.

The TRO in September 1999 appointed a Receiver over the Corporate Defendants and vested in him total and unfettered power over them. (A.-213). For example, the Receiver was authorized to “take and retain immediate possession, custody, and control of all assets and property and the books and records of original entry of the Corporate Defendants including, without limitation, all assets and property . . .” (A.-213).

In October 1999, the Receiver and JPLs agreed to the MOA regarding the identification, recovery and administration of Defendant PEI's

corporate assets that further stripped Armstrong of any power or control over the Corporate Defendants.¹⁴ (A.-223). When the District Court approved the MOA, SEC counsel explained that the purpose of appointing the JPLs over the Corporate Defendants was to ensure that "Armstrong has nothing more to do with them . . ." (A.-331).

Demonstrating its plenary and exclusive power over the Corporate Defendants (and Armstrong's complete lack thereof), the Receiver in October 1999 consented to the October PI Order on the Corporate Defendants' behalf that resolved the SEC's claims against them. (A.-330). Even though Armstrong had not consented to it, the October PI Order also enjoined him from (1) "taking or retaining possession, custody, or control of any assets or property" belonging to the Corporate Defendants, (2) "taking any steps to secure or obtain possession of any assets or property of the Corporate Defendants," and (3) "acquiring or exercising any rights or powers which the Corporate Defendants or their affiliates or subsidiaries have to manage, control, operate or maintain their businesses (including, but not limited to, the power to direct, hire, suspend, and

¹⁴ Under the MOA, the Receiver and the JPLs agreed to withhold from Armstrong, an indicted defendant, any information they obtained. (A.-228).

terminate personnel) or to possess, receive, or use income, earnings, rents, or profits." (A.-365-66).¹⁵

Any lingering doubt about whether the Receiver possessed exclusive dominion over the Corporate Defendants and their related businesses was eliminated in October 2000 when the District Court granted the Receiver's motion, over Armstrong's objection, to terminate and wind-up the affairs of the Princeton Institute, even though it was not a defendant. (A.-1097).

Thus, there can be no dispute that after the Receiver was installed, Armstrong, as a matter of law, was stripped of all authority over the Corporate Defendants, including authority to serve as a corporate custodian. It is "[b]eyond doubt [that] the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on [the company's business], as the receiver is required to take possession of the books, records, and assets of every description of the association." *Bank of Bethel v.*

¹⁵ Armstrong was unaware that the Receiver had consented to the First PI Order because the SEC, in complete disregard of Armstrong's legal rights, did not serve him with a copy of it even though it applied to him. (A.-331). SEC counsel told the District Court that "[w]e negotiated the order with [the Receiver] and with the [JPLs]; and because the [JPLs] had taken over the corporations, so that Mr. Armstrong has nothing more to do with them - or the receiver had, whichever way you want to analyze it - we did not show it to Mr. Armstrong." (*Id.*)

Pahquioque Bank, 81 U.S. 383, 460 (1871). This Court has reached the same conclusion. For example, in *Graselli Chemical Co. v. Aetna Explosives Co.*, 252 F. 456, 459 (2d Cir. 1918), the Court held:

The appointment of the receiver supersedes the power of the directors to carry on the business of the corporation, and the receivers take possession of the corporation, its books, its records, and assets.

See also *Abm. S. See & Depew v. Fisheries Products, Co.*, 9 F.2d 235, 237 (2d Cir. 1925) (same); *Manhattan Rubber Mfg. Co. v. Lucey Mfg. Co.*, 5 F.2d 39, 40-41 (2d Cir. 1925) (same); *Malone v. Voges Mfg. Co.*, 271 F.2d 230, 231 (2d Cir. 1959) (holding that president of corporation had no authority to enter into contracts after appointment of receiver). The same principle has been applied in SEC and CFTC cases. In *CFTC v. FITC, Inc.*, 52 B.R. 935, 937 (N.D. Cal. 1985), the court held that an officer's commencement of bankruptcy proceedings on behalf of the corporation after the appointment of a receiver was invalid:

Once a court appoints a receiver, the management loses the power to run the corporation's affairs. The receiver obtains all the corporation's power and assets. Thus it was the receiver, and *only* the receiver, who the Second Circuit empowered with the authority to place FITC in bankruptcy.

