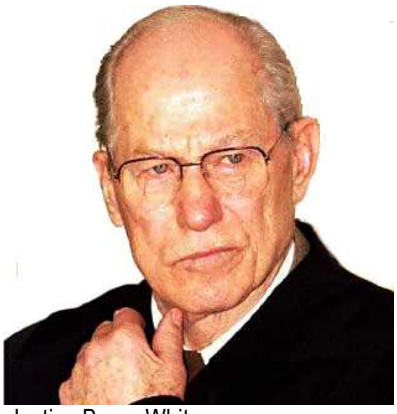
LIBERTY TREE

Vol. 15, No. 3 — March 2013

On the other Cheek

By Dick Greb

In 1991, the Supreme Court heard a case dealing with "willfulness" in the context of criminal tax cases.[1] An airline pilot named John Cheek had been convicted of six counts of willful failure to file (under I.R.C. § 7203) and three counts of willful evasion (§ 7201). His defense at trial was that he had not acted "willfully" because he believed in good faith that he wasn't required to file, in part because the wages he earned did not constitute "income" as that term is used in the Code. This defense comes from an earlier Supreme Court decision — *U.S. v. Murdock* — that clarified the term "willful" to mean "an act done *with a bad purpose*; without justifiable excuse; stubbornly, obstinately, perversely[;] *without ground for believing it is lawful*, or conduct marked by careless disregard whether or not one has the right so to act."[2] Thus, if an accused shows that he honestly believed he was complying with the law, no willfulness could exist, and therefore, no criminal violation could be upheld against him.



Justice Byron White.

Seventh's 'unreasonable' beliefs

However, the 7th Circuit — within whose jurisdiction Cheek's trial court sat — apart from all the other Circuits, had a list of "beliefs" that it considered "objectively unreasonable," such that said beliefs, even if held in good faith, would not mitigate the necessary element of willfulness. At the time, the list consisted of: "(1) the belief that the sixteenth amendment to the constitution was improperly ratified and therefore never came into being; (2) the belief that the sixteenth amendment is unconstitutional generally; (3) the belief that the income tax violates the takings clause of the fifth amendment; (4) the belief that the tax laws are unconstitutional; (5) the belief that wages are not income and therefore are not subject to federal income tax laws; (6) the belief that filing a tax return violates the privilege against self-incrimination; and (7) the belief that Federal Reserve Notes do not constitute cash or income."[3] Since Cheek's beliefs were generally among those 'prohibited' beliefs, the jury

Justice Antonin Scalia.

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1. *Cheek v. U.S.*, 498 U.S. 192 (1991).
2. *U.S. v. Murdock*, 290 U.S. 389, 395 (1933). Throughout this article, all emphases are mine, and internal citations are often omitted.
3. *U.S. v. Cheek*, 882 F.2d 1263, 1270 (1989), at FN2.

Thanks to the generosity of LWRN members and Patriot friends, in one month we were able to raise 50 percent of the back rent owed on the LWRN offices, and the landlord has given us a bit more time to get the rest together. If we can impose on that same generosity for the month of March, and get a comparable response, with possibly some additional donations, we will be able to retire our debt to the landlord. This will free up all our time and energy to work on furthering LWRN progress.

Please give — we still need help to stay on the air!

On February 9th, LWRN host David Alan Carmichael gave an encouraging report on his fact-finding visit to the radio station being used to implement the LWRN expansion

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was instructed that any misunderstanding on his part of his "duty" to file returns, and to claim his wages thereon as "income" could not eliminate his willfulness. Based on that instruction, the jury convicted him on all counts. The 7th Circuit Court of Appeals naturally upheld the conviction (since its cases were the basis of both the list and the "objectively unreasonable" rule in the first place), and Cheek appealed to the Supreme Court.

It's interesting to note that this type of defense — mitigating willfulness by showing a good faith misunderstanding of the law — is now often referred to as a "Cheek defense," even though it was actually laid out in the *Murdock* case cited earlier.[4] The main question for the high court in *Cheek* was only whether the 7th Circuit's "objectively reasonable" rule improperly removed the determination of the necessary element of willfulness from the jury. The court said it did, although they noted that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge."[5] On remand, Cheek's conviction was overturned, but at his retrial, the jury again convicted him on all nine counts. So, in the end, Cheek's win at the Supreme Court availed him little; in fact, his sentence was increased by a fine of $62,000 at his second trial (in addition to the same one year and one day imprisonment he had received the first time around).[6]

