

THE UNTOUCHABLES: PROTECTIONS FROM LIABILITY FOR BORDER SEARCHES CONDUCTED BY U.S. CUSTOMS IN LIGHT OF THE PASSAGE OF THE GOOD FAITH DEFENSE IN 19 U.S.C. § 482(b)

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INTRODUCTION

Due to the increased public focus on security observable since the attacks of September 11, 2001, there is an ongoing debate concerning the proper balance to be struck between respecting civil rights and the role of the government in protecting the nation from terrorism. The growing concern about who and what is entering the country has provided proponents of stronger police powers with support in their efforts to increase that power. Nowhere is this debate more obvious than at the nation's airports and border crossings. The public is interested in seeing people and contraband linked to terrorism stopped before they enter the country. The bulk of the responsibility for protecting these public interests falls on the U.S. Customs Service ("Customs"). Customs officially transferred to the Department of Homeland Security on March 1, 2003.¹ The division of Customs that is charged with protecting the nation's borders and collecting duties on imported merchandise is now referred to as the Bureau of Customs and Border Protection.² Customs performs these duties by searching individuals and merchandise that enter the country. Of course, to carry out that mission Customs employees must make important decisions about the balance that must be struck between respecting civil rights and protecting the nation's borders. Customs has the authority to detain and search individuals and their property when entering the country, and because of the important public policies at issue, there is little doubt that Customs should have significant leeway in making those decisions. For this reason, Customs has been granted protections from liability by both Congress and the courts.

To understand the scope of these protections, an illustration is in order. Imagine that you are a female returning to the United States after a trip to Jamaica. After your flight arrives, a Customs narcotic detection dog "alerts" to

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1. H.R. DOC. No. 108-32, at 4 (2003).

2. According to the "Reorganization Plan Modification for the Department of Homeland Security," the U.S. Customs Service has been renamed to the "Bureau of Customs and Border Protection." *Id.* Further, the Homeland Security Act makes it clear that all references to any agency in a statute, regulation, directive, or delegation that was in place before the transfer will continue to apply to that agency, regardless of name changes, after the switch to the new department. Pub. L. No. 107-296, § 1512(d), 116 Stat. 2135 (2002). Therefore, all statutory protections afforded to employees of the former Customs Service will now apply to employees of the Bureau of Customs and Border Protection. Throughout this Note, all references to Customs will be understood as references to the Bureau of Customs and Border Patrol, which also includes former members of the Border Patrol.

your luggage. You are subsequently taken to a room where a pat down search is conducted by a female Customs inspector, revealing what the inspector interprets as a bulge in your pelvic region. The inspector then performs a partial strip search of your person. No drugs are found on you, or in your luggage, and you are released without further incident. On these same facts, a court recently, and not surprisingly, held that the inspector involved was not liable for damages for violation of the plaintiff's constitutional rights.³ This result, which will be explained in more detail throughout this note, is not particularly surprising, or disturbing, because legitimate policies exist to justify the result. One such policy is to allow the government to protect its borders as the sovereign.⁴ Without this protection, terrorist contraband and drugs would enter this country unchecked. However, when considering how quickly such an intimate search can cross the boundaries of acceptance, the question arises as to whether Customs should be granted more protections in order to avoid liability for possible digressions. The relevance of this question is especially appropriate in the aftermath of the events of September 11, 2001, and the ensuing "war on terror." Congress answered the question: more protection is exactly what Congress granted to Customs in August 2002.

In the summer of 2002, the Trade Act of 2002 became law.⁵ Section 341 of the Act amends 19 U.S.C. § 482 by adding subsection (b). Before the amendment, 19 U.S.C. § 482 allowed any authorized person to board or search vessels to search for any merchandise which was subject to duty and/or being imported into the country contrary to law.⁶ This section gave Customs inspectors the ability to conduct searches of "any vehicle, beast, or person"⁷ at the nation's borders which they suspect has merchandise that is subject to duty, or that is being imported contrary to law.⁸ The additional subsection grants persons conducting searches under § 482's authority immunity from liability in suits stemming from such searches if the person acts in good faith.⁹ The provision is a radical departure from the traditional protections granted to Customs and was hotly debated in Congress. The amendment is the first instance in which Congress has enacted a statute that changes the standard for qualified immunity in a constitutional tort case.¹⁰

On its face, this amendment seems like it would be a radical shift from traditional ideas of liability and would go far in giving Customs inspectors a license to use and abuse their authority to search for contraband. Surprisingly, or perhaps disturbingly, because of the array of protections already available to Customs, the amendment will likely only be necessary in a limited number of

3. *Saffell v. Crews*, 183 F.3d 655, 659 (7th Cir. 1999).

4. The sovereign can protect itself by stopping and searching people and property entering the country. *Id.* at 657 (citing *United States v. Ramsey*, 431 U.S. 606, 616, 619 (1977)).

5. Pub. L. No. 107-210.

6. 19 U.S.C. § 482(a) (2003).

7. *Id.*

8. *Id.*

9. *Id.* § 482(b).