Id. at 937 (citing *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan*, 531 F. Supp. 251, 255 (D. Haw. 1981)); *SEC v. Spence & Green*, 612 F.2d 896, 903 (5th Cir. 1980) (rejecting officer's challenge to a consent decree entered into between the receiver and the SEC on the grounds that "as a general rule a receiver . . . holds the sole right to direct the litigation of the corporation with whose care he is entrusted").

The District Court, however, relied upon the Receiver's contention that (1) Armstrong could have been nominated as the Receiver's co-custodian, had the Receiver so chosen, (A.-449-50), and (2) Armstrong had not resigned, but rather, had taken various actions as a corporate director. (A.-450-51). The case law makes clear, however, that the appointment of a receiver divests the prior officers and directors of all powers as a matter of law. Any affirmative acts undertaken by prior officers and directors on behalf of the corporation would be *ultra vires*, and a formal resignation would be unnecessary. Moreover, Armstrong's actions as a director were taken *prior* to the TRO, and post-TRO actions were undertaken by other people.

This Court's decision in *Three Grand Jury Subpoenas*, 191 F.3d 173, should have been dispositive. There, in 1996 three defendants were served with subpoenas calling for the production of corporate records. *See id.* at 175.

Two of the defendants produced some, but not all corporate records, and the third defendant did not produce any records. All three defendants then resigned from the company. *See id.*

Three years later, in 1999, upon learning that certain former corporate employees had corporate records that were not produced in response to the 1996 subpoenas, the government served another set of subpoenas on the three defendants, demanding the production of any and all documents in their “care, custody, possession, or control, that were created during the course of, or in connection with, your employment at the corporation.” *Id.* All three defendants refused to produce the corporate records, asserting their Fifth Amendment privileges against self-incrimination.

Rejecting the Government's arguments that the records were corporate records, that the three defendants remained “custodians” of the corporation, and that their assertions of the Fifth Amendment privilege was precluded by *Braswell*, 191 F.3d at 176, the district court held that “the act of testimonial [production] on behalf of a person who is no longer with the corporation is self-incrimination in its classic sense of the word, and the Constitution does not permit it.” The court emphasized that the “question of testimonial incrimination is at its height when [the document] is produced by a

person who is no longer employed by the corporation, because there is an inference that [he] may have stolen [it].” *Id.*

This Court agreed and refused to require compliance with any of the subpoenas -- regardless of whether they were issued in 1996 while the defendants were still corporate officers or issued in 1999 after they resigned. *Id.* at 181. Relying on its prior decision in *In re Grand Jury Subpoenas Duces Tecum dated June 13, 1983 and June 22, 1983*, 722 F.2d 981 (2d Cir. 1983), this Court held that:

once the agency relationship terminates, the former employee is no longer an agent of the corporation and is not a custodian of the corporate records. When such an individual produces records in his possession he cannot be acting in anything other than his personal capacity. In no sense can it be said, as *Braswell* requires, that ‘the corporation produced the records subpoenaed.’ Nothing in *Braswell* convinces us otherwise, and neither the government nor the dissent has directed us to any authority for the proposition that the agency relationship between an employee and an employer somehow continues after the employment relationship ends.

191 F.3d at 181. Accordingly, “it is now settled that an individual may claim an act of production privilege to decline to produce documents, the contents of which are not privileged, where the act of production is, itself, (1) compelled, (2) testimonial, and (3) incriminating.” *Id.* at 178.

Thus, the District Court erred in rejecting Armstrong's assertion of his Fifth Amendment privilege and putting him to a Hobson's choice: testify or go to jail.

ii. **Braswell Does Not Authorize "Compelled Testimony" Of The Custodian**

Even assuming *arguendo* that the District Court correctly applied *Braswell* in compelling Armstrong to produce documents and assets on behalf of the Corporate Defendants, the District Court erred in compelling him to *testify* about those documents and assets he could not produce. *See Hubbell*, 530 U.S. at 36-37; *Curcio v. United States*, 354 U.S. 118 (1957).

In *Curcio*, the Supreme Court distinguished an order compelling a custodian to *produce* corporate documents and assets in his possession from an order compelling him to *give oral testimony* about the location of assets not in his possession. The Court held that the former would be consistent with the Fifth Amendment privilege against self-incrimination, but the latter would not. *See id.* at 128.

