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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: JOHN L. CHEEK, Petitioner V. UNITED STATES

CASE NO: 89-658

PLACE: Washington, D.C.

DATE: October 3, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN L. CHEEK, :  
Petitioner :  
v. : No. 89-658  
UNITED STATES :  
----- X

Washington, D.C.  
Wednesday, October 3, 1990

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:03 a.m.

APPEARANCES:

WILLIAM R. COULSON, ESQ., Chicago, Illinois; on behalf of  
the Petitioner.

EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor  
General,  
Department of Justice, Washington, D.C.; on behalf of  
the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-658, John L. Cheek v. United States.

ORAL ARGUMENT OF WILLIAM R. COULSON

ON BEHALF OF THE PETITIONER

MR. COULSON: Mr. Chief Justice, and may it please the Court:

This is a criminal tax case. Just before sentencing the petitioner, John L. Cheek, the district court said to him, "I do not want to sentence you for beliefs that I believe were honestly held, although I believe foolishly held." That is the district court speaking, and that is what this case is fundamentally all about.

Petitioner John Cheek's defense, albeit a pro se defense, was a classic mistake of law based in part on advice he got from counsel. He contended that at all times of the alleged offenses he had a bona fide misunderstanding of his duties under the tax laws. This is a recognized defense. It was articulated by this Court in Murdock in 1933, some 57 years ago.

However, not more than 3 weeks before petitioner's trial commenced before the Seventh Circuit - before the district court in Chicago, the Seventh

1 Circuit in October of 1987 in the United States v. Buckner  
2 decided that in so-called tax-protester cases it wasn't  
3 enough that the tax defendant's misunderstanding or  
4 belief, as the Seventh Circuit calls it, be sincerely held  
5 or bona fide per Murdock, but also the defendant's  
6 understanding or belief of the tax laws had to be found by  
7 the jury to be objectively reasonable, whatever that  
8 means.

9 Moreover, as to certain enumerated  
10 understandings, or beliefs, or misunderstandings of the  
11 tax laws, it wasn't enough even for a defendant to  
12 convince a jury that he sincerely possessed the  
13 misunderstanding and that the misunderstanding was  
14 objectively reasonable. But as to those listed beliefs  
15 the Seventh Circuit held that they were forever  
16 objectively unreasonable as a matter of law.

17 QUESTION: Mr. Coulson, you don't have to go to  
18 law school to learn that traditionally mistake of law is  
19 --is no defense. Why is there, why should it be a defense  
20 here, because of the word willfully in the statute?

21 MR. COULSON: Because this Court and other  
22 courts have recognized that in the criminal tax statutes,  
23 the mistake of law defense has particular vitality.

24 QUESTION: Why should that be?

25 MR. COULSON: Because the tax codes are complex

1 in numerous respects. Unlike most criminal statutes they  
2 are malum prohibitum rather than malum in se.

3 QUESTION: So do we import these same standards  
4 into the antitrust laws, which are also complex -- the  
5 case laws if not statutory?

6 MR. COULSON: I'm not suggesting that the  
7 doctrine that we suggest remain the law of the land be  
8 applied to anything other than criminal tax statutes.

9 QUESTION: But why should criminal tax statutes  
10 be singled out for this treatment?

11 MR. COULSON: This Court has singled them out  
12 for that treatment and other courts have, recognizing that  
13 in the tax area it is easy, relatively easy for a well-  
14 minded individual to violate the law, because the law is  
15 complex. Mistake of law has particular vitality in this -  
16 - under these -- in this context and under the criminal  
17 tax statutes. And I say that not only because this Court  
18 has said that, the circuits have said that.

19 QUESTION: Well, what if the taxpayer understood  
20 that the law says you'll file a tax return, but genuinely  
21 believed the -- the tax law was unconstitutional? Would  
22 that be a defense to willfulness?

23 MR. COULSON: No, but it's -- personal belief  
24 that a known statute is unconstitutional smacks of  
25 knowledge with existing law, but disagreement with it.

1 And I am not suggesting that any individuals --

2 QUESTION: Well, someone in good faith believes  
3 it. It is not objectively reasonable to believe that, but  
4 that is the belief. Now is that a defense to willfulness?

5 MR. COULSON: It depends on the nature of the  
6 defense. If the person believes as a personal belief that  
7 known -- law known to them is unconstitutional, I submit  
8 that that would not be a defense, because what the person  
9 is really saying is I know what the law is, for  
10 constitutional reasons I have made my own determination  
11 that it is invalid. I am not suggesting that that is a  
12 defense.

13 However, if the person was told by a lawyer or  
14 by an accountant erroneously that the statute is  
15 unconstitutional, and it's my professional advice to you  
16 that you don't have to follow it, then you have got a  
17 little different situation. This is not that case --

18 QUESTION: How do you instruct the jury so that  
19 they can convict in the one case and acquit in the other?

20 MR. COULSON: You instruct the jury that  
21 disagreement with known law is not a defense. You  
22 instruct the jury that --

23 QUESTION: A known law? Known to whom? Known  
24 to the defendant?

25 MR. COULSON: Known to the defendant. All of --

1 our position obviously is that all of this deals with the  
2 defendant's personal view, the defendant's personal state  
3 of mind, the defendant's personal knowledge.

4 QUESTION: And a known law is a -- is a statute  
5 that is on the books?

6 MR. COULSON: No. If the Government can prove  
7 that the defendant knew what the law is and chose --

8 QUESTION: He knew that the statute was on the  
9 books?

10 MR. COULSON: No, he knew of his duties under  
11 the tax laws a la Murdock. That is a little broader than  
12 just knowing there is a statute on the books.

13 QUESTION: He knows -- he knows his duty under  
14 the statute, and he knows that it's the (inaudible) of the  
15 Government to prosecute if he violates that duty. Is that  
16 sufficient?

17 MR. COULSON: No, because it would depend on the  
18 particular misunderstanding that is in issue. A defendant  
19 may believe that -- that bribes that he receives is not  
20 income. He may believe that, as in this case, wages he  
21 receives are not income.

22 QUESTION: And suppose that he also knows that  
23 the position of the IRS and of the Justice Department is  
24 to the contrary? What result?

25 MR. COULSON: The result is that a jury decides



1 whether his --

2 QUESTION: On what standing?

3 MR. COULSON: -- his understanding is pretextual  
4 or is sincere, based on all of this information.

5 QUESTION: He really -- he honestly -- it's an  
6 honest belief? Sincerity of belief, that's the test?

7 MR. COULSON: The test is sincerity of belief as  
8 to his understanding of his duties under the tax laws, and  
9 that is taken from Murdock.

10 QUESTION: Suppose -- the Seventh Circuit has  
11 ruled that he has to file and that the Seventh Circuit has  
12 ruled contrary to his beliefs.

13 MR. COULSON: A ruling that he has to file may  
14 or may not be relevant to his own belief given his tax  
15 situation.

16 QUESTION: (Inaudible) the Seventh Circuit has  
17 ruled that his belief was held in error.

18 MR. COULSON: That would be a fact which the  
19 Government would elicit. The jury would determine, based  
20 on that fact as well as other facts that the defendant may  
21 present, whether or not his good faith -- his  
22 misunderstanding is in good faith or is pretextual, just  
23 as the jury does in any other --

24 QUESTION: He thinks in good faith that the  
25 Seventh Circuit is wrong. What does the jury have to do

1 then?

2 MR. COULSON: No. If he testifies and the  
3 Government is able to elicit on cross-examination that he  
4 is aware of the Seventh Circuit case, and he is aware the  
5 Seventh Circuit thinks he is wrong, I rather suspect the  
6 jury would convict him in this situation.

7 QUESTION: Well, should the jury convict him  
8 based on -- this is what I want to know. What is the  
9 standard?

10 MR. COULSON: The standard is whether he has a  
11 good-faith misunderstanding of his particular duties under  
12 the tax laws. That is the standard this Court set out in  
13 Murdock.

14 QUESTION: Well, I am stipulating to you that he  
15 has an honest, sincere belief that the Seventh Circuit is  
16 180 degrees wrong.

17 MR. COULSON: I would submit that that would  
18 establish, at least if I were on the jury, as disagreement  
19 with what he knows to be the law.