10. 148 CONG. REC. H5980 (daily ed. July 26, 2002) (statement of Rep. Conyers).

cases—those with egregious facts. As previously illustrated, Customs already enjoys numerous protections, with little concern of liability. This begs the question of what kind of conduct the passage of the recent amendment will end up protecting that was not protected under the previous framework. Indeed, the defense of qualified immunity, to be discussed later, already protects “all but the plainly incompetent or those who knowingly violate the law.”¹¹

Part I of this Note provides an overview of the protections already available to both Customs and its employees for searches prior to the enactment of the Trade Act of 2002. In Part II of this Note, I discuss good faith in general and the amendment to 19 U.S.C. § 482. The legislation itself gives no indication as to what will constitute good faith; therefore, I speculate on some factors that courts would be likely to consider as proof of good faith. Finally, I conclude by arguing that the amendment is overreaching, and because of the factual inquiries involved in establishing good faith, it will only be necessary when the pre-existing defense of qualified immunity fails, giving those incompetent and malicious individuals mentioned above one more opportunity to escape liability.

It is important to point out that this Note does not focus on searches of merchandise at sea ports and warehouses. The analysis centers around searches of individuals at airports and border crossings. Having said that, it is also important to note that 19 U.S.C. § 482 does give Customs the authority to search vessels and warehouses at sea ports. Therefore, all of the defenses to be discussed will be available to inspectors in suits arising from these latter types of searches. However, because of the more prevalent concern over individual civil rights that has arisen since September 11, 2001, this Note focuses on personal searches.

I. STATUTORY PROTECTIONS FROM LIABILITY

There exist a variety of avenues to seek redress from the government for harms caused by the government. The Federal Tort Claims Act (FTCA) allows suits against the government for some tortious conduct, while suits for violation of Fourth Amendment rights can be brought under *Bivens*.¹² As this section will illustrate, a recovery against the government under the FTCA is highly unlikely in a case involving Customs.

A. *Federal Tort Claims Act*

The FTCA represents a dramatic waiver of the sovereign immunity enjoyed by the government. Under the FTCA, the government is liable for the actions of its employees if the employee can be held liable under the law of the state where the claim arose.¹³ One would assume that the FTCA would be a powerful

11. *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

12. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that the performance of a search that does not comply with the requirements of the Fourth Amendment creates a cause of action for the aggrieved party).

13. 28 U.S.C. § 2672 (1994).

weapon for a person who was detained by Customs unjustly or whose property was damaged during a search by Customs. However, the FTCA has a number of exceptions, some of which apply to Customs and protect Customs from much of the liability that would normally be associated with these searches.

1. *Discretionary Function Exception.*—One exception to the FTCA that seems to be invoked more than any other is the discretionary function exception. This provision exempts the United States from FTCA liability for claims that are based upon the exercise, performance, or failure to exercise or perform any discretionary function or duty by a federal agency or employee, whether or not the discretion involved is abused.¹⁴ The purpose of the discretionary function exception is to protect legislative and administrative decisions with social, economic, and political policy justifications from judicial second-guessing.¹⁵ Not only are decisions establishing programs and implementing regulations protected, also protected are decisions by employees in exercising discretion allowed by those regulations.¹⁶ This purpose seems to be directly related to Customs' decision of whether or not to search an individual, because that decision is an administrative decision backed by social policy (the policies of preventing entry of illegal contraband and protecting citizens from terrorist acts). Whether a court will find that Customs' decision to search an individual is protected by the discretionary function exception will differ depending on the jurisdiction in which the claim is adjudicated.¹⁷ Wherever the claim is adjudicated, at least one fact seems clear, the discretionary function exception does not protect conduct that violates a legal mandate.¹⁸ Therefore, a plaintiff can still recover for a search that is found to violate some established legal rule, even if a court finds that the Customs employees were performing a discretionary function.

Perhaps the most difficult part of applying the discretionary function exception is determining just what is a discretionary function. What factors will

14. *Id.* § 2680(a).

15. *O'Ferrell v. United States*, 253 F.3d 1257, 1266 (11th Cir. 2001) (citing *United States v. Gaubert*, 499 U.S. 315, 323 (1991)).

16. *Gaubert*, 499 U.S. at 323-24. "[I]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id.* at 324.

17. *See, e.g., Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (stating that claims for false imprisonment, invasion of privacy, and negligence do not seem to be protected by the discretionary function exception); *Caban v. United States*, 671 F.2d 1230, 1233 (2d Cir. 1982) (holding detention of suspect at international airport did not "involve a choice between competing policy considerations"). *But see, e.g., Attallah v. United States*, 955 F.2d 776, 784 (1st Cir. 1992) ("[A]ccording to the statute and regulations, the agents are not obligated to stop and search every passenger. This function, we believe, is a discretionary function as defined by § 2680 of Title 28 of the United States Code."); *Jackson v. United States*, 77 F. Supp. 2d 709, 714-15 (D. Md. 1999) (holding detention by Customs officials involved policy considerations and fell within discretionary function exception).