Curcio was served with two subpoenas addressed to him as secretary-treasurer of a local union; one subpoena required that he produce union books, the other that he testify. *See id.* at 119. Curcio appeared before the grand jury, stated that the books were not in his possession, and refused to

answer any questions as to their whereabouts. *See id.* Curcio was held in contempt for refusing to answer. *See id.* at 121. The Supreme Court reversed the contempt citation, rejecting the government's argument (and leap in logic) that the custodian has no privilege with regard to the *production* of corporate books and records and therefore cannot assert the privilege with respect to *questions* seeking to ascertain the whereabouts of books and records not produced. *See id.* at 128. The Court held that:

The Fifth Amendment suggests no such exception. It guarantees that 'No person . . . shall be compelled in any criminal case to be a witness against himself . . .' A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers. But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.

Id. at 123-24.

Moreover, the Court noted that the government's requests went beyond mere identification and authentication of the corporate records:

[I]n the instant case, the Government is seeking to compel the custodian to do more than identify documents already produced. It seeks to compel him to disclose, *by his oral testimony*, the *whereabouts* of books and records which he has failed to produce. It even seeks to make the custodian name the persons in whose possession the missing books may be found. Answers to such questions

are more than ‘auxiliary to the production’ of unprivileged corporate or association records.

Id. at 125 (emphasis added).

Similarly, this Court has held that it is impermissible for a district court to predicate a contempt sanction on a defendant’s refusal to answer questions regarding the location of documents not produced in response to a court order. In *United States v. Edgerton*, 734 F.2d 913 (2d Cir. 1984), Edgerton was served with an IRS summons requiring him to give testimony and produce tax documents. *See id.* at 915. When Edgerton failed to testify or produce documents, the district court issued an order enforcing the summons and directing him to appear at the IRS office, produce documents and give testimony. *See id.* at 915-16. Edgerton appeared, but produced no documents and asserted the Fifth Amendment privilege to virtually every question asked of him. *See id.* at 916.

At a contempt hearing, the district court found that the order enforcing the IRS summons had not been complied with. The district court stated that “we will cut right through that and go right to the questions which the law provides that you should be asked, and I will ask those questions at the behest of the Government.” *Id.* Reminiscent of the District Court’s pronouncements here, the district court in *Edgerton* said “we’re not dealing here

with refusal to answer questions . . . What we're talking about here is document production, *id.* at 916, and then set forth its intended procedure:

So it is the Court's intention in that connection merely to ask the three elements that really were considered by the Ninth Circuit in *Rylander*, and that is, as of right now, . . . there are only three significant questions. One, do the documents which are set forth in the Collection Summons in those categories exist at the present time? . . . Second, are they currently within his possession or control? And third, does he regard them as being private documents?

Id. at 916. Edgerton declined to answer any of the questions. *Id.* The district court then sentenced Edgerton "on a coercive basis [to] civil contempt, and you are confined until such time as you answer the three questions that I have put to you on this record today." *Id.* at 917.

In vacating the district court's contempt order, this Court rejected the government's claim that Edgerton was held in contempt for non-compliance with the order enforcing the IRS summons, distinguishing the case before it from cases such as *United States v. Rylander*, 460 U.S. 752 (1983), where the witness was held in contempt solely for failing to produce requested documents. *See Edgerton*, 734 F.2d at 919-20. Rather, in *Edgerton*, as here, the witness was held in contempt for failing "to answer certain questions posed by the court

regarding the existence and whereabouts of certain” documents and assets. *Id.* at 922.

The *Edgerton* Court recognized the difficult nature of its ruling:

This case presents the anomalous situation of a conscientious district court displaying the patience of Job in dealing with an obstreperous taxpayer determined to thwart and mock the very concepts of justice which he solemnly invoked in the name of the Constitution of the United States. And yet we are compelled to vacate the contempt order which the district court felt constrained to enter. We do so because a district court, in exercising the awesome power of contempt, must turn square corners.