20 QUESTION: The question isn't what --

21 QUESTION: Justice Marshall has had a question  
22 he wants to ask.

23 QUESTION: Would you make the same defense to a  
24 civil action?

25 MR. COULSON: No. Civil standards are

1 different.

2 QUESTION: And that's what I would like for you  
3 to explain, other than that civil and criminal are  
4 different.

5 MR. COULSON: I guess the most obvious example  
6 is his rule 11, or sanctions. You could take a legal  
7 position that is sanctionable under rule 11, even if you  
8 believe it to be true, if it's a frivolous position.  
9 Whereas to put somebody in jail, to convict somebody of a  
10 criminal offense, it seems to me the Government needs to  
11 show that it was a willful act.

12 QUESTION: You mean in a tax defense -- a tax  
13 case?

14 MR. COULSON: In a tax case. I am confining all  
15 of my remarks here to tax cases because, as this Court has  
16 pointed out, the willfulness element is somewhat unique in  
17 tax cases.

18 QUESTION: I just want to follow up on Justice  
19 Kennedy's question, because I don't think you have  
20 answered. You have given us a prediction what the jury  
21 would do. Say you are a trial judge and you are convinced  
22 that when this man gets on the stand and says I think not  
23 only the Seventh Circuit is wrong, but the United States  
24 Supreme Court is wrong, and that the Constitution does not  
25 require me to pay these taxes. That's my sincere and

1 honest belief, just like my belief in God is sincere and  
2 honest. Does he win or does he lose?

3 MR. COULSON: In that case the judge, as he  
4 would in evaluating any defense --

5 QUESTION: He believes him. That's what I am  
6 saying, the judge believes him. Then what does the judge  
7 do?

8 MR. COULSON: The judge rules that that is not a  
9 good-faith misunderstanding of one's duties to file. It  
10 is rather a knowledge of existing law and a belief that it  
11 is wrong, and that defense does not go to the jury. And  
12 that --

13 QUESTION: In other words, belief that the  
14 statute is unconstitutional is a belief that it's wrong?

15 MR. COULSON: Yes.

16 QUESTION: That's not what Murdock -- Murdock  
17 was a constitutional case, you know. You can even stop  
18 short of the unconstitutional point. All -- you're --  
19 you're stopping short -- you want to stop short of saying  
20 that a belief that is unconstitutional is a good -- like  
21 some of the other justices, I don't see the basis for  
22 drawing that line.

23 But you don't -- you don't stop short of saying  
24 that belief that the Supreme Court has misinterpreted the  
25 statute is -- is not a good-faith defense. Suppose he

1 doesn't think that the Constitution entitles him to say  
2 that wages are not income, but that simply the Supreme  
3 Court got it wrong when it said that under the Internal  
4 Revenue Code wages are not income and said, you know, gee,  
5 the Supreme Court said that, but they misinterpreted the  
6 statute.

7 MR. COULSON: I am trying to draw a distinction  
8 between knowing what the law is and disagreeing with it,  
9 which is not a good-faith misunderstanding of your duty to  
10 file.

11 QUESTION: Well, which is this? Is this a good-  
12 faith misunderstanding or not?

13 MR. COULSON: It sounds like it is not. I must  
14 point out --

15 QUESTION: Why is it not? He thinks the Supreme  
16 Court was wrong. He thinks the Supreme Court misread the  
17 statute. He sits down and looks at the statute and says,  
18 gee, I think they got it wrong again.

19 MR. COULSON: That is disagreement with the law.

20 QUESTION: That is disagreement with the law?

21 MR. COULSON: Right.

22 QUESTION: I am surprised at your position. It  
23 seems -- it seems to me that you would be arguing that  
24 it's a sincere, good-faith belief that is not willful.  
25 That is what I thought your position was below.

1 MR. COULSON: Well, it is. That is my position.

2 QUESTION: But only -- in other words,  
3 everything goes to the Supreme Court?

4 MR. COULSON: Not at all. Not at all. This  
5 case did not involve Mr. Cheek's contentions that the  
6 statutes were unconstitutional, and that's why I am  
7 dealing with these hypotheticals the way I am. He had a  
8 good-faith misunderstanding of his duties under the tax  
9 statutes in a number of various ways based on all the  
10 indoctrination he got.

11 QUESTION: Do you concede that those beliefs  
12 were not objectively reasonable beliefs?

13 MR. COULSON: I do not concede that. I believe  
14 --

15 QUESTION: Did you preserve that issue for  
16 review here then, or do we have to take it on the  
17 assumption that they were not objectively reasonable  
18 beliefs?

19 MR. COULSON: We don't know what objectively  
20 reasonable means. I don't --

21 QUESTION: Well, is that our assumption for  
22 deciding the case, and did you preserve that issue  
23 otherwise?

24 MR. COULSON: Our position is that there should  
25 be no such test as whether the contents of a belief are

1 objectively reasonable or not. I don't know if I am  
2 answering your question.

3 QUESTION: Part of your claim is, if you  
4 preserved it, that it's objectively reasonable to think  
5 that wages are not income?

6 MR. COULSON: It would be objectively  
7 unreasonable to a lawyer or to a judge. It might well be,  
8 and I contend here it was objectively reasonable to  
9 somebody like Mr. Cheek, who was a lay person and who was  
10 confused and who was hit with this tax-protester  
11 literature and these lectures and these statements from  
12 attorneys. Our point is isn't it an individualized  
13 determination of each defendant?

14 QUESTION: Well, then, but then what use is the  
15 term objectively reasonable, if it is an individualized  
16 determination and if it would be -- objectively  
17 unreasonable for most people, but not objectively  
18 unreasonable for your client?

19 MR. COULSON: That illustrates the impossibility  
20 of dealing with what -- the term the Seventh Circuit has  
21 defined. Objectively reasonable, what does it mean? What  
22 is it? It would differ from case to case. It would  
23 differ from jury to jury. It would differ from judge to  
24 judge. I'm arguing there should be no such standard as  
25 objectively reasonable. It ought to be a question of

1 whether the jury finds that the defendant sincerely  
2 believes -- has a sincere misunderstanding of his duties  
3 under the tax law.

4 QUESTION: Well, what, what standard were you  
5 applying when you answered these questions about if the  
6 Supreme Court has held that wages are income and he -- you  
7 say that he couldn't possibly have -- have a defense in  
8 that respect.

9 MR. COULSON: No. If he knows -- if the  
10 Government proves he knows that the Supreme Court has held  
11 that.

12 QUESTION: All right, he knows it, but he says  
13 they got it wrong. They got it wrong, and I sincerely  
14 believe that they misread the statute.

15 MR. COULSON: I am not suggesting that  
16 disagreement with known law can be excused.

17 QUESTION: Well, what standard are you applying  
18 in saying that? Objectively reasonable?

19 MR. COULSON: No.

20 QUESTION: Well, what -- what is it?

21 MR. COULSON: I am -- the standard I am applying  
22 is the one set out in Murdock. Did the defendant have a  
23 good-faith misunderstanding of his duties under the tax  
24 laws? If the defendant -- that does not include  
25 disagreement with the law. It means it's confusion or



1 misunderstanding with his duties under the law that is a  
2 defense. And I am suggesting that that has to be a  
3 determination --

4 QUESTION: He -- he mistakenly thought the  
5 Supreme Court had it wrong. He just made a mistake. Why  
6 isn't that a defense?

7 MR. COULSON: Because -- I'm not suggesting that  
8 every citizen has the prerogative to decide for himself if  
9 he is going to obey what this Court or any other court  
10 says.

11 QUESTION: Or suppose that the Treasury  
12 regulations say wages are income and are taxable, and he  
13 says well, I know that, and regulation is supposed to be  
14 the law, but the Commissioner just had it wrong. They --  
15 those regulations are just inconsistent with the statute,  
16 or with the Constitution.

17 MR. COULSON: The first example would present  
18 for the jury a fact question. The jury would decide, is  
19 he sincerely confused about the law, and if so how? How  
20 did he come to that confusion, that misunderstanding? Or  
21 is he pretextual, does he know darn well what the law is?

22 QUESTION: Counselor, that is just not helpful  
23 for this argument. What we're trying to establish, and I  
24 think it's a difficult case, is what instruction the judge  
25 should give to the jury. What is the standard for guilt.