18. *Nurse*, 226 F.3d at 1002 (citing *United States Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir.), *cert. denied*, 487 U.S. 1235 (1988)).

a court consider to determine whether a discretionary function exists? As the name implies, for the discretionary function exception to apply, there must be room for the official to exercise discretion in making the decision at hand. The court in *Nurse v. United States*¹⁹ set forth a test for determining when an act qualifies for protection as a discretionary function when it stated:

In order to determine whether the discretionary function exception applies, the court must engage in a two-step inquiry. First, the court must determine whether the challenged conduct involves an element of judgment or choice.²⁰ Second, if the conduct involves some element of choice, the court must determine whether the conduct implements social, economic or political policy considerations.²¹

It would appear that the decision of a Customs inspector to select a certain individual for a search at an airport, or a certain vehicle at a port of entry, would qualify as a discretionary function under this test, and, as we have seen, some courts have so held. Therefore, for actions brought under the FTCA, we see that Customs may avoid liability if a court were to decide that the employees were performing a discretionary function when determining which passengers to search.

2. *Detention Exception*.—Regardless of whether the discretionary function exception will apply to a search, Customs has an even more powerful weapon available in the aptly named “detention exception.” The detention exception, also known as the “law enforcement exception,” provides protection for Customs officials from claims “arising in respect of” detention of goods by a Customs officer, as well as certain claims against “any other law enforcement officer.”²² This section has been interpreted to mean that Customs is not liable for any claim “arising out of” the detention of goods.²³ This interpretation has allowed courts to extend the detention exception beyond cases where Customs damages an individual’s goods during an inspection. The exception has even allowed inspectors to avoid liability in cases where inspectors have caused physical harm to citizens so long as the harm occurred incident to a detention of property by Customs.²⁴ In *Jeanmarie*, the detention exception was stretched so far as to

19. 226 F.3d at 996.

20. *Id.* at 1101 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

21. *Id.* (citing *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994)).

22. 28 U.S.C. § 2680(c) (2000). This exception will continue to apply to Customs searches at the border, even though the name of Customs has changed, because of the Savings Provision of the Homeland Security Act which allows references to agencies in statutes to carry over despite the change in nomenclature. Pub. L. No. 107-296 § 1512(d), 116 Stat. 2135 (2002).

23. *Kosak v. United States*, 465 U.S. 848, 854 (1984). “But we think that the fairest interpretation of the crucial portion of the provision is the one that first springs to mind: ‘any claim arising in respect of’ the detention of goods means any claim ‘arising out of’ the detention of goods. . . .” *Id.*

24. *Jeanmarie v. United States*, 242 F.3d 600, 605 (5th Cir. 2001).

[N]otwithstanding the fact that intentional tort claims arising out of arrests are not barred by § 2680(c), and are in fact permitted by § 2680(h), such claims are barred by

protect inspectors who physically restrained and injured a man who was looking for the restroom. The inspectors were searching his car and had told him to stay where he was. When the man left the inspection area anyway (because he had a medical condition making his use of the restroom urgent), the inspectors found him and physically restrained him, causing several injuries.²⁵ However, the court declined to hold the inspectors or Customs liable for the injuries, arguing that the detention exception barred recovery.²⁶ The detention exception is especially useful for Customs because almost all of Customs' interactions with the public occur as a result of a search of some type. For this reason, the detention exception will protect them from liability in the vast majority of suits brought under the FTCA.

The FTCA protects Customs from liability for the acts of its employees either when a court determines that the employees were exercising a discretionary function or when any claims arise during the detention of goods. As we have seen, the courts are willing to consider an inspection of a vehicle at the border as a detention,²⁷ and of course any search at an airport will be considered as arising out of the detention of goods because luggage is present and under Customs' control during personal searches. Therefore, it is difficult to envision a situation where a person being searched by Customs could argue that the detention exception did not apply. If they could, the court may decide to apply the discretionary function exception to avoid liability for Customs.

II. COMMON LAW PROTECTIONS FROM LIABILITY

Congress is not the only entity that has acknowledged the need for protections for government actors performing in their official capacities. The courts have also proved willing to provide protections for these same actors. Customs inspectors, like most government agents, are entitled to "qualified immunity" for actions taken in their official capacities. Qualified immunity is a powerful defense for government employees, discharging liability for all but the most heinous of actions. Even though qualified immunity allows some seemingly heinous conduct, there are important policy justifications for its continued existence. Following is a brief synopsis of the development of qualified immunity and its general application. A general understanding of qualified immunity is important before the scope of the "border authority"

the customs-duty exception if the alleged torts arose from the inspection, seizure, or detention of goods by a Customs agent because such claims involve conduct covered by § 2680(c).

Id. at 604 (citing *Gasho*, 39 F.3d at 1433-34).

25. *Id.* at 601-02.

26. *Id.* at 604. Interestingly, the *Jeanmarie* court held that 28 U.S.C. § 2680(h), which does allow certain claims arising from intentional torts by other law enforcement officers notwithstanding the application of 28 U.S.C. § 2680(c), does not allow claims for those same intentional torts if the officer involved is a Customs employee to whom the detention exception would normally apply. *Id.*

27. *Id.*

protection enjoyed by Customs, discussed later, can be fully appreciated.