Tough defense

The unfortunate fact is that although Cheek defenses have become the primary route used against criminal tax charges, they have succeeded in only a handful of cases. Many times this lack of success can be laid at the feet of corrupt judges, who refuse to allow defendants to testify about their beliefs, or to introduce the actual law as evidence for the jurors to examine. But alas, much of it still reflects the truth of Justice White's comment about convincing jurors that one honestly believes something that seems so unbelievable to *them*. This is especially true when those beliefs are centered on a construction of the tax laws that result in the defendant not being subject to the tax. As time goes on, and more and more juries find those beliefs unbelievable (and therefore, unlikely to be held in good faith), it becomes progressively harder to convince the next jury that one continues to honestly believe them. And that is a major pitfall to this type of Cheek defense — that is, one based on a mistaken belief that the law does not subject you to the tax.

However, there is another type of defense addressed in *Cheek*, but to my knowledge, this second type has never been tried, perhaps for good reason. Justice White discusses this second type in the following passage:

> Cheek asserted ***in the trial court*** that he should be acquitted because he believed in good faith that the income tax law is unconstitutional as applied to him and thus could not legally impose any duty upon him of which he should have been aware. *Such a submission is unsound, not because Cheek's constitutional arguments are not objectively reasonable or frivolous, which they surely are, but because the Murdock-Pomponio line of cases does not support such a position.* Those cases construed the willfulness requirement in the criminal provisions of the Internal Revenue Code to require proof of knowledge of the law. This was because in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law," and " '[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.' "
>
> *Claims that some of the provisions of the tax code are unconstitutional are submissions of a different order.* They do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. *Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable.*[7]

First, it should be noted that the above passage is merely *dicta*. That is, it is outside the scope of the case at hand. Notice White refers to Cheek's assertion "in the trial court," because Cheek dropped all unconstitutionality arguments from his appeal, and therefore they were not an issue before the Supremes. The reason he dropped them, brought out in oral arguments, is precisely the point White raised — that the *Murdock-Bishop-Pomponio* line of cases purports to foreclose that avenue for mitigating willfulness.[8]

Ignorance is no excuse

Second, White ignores the Supreme Court's precedent when he distinguishes between mistaken beliefs as to unconstitutionality of a law versus mistaken beliefs as to its application. Going all the way back to 1820, a distinction was always made for "ignorance of the law":

> [T]he common law, which is part of the law of every State in the Union, of which, for the most obvious reasons, *no one is allowed to allege his ignorance in excuse for any crime he may commit*. Nor is there

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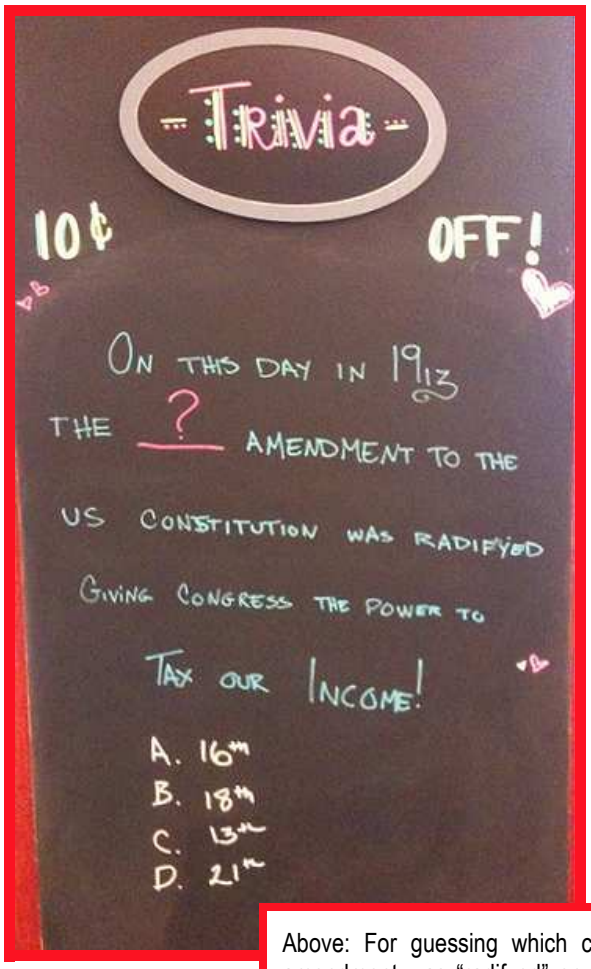
4. Later cases further refined the rule in *Murdock*: "Taken together, *Bishop* [412 U.S. 346] and *Pomponio* [429 U.S. 10] conclusively establish that the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.' " *Cheek*, at 201.
5. *Cheek*, at 203.
6. Cheek appealed this increased sentence as vindictive, but it was upheld by the 7th Circuit (3 F.3d 1057 (1993)), and the Supremes denied *certiorari.*
7. *Cheek*, at 204.
8. Cheek's attorney could hardly have asserted this disassociation from any argument of unconstitutionality more strongly.