1 And if you say, oh, that's for the jury, that doesn't help  
2 us. We're asking what the instruction should be.

3 And it seems to me that based on your case, you  
4 have to say that if he sincerely believes that the Supreme  
5 Court got it wrong, that is a defense. I think that's the  
6 theory of your case. And if you say, well, the Supreme  
7 Court, then I would ask you about the Seventh Circuit, or  
8 I would ask you about a Supreme Court decision which is 5  
9 to 4 and a justice leave the bench, and so forth and so  
10 on. We need to know what standard the judge uses when he  
11 instructs, or she instructs the jury.

12 MR. COULSON: The judge says to the jury it is a  
13 defense to willfulness if the defendant at the time of the  
14 alleged offenses had a good-faith misunderstanding of his  
15 duties under the tax laws. It is not a defense if the  
16 defendant had -- knew of his duties under the tax law, but  
17 had a personal or subjective disagreement with them.  
18 That's essentially -- part of those instructions were  
19 given in this case.

20 QUESTION: Mr. Coulson, can I just ask one  
21 question? Is this issue, whether the mistake of law  
22 issue, are you contending that it's a failure of proof of  
23 part of an element of the Government's affirmative case,  
24 or that this is an affirmative defense with respect to  
25 what you have the burden of showing that he had an honest

1 misunderstanding?

2 MR. COULSON: Obviously the Government has the  
3 burden in the first instance of its proving willfulness.  
4 It is in the nature of an affirmative defense, a mistake  
5 of law, based on in this case advice of counsel and  
6 various other things.

7 QUESTION: Your client was an American Airlines  
8 pilot, wasn't he?

9 MR. COULSON: Yes.

10 QUESTION: (Inaudible) the Government proved  
11 willfulness?

12 MR. COULSON: I do not agree that the Government  
13 proved willfulness.

14 QUESTION: Well, you mean that -- why did you  
15 need a defense then, other than to say there's a failure  
16 of proof?

17 MR. COULSON: Well, that was raised at trial  
18 when the Government rested. Of course the motion was  
19 overruled under the Seventh Circuit standards, and Mr.  
20 Cheek put on a defense. And his defense was that he had a  
21 good-faith misunderstanding of his duties under the tax  
22 laws, based on a number of factors. Based on his cult-  
23 like indoctrination he got.

24 QUESTION: But again he did not have to put on  
25 that defense unless the Government had put in evidence

1 that he knowingly violated a -- violated a known duty to  
2 obey the law, right?

3 MR. COULSON: Right.

4 QUESTION: In other words, they had proved --

5 MR. COULSON: And they had introduced some  
6 evidence.

7 QUESTION: At least prima facie they had proved  
8 willfulness.

9 MR. COULSON: Right. And I am not suggesting  
10 that Mr. Cheek or any other defendant is necessarily going  
11 to prevail in his mistake of law defense. Obviously I am  
12 saying he's entitled to present it to a jury. It's a fact  
13 question for the jury whether he possessed a mistake of  
14 law. It is not, as the Seventh Circuit has held, a legal  
15 question, a question in which they are going to launch  
16 this preemptive strike.

17 QUESTION: But the conclusion of your argument  
18 is that he has therefore established an affirmative  
19 defense known as mistake of law. It is not that ergo  
20 there is a failure to prove willfulness.

21 MR. COULSON: Well, I think that's right. I  
22 think it -- and it comes down to a jury question. The  
23 Government has its evidence, they have enough evidence of  
24 willfulness to get past a directed verdict. Mr. Cheek  
25 puts on his evidence as mistake of law. From all these

1 facts and all this mix the jury has to decide, as they do  
2 in every case in this country every day, whether he is a  
3 sham or whether he is sincerely confused.

4 QUESTION: But they are not deciding whether  
5 there's willfulness. They are deciding the separate  
6 issue, whether there is an affirmative defense of legal  
7 mistake, as I understand you.

8 MR. COULSON: The affirmative defense negates  
9 willfulness, so the two are related.

10 QUESTION: Did he take any position about the  
11 withholding tax?

12 MR. COULSON: I -- not -- not per se, Your  
13 Honor. He -- he filed withholding statements to have his  
14 -- to have his wages withheld -- the withholding stopped,  
15 I am sorry.

16 QUESTION: Well, he agreed that withholding was  
17 okay.

18 MR. COULSON: No, he fought withholding. He  
19 filed a civil suit against withholding. He filed W-4's  
20 claiming he was exempt. The usual indoctrination that  
21 somebody who goes to these meetings of these tax  
22 protesters gets.

23 QUESTION: Did you submit an instruction to the  
24 jury on mistake of law as an affirmative defense?

25 MR. COULSON: In this, no. In this case Mr.

1 Cheek was pro se at the trial level, and essentially Judge  
2 Plunkett construct -- put all the instructions together  
3 for him.

4 QUESTION: Well then did Mr. Cheek submit an  
5 instruction on mistake of law?

6 MR. COULSON: Yes, there was an instruction. He  
7 did and he didn't. He orally discussed it with Judge  
8 Plunkett, and Judge Plunkett drafted it for him because he  
9 was pro se. He didn't have a lawyer at the trial.

10 QUESTION: And what was the substance of the  
11 instruction?

12 MR. COULSON: The substance of the instruction  
13 was -- was Buckner, which Judge Plunkett felt compelled to  
14 give, that a good-faith misunderstanding has to be sincere  
15 and objectively reasonable.

16 The jury was confused. The jury couldn't agree.  
17 The jury sent out notes what does this mean? We think he  
18 is sincere, what does this mean? The judge reinstructed  
19 him, and then the judge instructed him that, per Buckner,  
20 wages of not income is a prohibited belief. It cannot  
21 form the basis for a good-faith defense.

22 But that was not tendered until after the jury  
23 was out, after the jury had had some questions. And I  
24 think it illustrates the difficulty that Judge Plunkett  
25 and other district judges have had trying to apply this

1 Buckner-Cheek doctrine.

2           There are a lot of other problems with Buckner-  
3 Cheek. It was decided in October of '87, it was applied  
4 retroactively to Cheek's trial, even though the offenses  
5 that Cheek had allegedly committed took place in 1981 to  
6 the spring of 1987, before Buckner. This Buckner-Cheek  
7 doctrine, you look at the Buckner and Cheek and the Dunkel  
8 case, in the Seventh Circuit it is applied only to tax  
9 protesters. It is not applied to more traditional tax-  
10 evasion defendants in the Seventh Circuit. It has not  
11 been applied in any other circuit in this country.

12           QUESTION: I don't understand. How can you  
13 avoid applying it to other, you know -- how can you avoid  
14 applying it across the board to all taxpayers who fail to  
15 do it?

16           MR. COULSON: I agree completely, and that is a  
17 problem with the way the Seventh Circuit has done it.  
18 They have singled out tax protesters. They have come up  
19 with a unique definition of willfulness in the criminal  
20 tax statutes and they have applied it only to the people  
21 they consider to be tax protesters. That is unfair. That  
22 is improper. Absolutely. That is one of our complaints  
23 about the Buckner-Cheek doctrine.

24           QUESTION: I don't understand what you mean.  
25 You don't mean that they -- that they apply their rule

1 only to tax protesters. You mean that their rule only  
2 identifies tax protesters. Is that what you mean?

3 MR. COULSON: The rule is expressly designed to  
4 deal with tax protesters, and in fact it has been applied  
5 only in tax-protester cases. And I cite in our brief some  
6 Seventh Circuit traditional tax-evasion cases in which the  
7 Seventh Circuit applies the subjective standard. They  
8 don't require -- a person defends in the Seventh Circuit  
9 and says I didn't know that bribes were income or I didn't  
10 know that this payment to me, the return of capital, was  
11 income. Issues like that. The Seventh Circuit does not  
12 require that the defendant establish that those ideas are  
13 objectively reasonable. It is only in tax protesters.

14 QUESTION: Do you think --

15 MR. COULSON: That's another unfairness of this  
16 doctrine.

17 QUESTION: But, certainly that point is not  
18 raised in your petition for certiorari, the suggestion  
19 that the court of appeals for the Seventh Circuit has  
20 unfairly applied its law to tax protesters.