A. *Qualified Immunity*

Qualified immunity has developed as a defense to protect government actors from liability for suits brought against them for actions taken in their official capacities. The doctrine is not available to government employees who knew or should have known that the actions they took violated the constitutional rights of the plaintiff, or if the act was performed with malicious intention to deprive constitutional rights or cause some other injury.²⁸ Obviously, qualified immunity has a subjective aspect. The Supreme Court summed up the standard in 1974: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."²⁹

The Supreme Court altered its reliance on subjective good faith intention in 1982 in *Harlow*.³⁰ In that case, the Court listed several costs to society caused by extended litigation over subjective good faith including "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."³¹ Another important impetus for this change was to avoid waste of valuable government resources to defend mere allegations.³² The Court justified the change when it stated that by relying on the objective reasonableness of an employee's actions, which would be measured against clearly established law, the courts could avoid excessive disruption of official duties, and allow many insubstantial claims to be resolved in summary judgment motions.³³ The Court also pointed out that "the public interest in deterrence of unlawful conduct and compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts."³⁴ It is this test that courts apply to acts of Customs inspectors for claims arising against them in the scope of their employment, whether the inspector violated a clearly established legal mandate at the time of the actions. However, the question remained as to what was a clearly established legal mandate. The

28. *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

29. *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

30. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

31. *Id.* at 816.

32.

[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 817-18.

33. *Id.* at 818.

34. *Id.* at 819.

Supreme Court shed light on this question five years later in *Anderson v. Creighton*.³⁵

The issue in *Anderson* was whether a federal agent who conducted a search that violated the Fourth Amendment could be held liable for money damages if a reasonable officer could have believed that the search did not violate the Fourth Amendment.³⁶ The Court noted that the *Harlow* standard depends on how generally the legal rule allegedly violated had been defined.³⁷ The Court realized that allowing the plaintiff to state the legal rule too broadly would annul the qualified immunity defense. A complaining party could simply allege that the defendant had violated a constitutional principle, and since constitutional principles, such as the protection against unreasonable searches, are largely established, the claim would have to go to trial and the resources that the Court enunciated in *Harlow* would be wasted. In addition to wasting resources by allowing claims based on very general principals to proceed to trial, an overly broad interpretation of the relevant legal principles also affects an official's ability to perform his or her job effectively.³⁸ In the end, the *Anderson* Court determined that the right must be so clearly defined that an official could tell that her conduct was illegal.³⁹

Oftentimes, qualified immunity is referred to as qualified "good faith" immunity, but that term is misleading since there is no requirement of subjective good faith.⁴⁰ The *Anderson* Court did state that when determining whether the

35. 483 U.S. 635 (1987).

36. *Id.* at 636-37.

37. The Court gave the example:

[T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that [c]lause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*.

Id. at 639.

38. Allowing such a general definition of the relevant legal principle would destroy the balance that had been struck between the interest of citizens in vindicating constitutional rights and in officials performing their official duties because it would make it impossible for officials to determine when their conduct might give rise to liability. *Id.* at 639-40 (citing *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

39.

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)) (citing *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986)) (citing *Davis v. Scherer*, 468 U.S. 183, 191, 195 (1984)).

40. *Suissa v. Fulton County, Ga.*, 74 F.3d 266, 269 (11th Cir. 1996) ("Although the cases

actions of the official were objectively reasonable the information that was in the possession of the official at the time those actions were taken should be considered. However, this inquiry was not the same as the good faith inquiry that *Harlow* ended.⁴¹ Courts continue to advance and alter the rule stated in *Anderson* to determine how to define the legal mandate at issue.⁴² How a court defines the question of law at issue is very important to the disposition of a case where qualified immunity is at issue because of the procedural aspects of such a claim.

In order to fully understand the usefulness of the qualified immunity defense, one must understand its procedural context. As stated previously, many of the justifications for the defense of qualified immunity are to protect valuable government resources from time spent defending frivolous lawsuits. For this reason, qualified immunity is not just immunity from liability, but also immunity from suit.⁴³ Because the principal question in a qualified immunity case is whether the right allegedly violated was clearly established, and due to the fact that after *Harlow* there was no subjective element to the inquiry, these claims are often very amenable to disposition by summary judgment. This both protects government officials from extended litigation and saves government resources in defending such claims. In the end, whether the plaintiff is victorious will depend on how the court defines the legal question at issue because the court will then ask if that question has been definitively settled by existing case law.⁴⁴

As illustrated, there are important policy justifications for the qualified immunity defense. Because of these justifications, the defense is a very powerful tool that government employees can use to not only avoid liability for acts committed in their individual capacities, but also to avoid suits by dismissing meritless claims at early stages of the litigation. Now that we have a basic understanding of the doctrine of qualified immunity as it applies to most government officials, we can consider certain other protections that make this defense even more useful for Customs employees.

B. Border Authority

Even before the passage of the Trade Act of 2002, which granted Customs inspectors immunity for searches conducted in good faith, Customs inspectors enjoyed considerably more freedom in performing searches than most other law

sometimes refer to the doctrine of qualified 'good faith' immunity, the test is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith.") (quoting *Swint v. City of Wadley, Ala.*, 51 F.3d 988, 995 (11th Cir. 1995)).

41. *Anderson*, 483 U.S. at 641 (citing *Harlow*, 457 U.S. at 815-20). (The court concluded that "The relevant question in this case . . . is the objective . . . question whether a reasonable officer could have believed Anderson's warrantless search to be lawful. . . . Anderson's subjective beliefs about the search are irrelevant.") *Id.*

42. "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Lassiter v. Ala. A&M Univ., Bd. of Trs.* 28 F.3d 1146, 1150 (11th Cir. 1994) (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993)).

43. *Mitchell*, 472 U.S. at 526.