Id. at 915. As in *Edgerton*, Armstrong’s “key to the jail cell” is predicated on providing an “explanation” as to why certain documents and assets were not produced and as to their whereabouts. (A.-671). But requiring a witness to provide such testimony in order to be released from incarceration for contempt is wholly impermissible. *See also Hubbell*, 530 U.S. at 36 (noting that such testimony implicates the Fifth Amendment privilege because it communicates information regarding the existence, custody and authenticity of requested items). Moreover, such testimony could be used to convict a witness or could provide a link in locating other incriminating evidence against him. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Here, Armstrong acted consistent with *Curcio*. At the *Braswell* Hearing, Armstrong agreed to “comply and turnover whatever he has in his possession,” but expressly preserved his Fifth Amendment privilege. (A.-489). This, however, was not enough for the District Court. The District Court stated “I don’t accept the language ‘whatever he has’” (A.-490-91), and that “if there is nonproduction, I’m going to want a competent explanation. I don’t want a Fifth Amendment explanation. I don’t want a rank hearsay explanation,” (A.-493-94). The District Court’s mandate that Armstrong provide testimony to explain the whereabouts of the assets subpoenaed but not produced is directly inconsistent with *Hubbell*, *Curcio* and *Edgerton*. Once Armstrong agreed to produce the things within his custody and control, the District Court could do no more. It was wholly impermissible for the District Court to demand that Armstrong testify as to the location of assets that the District Court deemed “missing” and then to hold him in contempt for failure to comply.¹⁶

iii. *Braswell* Does Not Apply To Personal As Opposed To Corporate Records

The TRO and a November 1999 Preliminary Injunction Order froze all of Armstrong's *personal* assets. (A.-212-13, 375). Remarkably, at the First

¹⁶ Continued compulsion also is inappropriate given that Armstrong, beginning at the First Contempt Hearing and repeatedly thereafter, has insisted
(Cont'd on following page)

Contempt Hearing, the District Court, misapplying *Braswell*, went so far as to permit the Receiver to question Armstrong regarding the whereabouts of his *personal* records. That interrogation blatantly exceeded the scope of what would be permissible under even the most expansive reading of *Braswell*.

The following questions and answers were exchanged between the Receiver and Armstrong at the First Contempt Hearing:

Q: Where are your personal papers, sir?

A: Some of my personal things are also in the hands of the lawyers.

Q: And do you have any personal papers that are not in the hands of the lawyers?

MR. FELD [Armstrong's counsel]: Objection, your honor.

THE COURT: I will permit that.

MR. FELD: The question is whether he has any corporate records. The personal papers are personal papers.

MR. COHEN [the Receiver]: We'll get to what is personal and corporate in a minute.

THE COURT: That's overruled

(A.-657).

(Cont'd from preceding page)

that he does not possess the items sought. (A.-1075).

The District Court erred in overruling Armstrong's objection to questions concerning personal papers. See *United States v. Kordel*, 397 U.S. 1, 7 (1970) (a corporate officer still retains his personal right to assert the Fifth Amendment privilege); *Boyd v. United States*, 116 U.S. 616, 634-35 (1886) (“[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the [F]ifth [A]mendment”).

**iv. The Fifth Amendment Privilege Applies To
The "Missing Corporate Assets" Covered By
The Turnover Orders**

In the December 2003 Order, the District Court ruled that the Turnover Orders did not violate Armstrong's Fifth Amendment rights because the items sought "do not have any arguable personal incriminatory content" and because, under *Braswell*, "any fact concerning the *production* of demanded items cannot be used against him." (A.-776). Both conclusions were wrong.

First, in deciding that these assets were not incriminating, the District Court ignored that the First and Second Indictments plainly refer to them (*i.e.*, gold coins and antiquities) as fruits of Armstrong's purportedly criminal conduct that provided him a motive to engage in the alleged fraud. Indeed, the District Court itself viewed these assets as "fruits of th[e] crime."