21 MR. COULSON: Yes, sir, it is. It is. We even  
22 put it in the nature of a First Amendment gloss on the  
23 issue in our cert. petition. A doctrine which is --

24 QUESTION: I -- I shouldn't have to read back to  
25 you the two questions presented in your petition for



1 certiorari. To me the idea that the Seventh Circuit has  
2 deliberately treated tax protesters differently than other  
3 tax defendants to whom it is equally applicable is not  
4 fairly subsumed in those questions. The first is "Is the  
5 Seventh Circuit's unique approach, under which petitioner  
6 was convicted and jailed because a panel announced that  
7 his sincerely held beliefs were unreasonable and therefore  
8 impermissible, consistent with the statutes under which  
9 petitioner was convicted. 2. If so, is the Seventh  
10 Circuit's approach consistent with the First, Fifth, and  
11 Sixth Amendments?"

12 Those are complaints about the way the Seventh  
13 Circuit decide -- decided your client's case. They don't  
14 to me import any suggestion that the Seventh Circuit is  
15 not even handed in deciding similarly situated cases.

16 MR. COULSON: No, I think it is fairly subsumed  
17 in our issues, because the Buckner-Cheek doctrine  
18 expressly, expressly -- the Seventh Circuit said we are -  
19 - have to deal with annoying tax protesters. That is  
20 their term, annoying tax protesters. Thorns in the side  
21 of the Federal judiciary, the Seventh Circuit calls these  
22 annoying tax protesters. Well, I would expect a Federal  
23 judiciary has developed a thick enough hide to be able to  
24 tolerate these annoying thorns.

25 All we're asking this Court to do is to have

1 John Cheek treated like any other tax-evasion defendant in  
2 the Seventh Circuit, like any other tax-evasion defendant  
3 anywhere else in the country. And that is if he can  
4 establish his bona fides to a jury, if he can show the  
5 jury that he was -- had a sincere and good-faith  
6 misunderstanding of his duties under the tax law, he has  
7 negated willfulness and he is entitled to be acquitted.

8 And to be sure, the Government is going to  
9 collect its taxes. They are going to collect civil  
10 penalties, and so forth. But they should not be able to  
11 convict him of a criminal offense unless they show he  
12 acted willfully. And under this Court's rulings he did  
13 not act wilfully if he had a good-faith misunderstanding  
14 of his duty.

15 And we're -- all we are asking is that he  
16 permitted to have a jury make that judgment. And there is  
17 nothing more fundamental, I think, in our criminal justice  
18 system than the notion that the issue of criminal intent  
19 is one for the jury. It's not one for the Seventh  
20 Circuit, it is not one that ignores in all situations the  
21 genesis of a defendant's claimed misunderstanding. Cheek  
22 went to seminars. He had lawyers tell him this stuff. He  
23 did not act with criminal intent, and he never got the  
24 opportunity because of Buckner-Cheek to have a jury pass  
25 on it. That's really all we are asking.

1           And I think that the Government's position would  
2 represent a radical departure from subtle law going back  
3 though Murdock, going back through Bishop, the cases we  
4 cite in our brief. But I think to disrupt, to unsettle  
5 the law on such a fundamental element as the need for a  
6 jury to pass on criminal intent simply because of the  
7 occasional John Cheeks of the world is -- is unfair and it  
8 is unwise on the part of the Government.

9           The Government does not need to win this case.  
10 They don't need it to enforce the tax laws. They don't  
11 need it in the other circuits. And this Court should not,  
12 on this kind of a showing by the Government, depart from  
13 57 years of settled law under the criminal justice system.

14           I would like to reserve the remaining time for  
15 rebuttal.

16           QUESTION: Very well, Mr. Coulson.

17           Mr. Kneedler.

18           ORAL ARGUMENT OF EDWIN S. KNEEDLER

19           ON BEHALF OF THE RESPONDENT

20           MR. KNEEDLER: Thank you, Mr. Chief Justice, and  
21 may it please the Court:

22           The obvious purpose of the criminal tax  
23 statutes, as this Court recognized in the Spies case, is  
24 to induce the prompt fulfillment of every duty under the  
25 tax laws. At the same time the Court has understood

1 Congress not to want to punish what it termed innocent  
2 errors made despite the exercise of reasonable care in  
3 trying to comply with the complex tax code, those  
4 provisions that are complex.

5 And this Court has construed that criminal tax  
6 statute in a line of cases that seek to give effect to  
7 both of those purposes, in particular as the Court stated  
8 in Bishop, and I quote, "It has construed the term  
9 willfully in a way that implements the intent of Congress  
10 to construct penalties that separate the purposeful tax  
11 violator on the one hand from the well-meaning but easily  
12 confused mass of taxpayers on the other."

13 In this case petitioner Cheek is far removed  
14 from the category of innocent but well meaning class of  
15 categories, those seeking to comply with the sometimes  
16 complex provisions of the Internal Revenue Code. He  
17 didn't commit innocent errors in -- in connection with  
18 such complex provisions. Despite his awareness of the  
19 basic requirements of the code, he declined, refused to  
20 comply with the most basic and universally applicable  
21 provisions of the code. He declined to file tax returns,  
22 and he declined to --

23 QUESTION: Well, the Seventh Circuit though said  
24 it didn't make any difference whether his actions were  
25 innocent if they were not objectively reasonable. So to

1 argue here that they weren't even innocent, I don't think  
2 is very acceptable.

3 MR. KNEEDLER: No, but the point I am making,  
4 sir -- Chief Justice, is the fact that the most basic  
5 obligations in the tax code that are at issue here, the  
6 duty to file a return and the duty to acknowledge that  
7 wages are taxable income, a belief that a person doesn't  
8 have to comply with those provisions is not objectively  
9 reasonable. The Seventh Circuit was addressing a category  
10 of -- of assertions in this case --

11 QUESTION: But you made the statement that he  
12 was not innocent, which to me means that he did not  
13 sincerely believe this. And of course the jury was never  
14 given an opportunity --

15 MR. KNEEDLER: I was using the word innocent in  
16 a -- in a different way, of somebody who is --

17 QUESTION: Who is unreasonable is not innocent.

18 MR. KNEEDLER: Pardon me, I'm sorry.

19 QUESTION: Somebody who is unreasonable is not  
20 innocent. Our jails will be full, Mr. Kneedler.

21 MR. KNEEDLER: No. What is required in this  
22 case, it's our position that, generally as the Court said  
23 in Bishop and Pomponio, that the Government must prove an  
24 intentional violation of a known legal duty, which is the  
25 gloss that the Court has put on the word willfully under

1 the tax statutes. A known legal duty requires awareness  
2 of the duty. Here there's no question that Mr. Cheek was  
3 aware of his duty under the tax laws to file a return.

4 QUESTION: But the gloss -- the gloss we put on  
5 it in Murdock is that quote, "an evil motive" -- and evil  
6 motive -- "is a constituent element of the crime."

7 MR. KNEEDLER: Well, subsequently though,  
8 Justice Scalia, in Pomponio the Court described what it  
9 meant by the phrase evil motive in prior cases. What it  
10 meant -- what it said was we meant by that nothing more  
11 than intentional violation of a known legal duty. And  
12 that was the precise question presented on Pomponio. So -  
13 -

14 QUESTION: Well, here he says he was somehow  
15 fooled into believing that his conduct was lawful.

16 MR. KNEEDLER: Well, I think --

17 QUESTION: And I guess we have to take the case  
18 on that assumption.

19 MR. KNEEDLER: I think for purposes of analyzing  
20 the legal question, perhaps that is true. I would like to  
21 say, though, that the tax seminars and what not that he  
22 says he attended were in 1980. From then on his  
23 submissions to the IRS and his legal arguments about the  
24 Sixteenth Amendment and other legal objections to the tax  
25 system appear -- for all that appears to be self-generated

1 and --

2 QUESTION: Well, but that's -- that's for the  
3 jury. We are talking about the instruction.

4 MR. KNEEDLER: I understand, I understand.

5 QUESTION: Is the problem here with the term  
6 known legal duty? Is that where we're having difficulty?

7 MR. KNEEDLER: Well, it's -- it's -- it's one  
8 place in the case that I think it's useful, productive to  
9 focus upon. Known -- the term knowledge as used in this  
10 Court's decision in Bailey and as the model penal code  
11 describes the word knowledge, it uses that in terms of  
12 awareness, cognition. Is the actor aware of the attendant  
13 circumstances, where the attendant circumstances that have  
14 to be shown are the state of the law, where, in this case  
15 the Internal Revenue Code requirements, awareness of what  
16 the Internal Revenue Code requires is an element of the  
17 offense.