44. *Id.* at 535.

enforcement officers.⁴⁵ The reason for this freedom is past court decisions holding that the interests of the sovereign in protecting itself outweigh the privacy interests of an individual at the nation's borders.⁴⁶ This extended police power is commonly referred to as the "border authority." What follows is a summary of current border authority precedent. The border authority does not modify the qualified immunity inquiry. Instead, the border authority alters the *prime facie* showing of a constitutional violation, which is a pre-requisite to the court considering whether qualified immunity exists. For instance, the rules governing when a search will be considered unreasonable under the Fourth Amendment are different for claims arising on the national border than they are for claims arising on the interior. For this section, it is important to realize that international airports are considered national borders.⁴⁷ Therefore, the protections of the border authority are extended to Customs' work at these airports. Again, the border authority does not alter the qualified immunity analysis, but instead may affect when that analysis will be undertaken.

Many of the constitutional claims against Customs inspectors arise under the Fourth Amendment, which protects against unreasonable searches.⁴⁸ To understand how the border authority affects a finding of unreasonableness under the Fourth Amendment, a quick overview of the standard under a "normal" search is in order. To determine whether a "normal" search (i.e., a search that is not conducted at the border) violates the Fourth Amendment, the court will consider the scope of the intrusion, the way it was conducted, what the justifications are, and the place where it was conducted.⁴⁹ In order to decide whether a violation of the Fourth Amendment exists, the court weighs public interest against the Fourth Amendment interests of the individual.⁵⁰ The individual's interest in preserving privacy is well respected by the courts when the search was conducted in the nation's interior.

In contrast, courts have placed a much higher value on the sovereign's right to protect itself at the borders than on the individual's right to privacy. The executive has authority to conduct routine searches and seizures at the borders without probable cause or a warrant in order to collect duties and prevent the introduction of contraband.⁵¹ The courts have determined that to accomplish this task some of the protections that citizens take for granted on the interior have to

45. *United States v. Cascante-Bernitta*, 711 F.2d 36, 37-38 (5th Cir. 1983).

46. *United States v. Montoya de Hernandez*, 473 U.S. 531, 539-41 (1985).

47. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

48. U.S. CONST. amend. IV.

49. *Bell v. Wolfish*, 441 U.S. 520, 559 (1970). *See also* *New Jersey v. TLO*, 469 U.S. 325, 337-42 (1985) (holding what is reasonable depends on all the circumstances and the nature of the search and seizure).

50. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). *See also* *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

51. *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977). This authority comes from the Constitution Article I, Section 8, Clause 3, which grants power to prevent smuggling and to prevent prohibited articles from entry. *Id.* at 618-19 (citing *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 125 (1973)).

be lessened. Specifically, it has been held that routine searches at the border can be conducted without any requirement of probable cause.⁵² Of course, there are valid reasons for this result, and upon even a little reflection one realizes that if there was a requirement of warrants at the borders, either trade would grind to a halt while investigations were conducted, or, more likely, contraband would simply enter the country unhindered. Obviously either result is unacceptable; therefore, the courts have placed the balance of interests in the government's favor as opposed to the individual citizen's right to privacy.

As stated, the *Montoya de Hernandez* Court determined that routine border searches did not require probable cause. The obvious next question is, what border searches are to be considered routine? The cases describe numerous types of searches performed by Customs, from luggage inspections and pat downs to strip searches and x-rays. Of course, not all of these searches can be considered routine. Therefore, not all are exempt from the probable cause requirement. Pat down searches seem to be the most prevalent types of searches that are litigated. This result is not surprising since pat down searches are a quick and easy way to search for merchandise. Of the circuit courts that have considered the issue, none have held that a pat down search is a non-routine border search.⁵³

While legitimate reasons do exist for not requiring probable cause for routine searches at the border, the courts have granted some powers to inspectors that do not seem to have as much justification. For instance, the courts have even given Border Patrol agents the right to racially profile when determining which vehicles to stop at immigration checkpoints near the border.⁵⁴ These troubling holdings have been justified by the argument that race is a relevant factor in the search for illegal aliens.⁵⁵ While there is obviously a legitimate argument that race is an important factor in determining whether a person is an illegal alien,

52. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). “[T]he Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant.” *Id.* at 538.

53. *Bradley v. United States*, 299 F.3d 197, 203 (3d Cir. 2002) (citing *United States v. Bearas*, 183 F.3d 22, 26 (1st Cir. 1999)) (citing *United States v. Gonzalez-Rincon*, 36 F.3d 856, 864 (9th Cir. 1994)) (stating luggage and pat down searches are routine and there is no requirement of reasonable suspicion to conduct them).

54. *Montoya de Hernandez*, 473 U.S. at 538. “Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is largely based on ethnicity.” *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-63 (1976)). *See also Martinez-Fuerte*, 428 U.S. at 563-64 (stating “even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation”) (citing *Brignoni-Ponce*, 422 U.S. at 878).

55. “To the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint . . . that reliance clearly is relevant to the law enforcement need to be served.” *Martinez-Fuerte*, 428 U.S. at 564 n.17. Justification for this statement came from the *Brignoni-Ponce* Court when it explained that the likelihood of any given person of Mexican ancestry being an alien was high enough to make race a relevant factor in determining which vehicles to stop for inspection. *Brignoni-Ponce*, 422 U.S. at 886-87.

there is also a point to be made that a more compelling public interest should be required before race is allowed as a criteria for conducting searches that lack probable cause. Simply trying to stop illegal aliens from entering the country may not seem like an issue that justifies such a blatant intrusion on an individual's rights.