Cheek *(Continued from page 2)*

any hardship in this, for *the great body of the community have it in their power to become acquainted with the criminal code under which they live; not so when acts which constitute a crime are to be collected* from a variety of writers, either in different languages, or under the disadvantage of translations, and *from a code with whose provisions even professional men are not always acquainted*.[9]

Justice Story gives a reason for this distinction in a later case:

> [I]t results from the extreme difficulty of ascertaining what is, bonâ fide, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public. *There is scarcely any law, which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them*.[10]



Above: For guessing which constitutional amendment was "radifyed" on February 3, 1913, customers get a whole dime off their Caribou coffee. Philander Knox, below — unscrupulous robber-baron lawyer and Secretary of State — declared the 16th Amendment "in effect" on February 25, 1913. In the 1980s, Bill Benson and Red Beckman showed through their research that the Amendment was not ratified by the requisite number of States, and that Knox knew it. In addition, the *Brushaber* and *Baltic Mining* cases "settled that the provisions of the 16th Amendment conferred no new power of taxation," according to the Supreme Court. So is it 'objectively reasonable' to believe that both commonly held assumptions of the Trivia question are false?

Believing in the Constitution

However, the distinction for unconstitutionality is of a different nature. Justice Owen Roberts wrote the opinion in a 1945 case which acknowledged that a belief in the unconstitutionality of a law mitigated willfulness: "One with innocent motives, who ***honestly believes a law is unconstitutional and, therefore, not obligatory***, may well counsel that the law shall not be obeyed."[11] So essentially, White reversed a half-century of precedent without even mentioning that earlier case, and despite the fact that the question was not properly before the court.

Further, White's distinction in *Cheek* reveals its incorrectness on its face. He claims that a belief in unconstitutionality doesn't mitigate willfulness because such a belief evidences knowledge of what the law requires, but he ignores the result of that belief — *i.e.*, that the law would therefore be "*invalid and unenforceable*." This fallacy was not lost on Justice Scalia however, who shredded White's bogus assertion in his concurring opinion. Citing *Marbury v. Madison*, 5 U.S. 137 (1803), Scalia shows that he understands the consequence of unconstitutionality:

> It seems to me that today's opinion squarely reverses that long-established statutory construction when it says that a good-faith erroneous belief in the unconstitutionality of a tax law is no defense. It is quite impossible to say that a statute which one believes unconstitutional represents a "known legal duty." ... I find it impossible to understand how one can derive from the lonesome word "willfully" the proposition that belief in the nonexistence of a textual prohibition excuses liability, but belief in the invalidity (i.e., the legal nonexistence) of a textual prohibition does not. ... [I]t seems to me impossible to say that the word refers to consciousness that some legal text exists, without consciousness that that legal text is binding, *i.e.*, with the good-faith belief that it is not a valid law. (*Cheek*, at 207-209.)

A succinct and familiar wording of the principle Scalia referred to is found in *Norton v. Shelby County*, 118 U.S. 425, 442 (1886): "***An unconstitutional act*** is not a law; it confers no

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9. *U.S. v. Smith*, 18 U.S. 153, 182 (1820). This quote comes from the opinion of Justice Livingston, dissenting from Justice Story's majority opinion that a man could be convicted of "piracy" even though that term was defined only in "the law of nations." Thus, Livingston's reference to an exception from the general rule when the law must be ascertained by searching through laws in foreign languages, etc. However, this exception must certainly apply today as well, given that governments at all levels have enacted so many laws that it is impossible for anyone to "become acquainted with the criminal code under which they live."
10. *Barlow v. U.S.*, 32 U.S. 404, 411 (1833).
11. *Keegan v. U.S.*, 325 U.S. 478, 493 (1945). The SC reversed Keegan's conviction on charges of "knowingly" counseling another to evade either registration or service in the armed forces.