18 But once he is aware of what the law requires,  
19 but disagrees with, as I think it's only fair to say Mr.  
20 Cheek does in this case, disagrees with the code either  
21 because he thinks it is unconstitutional or because the  
22 IRS' construction of it is wrong, or --

23 QUESTION: I didn't understand that, Mr.  
24 Kneedler. I understand he disagreed with whether the code  
25 -- his position was that the code did not require it,

1 despite what the courts had said, despite what the  
2 regulations said. He didn't think the code required that.  
3 I thought that was what the facts of this case are.

4 MR. KNEEDLER: Well, most of his arguments in  
5 this case are constitutionally based, that the Sixteenth  
6 Amendment was not properly ratified, or that -- that this  
7 tax is a direct tax that has to be apportioned among the  
8 states, which is just simply wrong under Pollock --

9 QUESTION: He's abandoning that, as I understood  
10 the argument. Illogically, perhaps, but the assertion is  
11 not being made that if he thinks the statute is  
12 unconstitutional he has a defense.

13 MR. KNEEDLER: I understood him to be abandoning  
14 that as well, although I would like to point out that --  
15 that even the courts that have adopted the purely subject  
16 standard for claims to a belief that income -- that a  
17 certain duty under the code is not required, it's purely  
18 subjective. Those courts have all said that a belief that  
19 the statute is unconstitutional is not a defense.

20 And there is a statutory basis for that, because  
21 both 7201 and 7203 refer to evading titles imposed by this  
22 title, or failing to perform a duty required by this  
23 title, which suggests all you look to is the title -- is  
24 the statute, rather than whether the Constitution might  
25 trump the statute.



1                   QUESTION: Mr. Kneedler, the Murdock case  
2 though, the defense was based on a Constitution -- belief  
3 that the Constitution did not require him to incriminate  
4 himself.

5                   MR. KNEEDLER: Right, but it was not -- it was  
6 not a claim that the statute was unconstitutional. What  
7 he was claiming was a constitutional privilege from having  
8 to furnish the information. It was not a claim that  
9 Congress did not have the authority to enact such a  
10 statute in the first place.

11                  QUESTION: Why should that make a difference?

12                  MR. KNEEDLER: Well, I think it's -- first of  
13 all, I think when -- when that involves someone who was  
14 summoned to furnish information to the IRS, I think it's  
15 fair to attribute to Congress an intent to comply with the  
16 Fifth Amendment when a person is requested for  
17 information. And so whether a person has a duty -- a duty  
18 to comply in those circumstances, I think there isn't a  
19 clash between the Fifth Amendment and the statute. The  
20 way you are claiming that the statute itself is  
21 unconstitutional in the sense that Congress didn't even  
22 have authority to enact it in the first place, I think  
23 that's -- I think that's quite a different sort of claim.

24                  QUESTION: Even if it were a closely debated and  
25 open question on which scholars disagreed as to the

1 constitutional issue?

2 MR. KNEEDLER: Yes, because I think we would be  
3 reduced to chaos if -- if individual citizens could take  
4 it upon themselves to make, as one court of appeals put in  
5 response to this very argument, to make individualized  
6 determinations of constitutionality. There is a  
7 presumption of constitutionality.

8 QUESTION: Congress could avoid being reduced to  
9 chaos by removing the willfully requirement.

10 MR. KNEEDLER: It -- it could, but I think there  
11 is no reason to think that Congress intended to encourage  
12 disobedience of the statutes it enacted by claims that  
13 those statutes are -- are unconstitutional.

14 QUESTION: Or the courts could change their  
15 interpretation of willfulness. The courts are the ones  
16 that put this spin on willfulness in the tax cases.

17 MR. KNEEDLER: Well, this Court -- this Court in  
18 particular in *Murdock* and in subsequent cases. And in  
19 *Murdock* the Court says the, said that the word willfully  
20 has to be construed in light of its context in the tax  
21 code and the purposes of the tax code.

22 QUESTION: Well, and you -- and you say that  
23 there is a special rule about willfulness in tax cases.  
24 You accept that.

25 MR. KNEEDLER: Yes, but -- but --

1                   QUESTION: And all it -- and that he must --  
2 he's entitled to have a mistake of law.

3                   MR. KNEEDLER: Yes, we do acknowledge the  
4 existence of a certain implied defense of mistake of law.

5                   QUESTION: So he must know what his legal duty  
6 is.

7                   MR. KNEEDLER: We -- it must be shown that he  
8 was aware of his legal duty, a known legal duty in that  
9 sense.

10                  QUESTION: Aware of his legal duty. And if says  
11 I am not aware of it, and the jury believes him, he's off.

12                  MR. KNEEDLER: Right. That is correct. But I  
13 think --

14                  QUESTION: Is he aware of the legal duty if he  
15 disagrees with the Government's interpretation of the  
16 legal duty?

17                  MR. KNEEDLER: Yes, I think that he is. He's  
18 aware in the sense that is relevant for purposes of the  
19 criminal law. The criminal law is --

20                  QUESTION: So all he has to know is that the IRS  
21 takes a position different than he does?

22                  MR. KNEEDLER: For purposes of triggering the  
23 awareness of the requirements of the law, yes. Now that  
24 is where the defense of objective -- objectively  
25 reasonable belief in the validity of his legal position

1 kicks in. Of course, if the court -- if the court agrees  
2 with his position on the merits that wages aren't income,  
3 then you don't need the willfulness standard. He simply  
4 hasn't committed a violation of the act. But -- but -- so  
5 we are assuming that his view of the law is incorrect.

6 QUESTION: He hasn't preserved that question,  
7 has he, whether wages are income?

8 MR. KNEEDLER: No.

9 QUESTION: We don't have to wrestle with that  
10 one, do we?

11 MR. KNEEDLER: No, although, Justice Scalia, we  
12 would be delighted with a statement by this Court that  
13 would put to rest once and for all the proposition that  
14 wages are not income. It may seem amusing here, but it is  
15 -- it is a problem with an assertion like this being made  
16 in cases in this day and age. IRS informs me that 116  
17 million tax returns were filed last year with W-2's  
18 attached to them, meaning that those were tax forms filed  
19 by wage earners. People know in this country that wages  
20 are income, and the idea that a defense like this should  
21 be presented to the jury, I think I would do nothing but  
22 promote disrespect for the tax laws, when what the court  
23 should be doing in construing willfully is promoting the  
24 duty to comply with the tax laws.

25 QUESTION: Mr. Kneedler, can I take your -- I

1 understand your argument why -- a constitutional concern.  
2 We understand what the statute requires. Supposing a  
3 taxpayer honestly advised by counsel believes that a  
4 regulation does not comply with the Internal Revenue Code,  
5 but he knows very well what the regulation requires.  
6 Criminal or not?

7 MR. KNEEDLER: I think your point -- your  
8 question raises two points. One is advised by counsel.  
9 There is --there --

10 QUESTION: It's a sincere belief.

11 MR. KNEEDLER: Here I should put out -- point  
12 out petitioner did not --

13 QUESTION: Well, let's leave out --

14 MR. KNEEDLER: -- he's not claiming he was  
15 advised -- it's not the classic advice of counsel defense,  
16 is the only point that I am making.

17 QUESTION: All right, okay. I just mean a  
18 sincere belief that a regulation is not authorized by the  
19 statute.

20 MR. KNEEDLER: Right. As long as that is a  
21 reasonable belief, a plausible belief, and I think there  
22 should be considerable latitude for a court to recognize  
23 arguments such as that. But on the other hand if this --

24 QUESTION: It is a defense if it's a plausible  
25 belief?

1 MR. KNEEDLER: If -- if he has -- he is aware of  
2 the regulation, we -- we therefore have shown the  
3 knowledge --

4 QUESTION: Why is that different from a  
5 plausible belief that a statute is unconstitutional?

6 MR. KNEEDLER: Because the statute is written  
7 terms -- in terms of, for example, in terms of filing  
8 returns. It refers to returns that are required by this  
9 statute, or regulations under it, in fact. So the  
10 regulations reflect IRS' interpretation of the statute.