Fortunately, and regardless of how one feels about the issue, it does not seem that Customs would be able to build on these prior holdings to make an argument that racial profiling in any other context is valid. The *Brignoni-Ponce* Court specifically stated that Mexican ancestry was a relevant factor for the Border Patrol to consider in determining whether a vehicle was carrying illegal aliens.⁵⁶ Customs would be hard pressed to argue similarly that race is a relevant factor in determining who is or is not attempting to bring dutiable goods or contraband into the country illegally.

One interesting side-note is that while these holdings dealing with immigration checkpoints are based on the border authority, the checkpoints at issue were not actually at the border. Therefore, Customs inspectors may enjoy the protections of the border authority beyond the actual border. This raises the question of where Customs authority to conduct searches without probable cause should cease, but that is a topic for another note.

One issue that is relevant to this note is the question left open by the *Montoya de Hernandez* Court, namely what level of suspicion, if any, is required for a non-routine border search. The Court listed strip searches, body cavity searches, and involuntary x-ray searches as non routine searches.⁵⁷ Of the courts that have considered what level of suspicion is required for these more intrusive searches, they have consistently held that reasonable suspicion is required.⁵⁸ Reasonable suspicion has been defined as "a particularized and objective basis for suspecting the particular person" of smuggling contraband,⁵⁹ and requires that the inspectors have a "particularized and objective basis for suspecting the particular person of . . . smuggling."⁶⁰ Moreover, courts have observed that when a search progresses from a routine border search to a non-routine search, the inspector must be able to justify the progression with reasonable cause as defined above.⁶¹ Therefore, there is no requirement of suspicion for a routine search at

56. *Brignoni-Ponce*, 422 U.S. at 886-87.

57. *Montoya de Hernandez*, 473 U.S. at 541 n.4.

58. *Bradley*, 299 F.3d at 203 (citing *Gonzalez-Rincon*, 36 F.3d at 864) (citing *United States v. Yakubu*, 936 F.2d 939 (7th Cir. 1991)) (citing *United States v. Oyekan*, 786 F.2d 832, 837-39 (8th Cir. 1986)) (citing *United States v. Carreon*, 872 F.2d 1436, 1442 (10th Cir. 1989)).

59. *United States v. Cortez*, 449 U.S. 411, 417 (1981).

60. *Montoya de Hernandez*, 473 U.S. at 541-42 (quoting *Cortez*, 449 U.S. at 417 (1981)). See also *Brent v. Ashley*, 247 F.3d 1294, 1300 (11th Cir. 2001) (stating "[r]easonable suspicion to justify a strip search can *only* be met by a showing of articulable facts which are particularized as to the place to be searched") (citing *United States v. Vega-Barvo*, 729 F.2d 1341, 1349 (11th Cir. 1984)) (emphasis added).

61. "[A]s a search progresses from a stop, to a pat-down search, to a strip search, an agent must reevaluate whether reasonable suspicion to justify the next level of intrusion exists in light of the information gained during the encounter." *Ashley*, 247 F.3d at 1300 (citing *Vega-Barvo*, 729

the border, but non-routine searches require reasonable suspicion.

It is easy to lose sight of constitutional protections afforded individuals in the context of border searches. As stated earlier, the Fourth Amendment is designed to protect against unreasonable searches and seizures. How can a search conducted without any reasonable suspicion or probable cause fail to run afoul of the Fourth Amendment's mandate? The answer is that people at the border still have the right to be free from unreasonable searches and seizures, as guaranteed by the Fourth Amendment, but their expectation of privacy is less at the border than in the interior.⁶² As stated earlier, the courts have struck the balance between the individual's right to privacy at the borders and the right of the government to protect itself in the government's favor.⁶³ In addition to the sovereign's interest in protecting itself, courts have pointed to the practical problems with a requirement of probable cause for searches conducted on inland routes into the country.⁶⁴ It is reasonable to assume that this same concern justifies the lack of a probable cause requirement for searches conducted at an airport as well.

The border authority is obviously an important doctrine. It is important not only for the protections that it affords inspectors from liability, therefore protecting valuable government resources from constant litigation, but also because it allows government actors to perform the important task of protecting the nation's borders without fear of personal liability. Of course, any discussion of the border authority involves important competing policies, such as the proper balance between an individual's civil rights and the government's ability to protect its borders. Now that these policies and arguments have been set out, it is possible to consider how these standards operate while taking a broad view of the policies driving their implementation.

III. THE STANDARDS IN ACTION

At this point, the majority of the defenses available to Customs employees, as well as the policies and arguments justifying those defenses, have been discussed. What remains, before a discussion of how those standards have been changed with the amendment to 19 U.S.C. § 482 should be undertaken, is a brief illustration of how those standards already operate in "real world" settings. To accomplish this illustration, this section will simply set out facts from recent cases, or facts that seem characteristic of a large percentage of cases in this area, and give an overview of how the discussed protections affect Customs employees.

In *Bradley*, the plaintiff alleged that the search Customs performed on her violated the Fourth Amendment.⁶⁵ Bradley had been subjected to a pat down.