(A.-518). The First Indictment alleged that Armstrong had misappropriated millions of dollars obtained from the sale of the Notes "to purchase rare coins and antiquities." (A.-113). Likewise, the Second Indictment alleges that computer equipment that Armstrong failed to return contains information that is "amongst the most incriminating" evidence of his criminality. (A.-888). And, according to the Government, Armstrong's purported failure to produce the assets is "direct evidence" of his guilt. (A.-909). Thus, the items themselves are incriminating evidence the Government could use to convict Armstrong, *see (Suppressed) v. (Suppressed)*, 109 F. Supp. 2d 902, 904 (N.D. Ill. 2000) (information disclosing assets in defendants' possession that may have been obtained from allegedly illegal conduct "is, without question, information that might tend to incriminate them"), or could be used as a link in locating other evidence upon which to prosecute him, *see Hoffman*, 341 U.S. at 486 (noting that the privilege against self-incrimination embraces evidence "which would furnish a link in the chain of evidence" needed to convict). Further, no one can dispute that these assets (*e.g.*, coins, busts and antiquities) carry as much probative value as documents identifying them. Therefore, the District Court's purported distinction between assets and documents is without merit.

Second, the District Court disregarded the fact that *Braswell's* evidentiary privilege covering the act of production does not eliminate the danger of self-incrimination under the circumstances of this case. *Braswell* does not protect against the hazard that the compelled testimonial aspect inherent in the act of production itself, *see Hubbell*, 530 U.S. at 38, may result in the tacit communication of incriminating information as to the existence, whereabouts, custody and authenticity of items produced, *see id.* at 36. Moreover, *Hubbell* made clear that "[c]ompelled testimony that communicates information that may 'lead to incriminatory evidence' is privileged even if the information itself is not inculpatory." *Id.* at 38 (quoting *Doe*, 487 U.S. at 208 n.6). Therefore, *Braswell's* act of production privilege "is not co-extensive with the Fifth Amendment privilege" and does "not extend to evidence derived from that production," *In re Three Grand Jury Subpoenas*, 191 F.3d at 182, protections that are woefully needed if the Fifth Amendment is to mean anything in a post-indictment setting.

2. Armstrong Did Not Waive His Fifth Amendment Privilege Against Self-Incrimination

In its July 2001 Order, the District Court incorrectly determined that Armstrong had waived his Fifth Amendment privilege against self-incrimination at the First Contempt Hearing "when he testified regarding the

factual circumstances surrounding the [corporate assets] and, moreover, that he no longer had possession of these items." (A.-752). According to the District Court, "had [Armstrong] wished to remain silent for fear of self-incrimination at that time, he could have done so by asserting the Fifth Amendment." (A.-753).

The District Court was wrong both as a matter of fact and law.¹⁷ First, the District Court conveniently ignored the fact that at the *Braswell* Hearing it explicitly warned Armstrong that asserting the privilege was not an option available to him. (A.-493-94). There, the District Court warned that "if there is nonproduction, I am going to want a competent explanation. *I don't want a Fifth Amendment explanation.* I don't want a rank hearsay explanation. I want something where even the lawyers, if necessary, say "[w]e went here and we went there and we looked at this and we did that," and then *you [i.e., Armstrong] swear to it.*" (A.-493-94 (emphasis added).) Indeed, the District Court made crystal clear to Armstrong that, unless he wished to be jailed for contempt, an explanation for non-production of any items sought by the Turnover Orders would have to come from him and not in the form of an assertion of the Fifth Amendment privilege. Having compelled Armstrong to

¹⁷ It is difficult to understand how the District Court could conclude that Armstrong waived his Fifth Amendment privilege by testifying about corporate
(Cont'd on following page)

testify at the First Contempt Hearing a week later, during which the District Court demanded that Armstrong explain why he did not produce items the court believed were within his possession or control, the District Court could not rely on the same compelled testimony to find that Armstrong had waived his privilege voluntarily.

Second, as a matter of law there was no waiver because, while preserving his Fifth Amendment privilege, Armstrong testified only to the extent necessary to carry his burden of producing evidence of his inability to comply with the Turnover Orders as to assets not within his possession, custody or control. In *Rylander*, 460 U.S. at 760-61, the Supreme Court explained that a witness must come forward with evidence to defend against a contempt proceeding for failure to comply with an order to produce demanded items on the ground that the witness is unable to produce them. Consistent with *Rylander*, at the First Contempt Hearing, Armstrong's counsel prefaced Armstrong's testimony by stating on the record that he would permit Armstrong to testify "limited to *the issues of compliance*" with the District Court's directive, which Armstrong did. (A.-581 (emphasis added).)

(Cont'd from preceding page)

assets when, according to the Receiver, there are purportedly missing items about which Armstrong has never offered *any* testimony. (A.-1067).