11 QUESTION: But Mr. Kneedler, is it plausible on  
12 a subjective basis or plausible on an objective basis? I  
13 mean, that is the question. You say plausible --

14 MR. KNEEDLER: It has to be plausible on an  
15 objective basis. I mean, there is a threshold --

16 QUESTION: Well, suppose -- suppose there's --  
17 suppose there's a baggage worker or a janitor, not a  
18 pilot, but he is working for American Airlines. And some  
19 one of his coworkers announced, remember now that wages  
20 aren't income, this is a new theory. And he really  
21 believes that. And he is just as wrong as he can be, but  
22 he believes it.

23 MR. KNEEDLER: Well, there may all -- I mean,  
24 there is always the possibility that he will show -- that  
25 he would be able to show a lack of knowledge.

1 QUESTION: What is the instruction, Mr.  
2 Kneedler?

3 MR. KNEEDLER: The instruction is that we have  
4 to show that there was a violation of a known legal duty.  
5 He had to know that the Internal Revenue Code required him  
6 to file a tax return, and that wages are income under the  
7 Internal Revenue Code as construed.

8 QUESTION: He knows that it's in the code, but  
9 he has been told that the code section's invalid. And he  
10 really believes it and he is really dumb.

11 MR. KNEEDLER: Then, no matter who it is, this  
12 is a ruling -- this is a determination that that is not an  
13 acceptable basis for declining to comply with the tax  
14 code. Because the rule we're proposing is not that --  
15 doesn't turn on somebody's ability to do legal research on  
16 the question. It is simply that as a matter of judgment -  
17 - and what is a reasonable legal argument is  
18 quintessentially a legal determination, that that's simply  
19 -- that's simply frivolous. And in fact Mr. Cheek's  
20 lawyer was, or Mr. Cheek was assessed penalties in his  
21 civil case for making that precise argument in the courts.

22 QUESTION: You agree that he has to know more  
23 than what the regulations, the tax code regulations say?

24 MR. KNEEDLER: No. The affirmative case that we  
25 must show is that it was a known legal duty in the sense

1 that he had to be aware that he was required by law --

2 QUESTION: All right, he -- he knows it, but he  
3 can still get off.

4 MR. KNEEDLER: The affirmative defense then  
5 kicks in. It is available to him, not in -- not in the  
6 hypothetical Justice Kennedy posited of the -- the janitor  
7 believing that wages aren't income. We are saying that is  
8 not objectively reasonable across the board. That is not  
9 individually --

10 QUESTION: All right, the -- suppose the  
11 regulation that he thinks is not consistent with the  
12 statute has been upheld as being consistent by the Supreme  
13 Court?

14 MR. KNEEDLER: Then in that situation I think it  
15 would -- it would not be objectively reasonable to  
16 challenge the regulation. At some point taxpayers have to  
17 recognize that their disagreements with the IRS have  
18 become settled by this Court, or once again we would be  
19 encouraging disrespect not only for the Internal Revenue  
20 Code, but for -- but for the judicial process.

21 I would like to get back to a question Justice  
22 Scalia mentioned earlier, that Mr. Cheek has conceded that  
23 constitutional objections to the Internal Revenue Code are  
24 not -- are not a sufficient basis for defense, but he had  
25 other objections. In fact his only other objection, as I



1 understand it, was the claim that wages are not income.

2 If you look at his testimony in this case, and  
3 as this argument has been presented in other cases, that  
4 is -- that has also been presented as a constitutional  
5 argument, that wages involve an equal exchange of labor  
6 for compensation. There is no gain or profit, therefore  
7 it can't be taxed. It's in effect a tax of his property,  
8 which is a direct tax which can't be taxed under the  
9 Sixteenth Amendment. So even that argument, as it has  
10 traditionally been interpreted, or traditionally --  
11 traditionally been presented and as it has been presented  
12 by Mr. Cheek in this case, is at bottom a constitutional  
13 objection and falls in that same category.

14 But there is another point I would like to make  
15 about that. Petitioner does not suggest that that  
16 argument is grounded in anything in the Internal Revenue  
17 Code. The other aspects of his testimony in this case  
18 were based on his -- on a set of beliefs that were not  
19 grounded in the Internal Revenue Code. He referred to his  
20 -- to his wages as property over which he had inalienable  
21 rights, citing and furnishing the IRS the Declaration of  
22 Independence. He had economic theories about equal  
23 exchanges of his labor for income. Those may be theories,  
24 those may be abstract beliefs, but they are not the sort  
25 of beliefs, as this Court made perfectly clear in Reynolds

1 and --

2 QUESTION: So I take it you do accept the  
3 Seventh Circuit saying that there has to be more than  
4 knowledge of, say, the provision of a regulation?

5 MR. KNEEDLER: That's all we have to show. The  
6 defendant then may come in --

7 QUESTION: I know. I know, but the Seventh  
8 Circuit would say that if it's objectively reasonable to  
9 believe that the regulation is invalid, he gets off.

10 MR. KNEEDLER: Yes.

11 QUESTION: You accept that?

12 MR. KNEEDLER: We accept -- we accept the  
13 mistake of law defense to that extent. But I think the  
14 Chief Justice made an important point very early in the  
15 argument, and that is that as a general matter in the  
16 criminal law, mistake of law is not even a defense at all.  
17 So we are operating in a context in which we are all --  
18 there is already an exception to the general principle  
19 under the criminal law that mistake of law is not a  
20 defense.

21 QUESTION: But an exception that wasn't invented  
22 by the Internal Revenue Service.

23 MR. KNEEDLER: It wasn't invented -- it wasn't  
24 invented in so many words by Congress either. It was --  
25 it came from this Court -- from this Court's --

1 QUESTION: Invented by this Court in Murdock.

2 MR. KNEEDLER: Right, attempting to -- but, by  
3 the same -- but I think that that points out why this  
4 Court should hold that defense within reasonable limits.  
5 If --if --

6 QUESTION: Well, it's a defense that makes a  
7 whole lot of sense, Mr. Kneedler. Let's not deprecate it.  
8 I take it that the reason we treat the tax laws  
9 differently is that everybody probably makes some mistake  
10 or other with respect to the complexities of the tax laws  
11 now and then. And if the only defense against going to  
12 jail for those mistakes is -- is throwing yourself on  
13 prosecutorial discretion, we are all in the hands of  
14 Federal prosecutors who can choose to pursue us or not to  
15 pursue us as suits their convenience.

16 MR. KNEEDLER: Right, and I did not mean -- I am  
17 sorry if I was suggesting I was denigrating. All I was  
18 saying is that it needs the objective reasonableness  
19 limitation --

20 QUESTION: Yes, but you would still be treating  
21 tax cases specially if you said you have to show that he  
22 knew what the law was.

23 MR. KNEEDLER: Right. But that is -- that is an  
24 interpretation this Court put on the word willfully.

25 QUESTION: But you don't need to -- you don't

1 need to have the objectively reasonable business at all -  
2 -

3 MR. KNEEDLER: No.

4 QUESTION: -- in order to treat the tax cases  
5 specially.

6 MR. KNEEDLER: That is correct, but we do  
7 recognize that Murdock did -- did recognize it in a little  
8 bit broader breadth for defense of mistake of law there.  
9 It was quite -- it was clear that there was no valid Fifth  
10 Amendment claim at the time that Murdock declined to  
11 furnish the information. But -- but because that was --

12 QUESTION: In any event, you accept the Seventh  
13 Circuit's objectively reasonable --

14 MR. KNEEDLER: We do, yes.

15 QUESTION: -- and that the mistake of law  
16 defense is that broad.

17 MR. KNEEDLER: That is right. But we think that  
18 the limitation the Seventh Circuit has put on it in terms  
19 of the objectively reasonable limitation is a critical  
20 limitation, because it would --

21 QUESTION: And how is the person who may be  
22 retarded or otherwise lacking in understanding to be  
23 protected here?