F.2d at 1349).

62. *Montoya de Hernandez*, 473 U.S. at 539 (citing *Carroll v. United States*, 267 U.S. 132, 154 (1925)).

63. *Id.* at 540.

64. *United States v. Martinez-Fuerte*, 428 U.S. 542, 557 (1976).

65. *Bradley v. United States*, 299 F.3d 197, 203 (3d Cir. 2002).

She alleged that the search was an “intrusive patdown,”⁶⁶ and required reasonable suspicion. The court did not answer the question of whether an intrusive patdown would require some level of suspicion because it concluded that the patdown at issue was not intrusive and was still a routine border search.⁶⁷ The facts of the case were that Bradley was returning from Jamaica, a country which Customs considers a “source country” on a flight that Customs considers a source flight. The search involved a pat down over Bradley’s dress. Bradley claimed that the inspector had inappropriately pushed on her breasts and inner and outer labia.

In its analysis of the allegations the court noted that searches at the border are presumed to be reasonable under the Fourth Amendment,⁶⁸ and that immigration checkpoints at international airports are the functional equivalent of national borders. The court went on to cite *Montoya de Hernandez* for the proposition that the sovereign has authority to conduct routine border searches without probable cause or warrant.⁶⁹ As such, the search was not subject to any requirement of suspicion. Therefore, Bradley’s rights were not violated.⁷⁰ The court did not reach the qualified immunity issue because after analyzing the search under existing border authority precedent, the court determined that there was no constitutional violation.⁷¹ It was further stated in dicta that even if there had been a constitutional violation, the inspectors would have been entitled to qualified immunity because there was no “clearly established” law holding that an intrusive pat down was not a routine search requiring some level of suspicion.⁷² The court did not hold that qualified immunity protected the inspectors, but that under the border authority the search was permissible and therefore a qualified immunity analysis was not necessary.⁷³

Now that we have seen an example of how all the protections available to Customs operate to protect them from liability, let us consider an example of a situation where the conduct was so egregious that the inspectors were not entitled to qualified immunity in the early stages of litigation. In *Brent v. Ashley*,⁷⁴ two Customs inspectors were challenging the denial of the motion for summary judgment, which was based on a theory of qualified immunity. According to the facts of the case, which consist of Brent’s version, Brent was returning from Nigeria and on the final leg of the flight, she met another passenger named

66. *Id.* at 201.

67. *Id.* at 203.

68. *Id.* at 201 (citing *United States v. Ramsey*, 431 U.S. 606, 616 (1977)) (citing *United States v. Hyde*, 37 F.3d 116, 118-20 (3d Cir. 1994)) (citing *United States v. Ezeiruaku*, 936 F.2d 136, 140 (3d Cir. 1991)).

69. *Id.* at 201-02 (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

70. *Id.* at 204 (“We need not decide whether the customs inspectors reasonably suspected that Bradley was smuggling contraband because we conclude that the patdown was not so intrusive as to be transformed into a nonroutine border search.”).

71. *Id.* at 205.

72. *Id.*

73. *Id.*

74. 247 F.3d 1294 (11th Cir. 2001).

Elbute. Brent and Elbute were the only black passengers on the flight. When they arrived, Customs searched Elbute and Brent displayed her disapproval. Based on her gesture, Inspector Seymour Schor instructed Inspector Carl Pietri to detain Brent who then alleged that she was being singled out because she was black.⁷⁵ After a detailed search of Brent's luggage, which returned nothing, the inspectors decided to detain Brent for further questioning. After questioning, the inspectors decided to conduct a full body pat down and a strip search. Three female inspectors were enlisted to conduct these searches. The form filed at the time listed the justifications for the search as merely nervousness and the fact that Brent had arrived from a "source country."⁷⁶ After the strip search, which included touching Brent's crotch area, removing her sanitary napkin, squeezing her abdomen, and monitoring her responses, Brent asked if she could use the restroom. Brent was allowed to use the rest room but was watched closely by inspectors and told not to flush the toilet so the inspectors could look for signs of contraband in her urine.

In spite of the fact that all the searches up to this point were negative, the original inspectors decided that an x-ray and pelvic exam should be performed at the hospital. Again, the justifications were nervousness and arrival from a source country. Brent was hand cuffed and presented with a consent form at the hospital, which she was told to sign or she would be held indefinitely. Again the searches were negative. Finally, ten hours after first being detained, Brent was released and allowed to return to Houston.⁷⁷

On the above listed facts the district court granted the summary judgment motions of the subordinate inspectors, including the females who had conducted the strip search, but the motions of the two original inspectors were denied.⁷⁸ On appeal, the circuit court first addressed the question of whether Brent's constitutional rights had been violated. The court held that the initial stop was justified under the border authority, but that to hold a traveler beyond the scope of a routine search is only justified if, considering all the facts, the traveler was reasonably suspected of smuggling contraband.⁷⁹ Also, the court stated, "reasonable suspicion to justify a strip search can *only* be met by a showing of articulable facts which are particularized as to the place to be searched."⁸⁰ Further, as a pat down progresses to a strip search, the agent must reevaluate whether reasonable suspicion to justify the heightened intrusion exists, considering the information gained during the previous search.⁸¹ The court, after considering similar cases with similar justifications, found that the only cause for suspicion of Brent was her nervousness, and that nervousness alone could not justify a strip search.⁸² The court held that because the initial stop of Brent and

75. *Id.*

76. *Id.* at 1298.