Moreover, Armstrong did not specifically testify as to the whereabouts of assets he did not produce because, as he made clear in his testimony at the First Contempt Hearing -- and on numerous occasions thereafter -- he cannot comply with the Turnover Orders either because the items sought are *not* in his possession, custody or control, or their whereabouts are unknown to him. (A.-580 *et seq.*).¹⁸ Thus, Armstrong did not relinquish the Fifth Amendment protections afforded him under *Curcio*, 354 U.S. at 128. Rather, he guarded his Fifth Amendment privilege by testifying only to the extent necessary to fulfill the burden of production imposed on him by *Rylander*. Accordingly, there was no waiver.¹⁹

¹⁸ Armstrong submitted to the District Court a sworn declaration by an Australian national, Nigel Kirwan, which corroborates Armstrong's testimony that in September 1998, Armstrong transferred more than \$10 million in corporate assets to Kirwan as part of a business transaction. (A.-1144-45). Kirwan subsequently confirmed in a deposition that the declaration and signature were his. (A.-1234).

¹⁹ The District Court had no right to force Armstrong to testify post-indictment absent a grant of immunity. Relying on 18 U.S.C. § 3481, this Court has recognized the need for immunity prior to compelling a defendant to testify post-indictment. *See United States v. Daisart Sportswear, Inc.*, 169 F.2d 856, 861-862 (2d Cir. 1948) (holding that “we do not believe that ... a corporate officer may be compelled to testify as to any and all phases of the corporation’s activities, without at the same time obtaining a grant of immunity for the incriminating matter he is compelled to disclose”); *see also United States v. Lawn*, 115 F. Supp. 674, 677 (S.D.N.Y. 1953), *aff’d*, 355 U.S. 339 (1958)

(Cont'd on following page)

B. Armstrong’s Continuing Incarceration For Civil Contempt Violates The Due Process Clause Of The Fifth Amendment

The Fifth Amendment’s Due Process clause forbids the government to “deprive any person. . . of . . . liberty . . . without due process of law.” The Supreme Court has held that “[f]reedom from imprisonment -- from government custody, detention, or other forms of civil restraint -- lies at the heart of the liberty that Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also Parham v. J.R.*, 442 U.S. 584, 600 (1979) (noting the "substantial liberty interest in not being confined unnecessarily").

1. Incarceration Beyond Eighteen Months Is Unlawful

As noted above, Section 1826, as originally proposed, would have placed no limitation on the duration confinement for civil contempt. *See In re Andrews*, 469 F. Supp. at 174. Criticized as "unduly harsh," the original proposal was replaced by an amended proposal that would have restricted the duration of confinement for civil contempt to the life of the grand jury or court proceeding, which the legislation proposed to extend from eighteen to thirty-six months. *See Braun*, 600 F.2d at 426

(Cont'd from preceding page)

(improper to call defendant to testify “without a request on his part”); *see generally United States v. Doss*, 563 F.2d 265 (6th Cir. 1977) (en banc).

The Senate Judiciary Committee faced criticisms on many fronts, including from the then Director of the American Civil Liberties Union, Lawrence Spieser, that a three-year maximum period of incarceration for civil contempt would violate the Due Process Clause of the Fifth Amendment:

[A] three year confinement without possibility of bail, well may run afoul of both the prohibition in the Eighth Amendment against cruel and unusual punishment and the Fifth Amendment requirement of due process.

In re Andrews, 469 F.Supp. at 75. Congress later amended the legislation to incorporate an eighteen-month limit to remove the "possibility that unconscionable, indeterminate periods of confinement might be imposed for civil contempt." *Braun*, 600 F.2d at 427. In sum, Section 1826 reflects Congress' carefully-considered determination that indefinite confinement of civil contemnors has no place in the judicial administration of the federal courts. Armstrong's continuing incarceration, now going on more than *five years* -- two years beyond the three-year period of confinement that Congress determined unquestionably would offend due process -- and even beyond sentencing range

authorized under the United States Sentencing Guidelines²⁰ -- is plainly improper and violates Armstrong's Fifth Amendment due process rights.