24 MR. KNEEDLER: By -- by the requirement of  
25 knowledge. He has to, we have to show in order to sustain

1 a conviction as part of our affirmative case that he was  
2 aware of the legal duty imposed by the code. And if he  
3 relies on a defense that -- or an interpretation of the  
4 code, notwithstanding his knowledge, that is objectively  
5 reasonable, he, like anyone else, would benefit from that.

6 QUESTION: Mr. Kneedler, you keep reciting that  
7 phrase and I have the same trouble that Justice Kennedy  
8 does with it, that he has to have knowledge of the legal  
9 duty imposed by the code. But, I mean, that is circular.  
10 He is always contending that there is no legal duty under  
11 the --under the code. What do you mean by he has  
12 knowledge of the legal duty? What precisely do you mean  
13 by it? He is always saying I think the code doesn't  
14 impose a legal duty.

15 MR. KNEEDLER: Well, in fact what he is saying  
16 in this case is what comes down to a natural law  
17 objection. In my view of what wages are, they aren't --  
18 there's no gain or profit.

19 QUESTION: I'm not talking about this case. I'm  
20 talking about somebody who reads the regulation and says  
21 that regulation, I don't think that's an accurate  
22 interpretation of the code.

23 MR. KNEEDLER: Well, if he has an argument --

24 QUESTION: So he has no knowledge of the duty  
25 imposed by the code then, right?

1           MR. KNEEDLER: I suppose one could look at it  
2 that way, but I think -- but he certainly has a duty of  
3 what the law says, the law being the statute and the  
4 regulations that the Commissioner is authorized -- or the  
5 Secretary is authorized to promulgate. That -- that's the  
6 classic place that people look for what the law is when  
7 they are trying to comport their behavior to the  
8 requirements of the law. They look to the law, the  
9 statute, and the regulations issued by the agency.

10           QUESTION: So all he has to know is the  
11 regulation. He has to know the existence of the  
12 regulation, and that -- that's your answer to Justice  
13 O'Connor of how the mentally retarded person is to be --

14           MR. KNEEDLER: I don't think he has to know the  
15 -- I don't think he has to know the -- he doesn't have to  
16 know the text of the statute. I think he has to know the  
17 legal duty. If we can show that, if we -- which is the  
18 phrase from Pomponio, --

19           QUESTION: Well, you're saying again he has to  
20 know the legal duty. What is legal duty?

21           MR. KNEEDLER: Legal duty traces from the  
22 statute. If the statute says, as this one does, you shall  
23 file a tax return if you have income above a certain  
24 amount, and you know of that legal requirement, then you  
25 have to -- then you have to file it.

1           And if the IRS has given content to that  
2 statutory requirement in regulations, and you disagree  
3 with that interpretation of the statute by IRS, and if  
4 your disagreement is objectively reasonable then you  
5 haven't committed a willful offense.

6           But I think it's important for -- when a person  
7 is claiming a mistake of law defense, that defense has to  
8 be grounded in the statute that he is challenging. He has  
9 to be able to say, using traditional legal tools, no,  
10 income doesn't include wages. He has to -- it has to be  
11 grounded in the act that he is claiming to have been  
12 mistaken about.

13           Nothing in this case remotely approached that.  
14 In fact, when you look at the definition of gross income  
15 under the Internal Revenue Code it refers to income from  
16 whatever source derived, specifically including in the  
17 first itemization compensation for services. It strikes  
18 me as a --

19           QUESTION: Mr. Kneedler, do you also go along  
20 with the Seventh Circuit that there is a laundry list of  
21 per se nonobjectively reasonable items?

22           MR. KNEEDLER: We -- we do agree that the  
23 arguments that have been, that --

24           QUESTION: Which should never have to go to the  
25 jury.

1 MR. KNEEDLER: That -- that's correct. Now  
2 again, most of those are constitutional arguments, which  
3 Mr. Cheek concedes are not a valid defense. And the  
4 argument that wages aren't income, again, I think that,  
5 given the virtually universal compliance by taxpayers in  
6 this country with the requirement to file tax returns on  
7 the understanding that wages are income, that is not an  
8 objectively reasonable belief in the matter of --

9 QUESTION: But Mr. Kneedler, the question  
10 whether a particular claim is objectionably reasonable or  
11 not then becomes a question of law if the court can  
12 specify a list. It and should not be submitted to the  
13 jury, should it?

14 MR. KNEEDLER: Well, our -- our principal  
15 submission is that it is a question of law, like the  
16 question of materiality in a false statement case.

17 QUESTION: Would it not have been correct then  
18 for the district court to in effect instruct the jury to  
19 reject this defense, because it was based on objectionably  
20 -- items on the laundry list. He says those are not a  
21 defense; just tell the jury that.

22 MR. KNEEDLER: Yes, absolutely. And the jury --  
23 the judge did in this case.

24 QUESTION: Say you had a closer case, maybe not  
25 wage or not income, would the -- should the judge decide



1 and tell the jury whether a particular claim is  
2 objectionably reasonable or not, or let the jury decide  
3 this semi-legal question?

4 MR. KNEEDLER: Well, I think one approach would  
5 be for the judge to say it's objectively reasonable, and  
6 then not even instruct the jury on the question. And I  
7 think if you look at Murdock, that is exactly the  
8 procedural approach the Court --

9 QUESTION: The Court decided it there.

10 MR. KNEEDLER: The Court decided it. What the  
11 Court said is because the law was uncertain at the time  
12 that he declined to furnish the information, it was  
13 improper for the judge to in effect instruct the jury that  
14 Murdock's belief was so unreasonable and ill founded --  
15 the words the court used -- to amount to willfulness. But  
16 the clear implication, the other side of what the court  
17 was saying, is if the -- if that question had been  
18 settled, as it subsequently was by this Court, if that  
19 question had been settled by this Court at the time that  
20 Murdock acted, then the district court should not have  
21 submitted that to the jury at all.

22 QUESTION: Well, maybe the solution to this  
23 problem is never to instruct the jury on an -- to make an  
24 objectively reasonable determination, but have the judge  
25 decide whether or not the defense is sufficient or not,

1 assuming that --

2 MR. KNEEDLER: I think that would be -- that  
3 would be one appropriate approach. And as I say, that has  
4 a lot of support in Murdock. That is I think what the  
5 Court contemplated.

6 QUESTION: Mr. Kneedler, the problem with that  
7 and the problem with having a laundry list, as the Seventh  
8 Circuit does, is that the statute, it seems to me, and  
9 using the term willfully clearly -- clearly requires an  
10 individuated determination. If someone visits the Supreme  
11 Court and a Supreme Court justice tells him I assure you,  
12 my boy, wages are not income, is -- is his reasonableness  
13 in believing that wages are not income no different from  
14 the reasonableness of someone who just -- just hears it  
15 from somebody on the street?

16 MR. KNEEDLER: The individualized determination,  
17 Justice Scalia, comes in the knowing requirement. Once  
18 again I would like to stress we have to show intentional  
19 violation of a known legal duty, and the person --

20 QUESTION: I don't understand your known legal  
21 duty. The more you explain it, the less I understand it.  
22 I do understand, however, that you're -- that you are  
23 trying to decide reasonableness on an across-the-board  
24 basis. It's reasonable for everybody, it is unreasonable  
25 for everybody in the world to believe X. And I am not

1 sure that's true, and I think the statute does require an  
2 individuated determination.

3 MR. KNEEDLER: Our second position in the case  
4 is that there may be cases in which it would be proper to  
5 submit to the jury, but these beliefs in this case are  
6 unreasonable -- unreasonable as a matter of law or  
7 unavailable as a matter of law.

8 QUESTION: You certainly didn't object to the  
9 business of unreasonable belief going to the jury in this  
10 case.

11 MR. KNEEDLER: That -- that's correct, so the  
12 Court doesn't have to decide that. It doesn't have to  
13 decide that question here.