rights; it ***imposes no duties***; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Thus, as Scalia rightly points out, a good-faith belief that a law is unconstitutional ***must*** eliminate the willfulness element, because ***an unconstitutional law can impose no legal duties***, resulting in no "known legal duty" for one to "intentionally violate." However, since White's dicta in *Cheek* purports to foreclose the use of this defense, one would need to be willing to pick up the torch lit by Justice Scalia, and argue against its use as precedent. Yet, perhaps even in this aspect, Scalia's comments[12] in oral arguments provide some guidance:

> QUESTION: ... Say you are a trial judge and you are convinced that when this man gets on the stand and says *I think not only the Seventh Circuit is wrong, but the United States Supreme Court is wrong, and that the Constitution does not require me to pay these taxes*. That's my sincere and honest belief, just like my belief in God is sincere and honest. Does he win or does he lose?
>
> MR. COULSON: In that case the judge, as he would in evaluating any defense --
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> QUESTION: He believes him. That's what I am saying, the judge believes him. Then what does the judge do?
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> MR. COULSON: The judge rules that that is not a good-faith misunderstanding of one's duties to file. It is rather a knowledge of existing law and a belief that it is wrong, and that defense does not go to the jury. And that --
>
> QUESTION: In other words, belief that the statute is unconstitutional is a belief that it's wrong?
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> MR. COULSON: Yes.
>
> QUESTION: That's not what Murdock -- Murdock was a constitutional case, you know. ...[Y]ou want to stop short of saying that a belief that is unconstitutional is a good -- *like some of the other justices, I don't see the basis for drawing that line.*[13]

Take a good look at that last line. Apparently it was not *just* Scalia who understood this point, but other justices too. And though there's no way to know, perhaps if Cheek's attorney had been as forceful in arguing that issue as he was in distancing himself from it, Cheek defenses today would encompass good-faith beliefs in the unconstitutionality of particular "legal duties."

Time to turn to the other Cheek?

As a practical matter, juries would likely be more receptive to a defendant's claim that he honestly believed that the "duty" to file a tax return, for example, violated the Fifth Amendment's prohibition against compelling a man to be a witness against himself, than they would be to a claim that he believed the law didn't apply to him. In fact, they may even harbor some feelings along those lines themselves already, making such beliefs even less "unreasonable" to them. And the less unreasonable they seem to the jury, the more likely they will be to attribute to them the necessary character of "good faith."

In the twenty-two years since *Cheek* was decided, the Supremes have had many changes in personnel. Neither of the two justices that dissented are left; they thought Cheek's conviction should not have been overturned in the first place. Of the five justices that formed the majority opinion, only Anthony Kennedy remains on the bench. And Antonin Scalia, the only justice willing to go on the record against the majority's ridiculous distinction between the two types of "Cheek defenses," is still there as well. So perhaps, there is time to get this travesty corrected yet. If nothing else, any attorney willing to give it a shot will have that 70-year old *Keegan* case to buttress his position. But best of all, he'll know going in that he already has at least one justice on his side.

12. The transcript of oral argument in *Cheek* doesn't identify the Justice speaking, so I can really only presume it to be Justice Scalia.
13. To listen to the oral argument, or view a transcript, see www.oyez.org/cases/1990-1999/1990/1990_89_658

LWRN REPORT (Continued from page 1)

plan. You can listen to David's report, recorded at the Save-A-Patriot Fellowship meeting, at **www.preservativetalkradio.com/links.html**: click on the February 9, 2013 links. Please take the time to listen, because if you do, I'm sure you will want to support this vitally important effort.

On February 25, TV news alarmed viewers by playing a clip of Obama claiming that if Republicans do not agree to his budget, it will affect the number of border patrol officers, cause a reduction in airline traffic, and reduce other "essential" services. Naturally, no opposing view was telecast. This insidious propaganda must be corrected if we are to both survive and rid ourselves of the Marxist onslaught trying to overthrow our Republic.

The awakening effect of the internet, and of liberty-minded talk shows, must be expanded to offset deceptive media propaganda. If you are serious about saving the Republic, all we ask is that you join in the LWRN effort, and help turn this plan to its complete reality. You can follow our progress by going to the LWRN website (*www.lwrn.net*) and checking out the graphic at the top of the home page. While you're there, have a look around at some of the other information we have posted. Remember: an educated population cannot be fooled or conquered!!

You can also help by increasing our listenership — get your freedom-loving friends and family members involved: tell them to download the phone apps from the website, or listen online!

Again, please take the time to listen to David's report; exciting things are happening, and your funds will see to it that more Americans understand their heritage of freedom. God Bless You, and we look forward to hearing from you. Whatever you can send, PLEASE SEND IT **NOW**!!