2. The Value Of "Missing" Assets Cannot Support The Contempt

Of concern to this Court has been the value of the "missing" assets at issue. *See Armstrong III*, 284 F.3d at 406. But the District Court inflated the valuation to approximately \$14 million by disregarding competent evidence. According to a sworn declaration of Nigel Kirwan which Armstrong submitted to the District Court, at least \$10 million worth of assets are not "missing," but are located in Australia.²¹ Thus, the total value of "missing" assets underlying the contempt more closely approximates \$4 million.

Continued incarceration violates due process when the contemnor cannot purge the contempt. Here, despite Armstrong's testimony and Kirwan's sworn declaration that Kirwan has possession of the bulk of the assets sought, the District Court continues to demand that Armstrong explain their whereabouts. At the same time, Kirwan has been ordered to return them to the

²⁰ Under a worst case scenario, Armstrong arguably could be sentenced to no more than fifty-seven months under the Sentencing Guidelines.

²¹ *See supra* note 18.

United States, but has refused. (A.-1241). This "catch-22," including the inflated dollar amount as a basis for contempt, violates due process.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ARMSTRONG'S BAIL MOTION WITHOUT EVEN CONSIDERING IT ON THE MERITS

Armstrong filed an application for bail supported by a lengthy brief and numerous supporting exhibits demonstrating that he more than met the legal standard for interim release pending a final decision on his habeas petition. At a September 23, 2004 hearing, the District Court summarily denied his application, refusing even to consider it under the applicable standard. (A.-935 ("THE COURT: I come at this so negatively that I think I am saving your breath.")). This was an abuse of the District Court's discretion. *See West v. Janing*, 449 F. Supp. 548, 552 (D. Neb. 1978) (citing *Deadwyler v. Volkswagen of Am., Inc.*, 884 F.2d 779, 784 (4th Cir. 1989)); *Beaulieu v. Hartigan*, 430 F. Supp. 925, 917 (D. Mass. 1977).

When Armstrong moved for bail in this Court (in Case No. 04-5448-PR), there was discussion regarding the applicability of *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). Although the inherent bail power recognized in *Mapp* applies in the context of Armstrong's habeas proceeding, the onerous standard for invoking it articulated in *Mapp* does not, *i.e.*, "substantial claims" and

"exceptional circumstances" which make granting bail necessary to make the habeas remedy effective. The *Mapp* test was drawn from prior Second Circuit cases involving *sentenced prisoners'* applications for bail in *post-conviction* habeas proceedings. See *id.* at 226, 230 (citing *Grune*, 913 F.2d at 41 (state prisoner); *Iuteri v. Nardoza*, 662 F.2d 159 (2d Cir. 1981) (federal prisoner); *Ostrer v. United States*, 584 F.2d 594, 596 n.1 (2d Cir. 1978) (same)).

The *Mapp* standard has no logical application to Armstrong, whose posture in seeking habeas review as a civil contemnor is markedly different than that of post-conviction petitioners for whom the *Mapp* test was devised. See *Sanchez v. Winfrey*, No. Civ.A.SA 04CA0293RFNN, 2004 WL 1118718 (W.D. Tex. Apr. 28, 2004). Rather, a lenient bail standard applies to pre-trial detainees like Armstrong. See *Farr v. Pitchess*, 409 U.S. 1243 (Douglas, Circuit Justice 1973) ("[T]he only question is whether the issue [raised by the civil contemnor] is a substantial one"); *cf.* 28 U.S.C. § 1826(b).

CONCLUSION

For the foregoing reasons, the District Court's order denying Armstrong's habeas petition should be vacated and Armstrong should be released from incarceration immediately.

Dated: Washington, D.C.
March 16, 2005

Respectfully submitted,

CHADBOURNE & PARKE LLP

By _____

Thomas V. Sjoblom, Esq. TS6555
Benjamin R. Ogletree, Esq.
1200 New Hampshire Avenue, NW
Washington, D.C. 20036
Telephone: (202) 974-5636
Facsimile: (202) 974-5602

Attorneys for Martin A. Armstrong

Certificate Of Compliance

I, Benjamin R. Ogletree, an attorney of record for Appellant Martin A. Armstrong, do hereby certify that the foregoing brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B)(i).

As computed by the "Word Count" function of Microsoft Word XP, which is the word processing program that I used to prepare this brief, the total number of words in the foregoing brief is 13,630.

Benjamin R. Ogletree