14 QUESTION: But you would have said that the  
15 issue didn't need to go to the jury at all, is that it?

16 MR. KNEEDLER: I think -- I think Murdock would  
17 support that approach, but because --

18 QUESTION: The judge in effect took it away from  
19 the jury, didn't he?

20 MR. KNEEDLER: Took several of the beliefs away  
21 from the jury. Took away -- took away the argument that  
22 the belief that the tax code is unconstitutional --

23 QUESTION: Only after the jury asked some  
24 questions.

25 MR. KNEEDLER: Pardon me?

1 QUESTION: Only when the jury asked some  
2 questions.

3 QUESTION: Only when the jury understood the  
4 thing.

5 MR. KNEEDLER: Right. I think the Chief Justice  
6 has put his finger on it. I think that there was a  
7 tension between the court's principal instructions and the  
8 court's attempt to explain Mr. Chief's theory of the  
9 defense, even though his theory was not -- was not a valid  
10 one.

11 QUESTION: Well, that is because this jury  
12 insisted on getting a clear explanation of what a known  
13 legal duty is.

14 (Laughter.)

15 QUESTION: And that's what we're trying to do.

16 MR. KNEEDLER: Well, again, I think the court  
17 gave a clear answer, and we think that this Court should  
18 give a clear answer. And that is that at least the  
19 particular beliefs that Mr. Cheek was offering here are  
20 not objectively reasonable as a matter of law, either on  
21 the theory that this is always a question for the judge,  
22 which was properly exercised here, in effect, or that at  
23 least in this case these beliefs were unreasonable as a  
24 matter of law.

25 I would like to go back again though to stress

1 that this Court has taken upon -- has had to take upon  
2 itself the construction of the term willfully in a way  
3 that furthers the policies of the tax statutes. And we  
4 think that a requirement that a jury acquit a defendant as  
5 long as it believes -- as long as he convinces them that  
6 he subjectively believed in his cause, even if that cause  
7 has no support in the Internal Revenue Code, that that  
8 would promote disrespect for the law, not just among the  
9 particular category of people who are sometimes  
10 categorized as tax protesters, but the rest of us who are  
11 taxpayers.

12 QUESTION: Well, I guess there's a whole range  
13 of civil penalties. We're dealing here with a criminal  
14 statute, not the civil recovery provisions and the civil  
15 penalties and so forth.

16 MR. KNEEDLER: Right, there are civil penalties,  
17 but here we had somebody -- and this case really -- really  
18 shows what, the mischief of the contrary rule. Somebody  
19 who has had four cases thrown out of court, making these  
20 arguments that they are frivolous. Somebody who has been  
21 written by the Internal Revenue Code -- written to by the  
22 Internal -- IRS, telling him that he has to file tax  
23 returns. Somebody who filed tax returns for 10 years, and  
24 he is entitled to go to the jury and say I believed I  
25 didn't have to. That's not the way our tax system

1 operates. Citizens in this country understand their legal  
2 duties under the tax code.

3 And at least focusing on the particular  
4 objections to the tax code here, we think it is proper for  
5 the Court to say that this defense is unavailable. A  
6 contrary rule would come into tension with Reynolds and  
7 Oregon Department of Employment Securities.

8 QUESTION: I seems to me, if you say you have to  
9 prove that he knew what his legal duty was, and yet you  
10 can say he has a sincere belief that there is no such  
11 duty, how can he possibly know it? I think you probably  
12 really now say, well, he really knew it, even if he has a  
13 belief that he doesn't have a duty.

14 MR. KNEEDLER: There is a difference between  
15 knowledge and belief. It's highlighted -- it's  
16 highlighted by the example of where this Court has ruled  
17 on the precise question. He certainly knows what the law  
18 is as interpreted by this Court. He simply doesn't  
19 believe it. Well, belief in the way -- in that sense is  
20 not a belief coming from trying to comply with the law.  
21 It's a belief -- it's a subjective abstract belief about  
22 what the law ought to be. And that defense, we submit,  
23 under the tax code is not available.

24 QUESTION: You -- you define law to be not just  
25 what this Court has said, but also whatever is set forth

1 in the regulation.

2 MR. KNEEDLER: Well, law --

3 QUESTION: If he reads that he knows what the  
4 law is, you tell us.

5 MR. KNEEDLER: No, law in the first instance is  
6 what Congress says it is. We are not suggesting that this  
7 Court has to have ruled before somebody has to comply with  
8 the tax code. It is what -- the law that Congress  
9 enacted.

10 QUESTION: Thank you, Mr. Kneedler.

11 Mr. Coulson, do you have rebuttal? You have 3  
12 minutes.

13 REBUTTAL ARGUMENT OF WILLIAM R. COULSON

14 ON BEHALF OF THE PETITIONER

15 MR. COULSON: Your Honor, the Government is  
16 taking the position that no one who possesses the belief  
17 that wages are not income can ever be not guilty. They  
18 are taking the position that it doesn't matter whether a  
19 lawyer tells you that, as happened in John Cheek's case,  
20 or an accountant tells you that. It wouldn't matter,  
21 because the Government says the content of that belief is  
22 on this forbidden list.

23 QUESTION: I suppose the Government -- wanted to  
24 add -- provided you know the Government is going to  
25 disagree with you and enforce its laws and prosecute you.

1 MR. COULSON: John Cheek had lawyers tell him  
2 that under the Internal Revenue Code wages were not  
3 income. Did he know his legal duty? Don't we want to  
4 encourage people to seek advice from lawyers and  
5 accountants on the tax laws?

6 QUESTION: Not from those lawyers. Not from  
7 those lawyers.

8 QUESTION: Well, I guess he had taken the issue  
9 to court in civil litigation and been told, hadn't he?

10 MR. COULSON: The Government, I think,  
11 exaggerates the significance of that evidence. In any  
12 event, it is my position that that is a question for the  
13 jury. The jury is entitled to all of this information on  
14 what Cheek did and didn't do, and what he was told, and  
15 what he really understood and what he claimed he  
16 understood. That is an individualized jury determination  
17 which the Government seeks to take from the jury in this  
18 case and in all other cases, because Cheek's particular  
19 belief or misunderstanding is on this forbidden list.  
20 That makes no sense.

21 If the Government is as confident, as Mr.  
22 Kneedler seems to be here, that Cheek is clearly guilty,  
23 he is clearly a sham, then why don't, why are they afraid  
24 to let a jury decide under the Murdock instruction? Why  
25 do they need the helping hand of Buckner-Cheek, which says



1 the jury has to find that it's objectively reasonable.  
2 And under Buckner-Cheek that is a jury determination  
3 unless it is on the forbidden list. It makes no sense in  
4 jurisprudence.

5 I am not abandoning this -- I don't like the  
6 word abandon. I don't feel that I am abandoning the  
7 argument on its unconstitutionality. I don't think it is  
8 an issue in Mr. Cheek's case.

9 He had all these crazy beliefs, wages are not  
10 income, the income tax is voluntary. To be sure, wrong  
11 beliefs. I am not here to defend those beliefs on the  
12 merits, but those are statutory beliefs. And he was told  
13 that that was the state of the law by attorneys at  
14 seminars, and he obviously is not a sophisticated man.  
15 And note, this Court and the Government cannot say that a  
16 person in Mr. Cheek's position as a matter of law could  
17 not have been mistaken. Yet that's the position the  
18 Government is urging.

19 All we are asking is that Mr. Cheek be permitted  
20 to present that to a jury. If the jury thinks he is a  
21 phoney they will convict him. If they think he is sincere  
22 they should acquit him. And the Government can get its  
23 penalties and fines --

24 QUESTION: Which they are likely to think. I  
25 mean, they're more likely to think he is a phony if it's

1 an unreasonable belief. I mean, you say, oh, come on,  
2 nobody --

3 MR. COULSON: Right. It's a factor the jury can  
4 consider, in addition to all the other factors, the  
5 genesis and so forth. A defendant like Cheek --

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
7 Coulson.

8 The case is submitted.

9 (Whereupon, at 12:03 p.m., the case in the  
10 above-entitled matter was submitted.)

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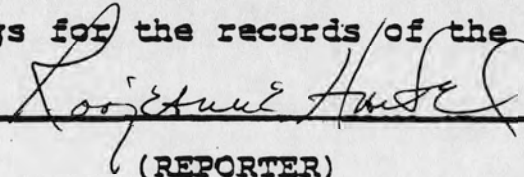
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#89-658 - JOHN L. CHEEK, Petitioner V. UNITED STATES

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