77. *Id.*

78. *Id.*

79. *Id.* at 1299 (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985)).

80. *Id.* at 1300 (citing *United States v. Vega-Barvo*, 729 F.2d 1341, 1345 (11th Cir. 1984)).

81. *Id.* (citing *Vega-Barvo*, 729 F.2d at 1349).

82. *Id.* at 1302 (citing *United States v. Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990)).

search of her luggage failed to produce a particularized or objective basis that would equate to particularized evidence that she was a drug courier, the search violated the Fourth Amendment.⁸³ For the same reasons, the court found that the x-ray was unconstitutional.⁸⁴ The court went on to hold that the supervisors were not entitled to qualified immunity because “a reasonable customs agent at the time of the incident would have known that a strip search under the facts of this case was a violation of Brent’s Fourth Amendment rights.”⁸⁵ As stated, *Brent* came to the court as an appeal of the district court’s denial of a summary judgment motion. Therefore, even though the appellate court held the inspectors were not entitled to qualified immunity on the facts presented, which were the facts as stated by the non-moving party, the inspectors still had the opportunity to a trial in which they could discredit those facts.

To the reasonable individual, the conduct of the inspectors in *Brent* likely seems outrageous. The fact that the government even filed a motion for summary judgment on the facts of this case seems disturbing because it can be understood as evidencing a mentality that inspectors should not be held liable for their conduct. The obvious question then arises: why do Customs inspectors need more protection from liability, especially when that protection is seemingly premised on the subjective knowledge and intent of the inspector? Some will undoubtedly argue that Customs needs protection so they can conduct proper searches at the nation’s borders without the fear of prosecution. While this is a valid argument, it does not explain why the protections already in place are insufficient. However, the debate about whether Customs should have more protection became largely moot in the summer of 2002 when Congress passed the amendment to 19 U.S.C. § 482. As stated previously, Customs now has immunity from liability for all searches conducted in good faith. Due to the recent passage of the act, however, there is no clear standard of what will suffice as good faith. The purpose of the following section is to offer some insight as to what the courts will likely consider as evidence of good faith.

IV. THE STANDARD FOR GOOD FAITH

No case law currently exists defining what will constitute good faith when the defense is raised by Customs for the first time. Further, because of the sheer size of the Trade Act of 2002, legislative history on the point is sparse at best. Therefore, to determine what the courts will consider as guidance, it is best to consider other statutory schemes with good faith defenses. However, the first relevant question is whether a good faith defense alters the effect of any of the existing defenses available to inspectors. In other words, will plaintiffs be able to argue successfully that by granting Customs inspectors good faith immunity from liability, Congress intended to deny Customs inspectors the existing defense of qualified immunity?

83. *Id.*

84. *Id.* at 1303.

85. *Id.* at 1305.

A. Effect of Good Faith Defense on Qualified Immunity

Whether good faith abrogates the common law defense of qualified immunity is a question that has recently been answered in the contexts of both the Fair Housing Act,⁸⁶ and the Federal Wiretap Act.⁸⁷ In *Gonzalez*, the court concluded that a good faith defense did not deny the defendant the protection of qualified immunity reasoning that “[n]either the text nor the legislative history of section 3617 [of the Fair Housing Act] indicates that Congress intended to abrogate the qualified immunity to which executive-branch officials were entitled under common law.”⁸⁸

The *Tapley* court went into more detail in its analysis of the good faith defense in the Federal Wiretap Act. The *Tapley* court rejected the notion that Congress had intended to abrogate the qualified immunity defense with the inclusion of a good faith defense when it stated, “the qualified immunity defense is so well-rooted in our jurisprudence that only a specific and unequivocal statement of Congress can abolish the defense.”⁸⁹ The court also noted that the test for qualified immunity is objective, while the test for good faith is subjective.⁹⁰ It was also observed that one of the main benefits of qualified immunity, the fact that it helps to resolve claims early in the proceedings, does not exist in a good faith defense.

We would not strip a judge or prosecutor of absolute immunity because the claim related to a statutory violation and the statute provided an affirmative defense. By the same token, police officers and public officials performing governmental functions should not lose their qualified immunity because of an affirmative defense which might or might not protect them but would, in all events, require they be subject to extended litigation and deprive them of the benefits of qualified immunity.⁹¹

This statement raises an interesting issue. Because a good faith defense rests on the subjective state of mind of the inspector, determining whether good faith exists will be a fact sensitive inquiry. As has already been illustrated, qualified immunity is often raised early in litigation before decisions of fact are resolved. Therefore, the good faith defense will only be required in cases where qualified immunity has failed, or when the qualified immunity question cannot be answered on summary judgment. As already illustrated in the previous section, there are very few cases where the qualified immunity defense does not protect inspectors, and cases where the inspectors are not entitled to qualified immunity seem to share fairly egregious facts. Therefore, the only effect of the good faith

86. *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290 (11th Cir. 1998).

87. *Tapley v. Collins*, 211 F.3d 1210 (11th Cir. 2000).

88. *Gonzalez*, 161 F.3d at 1299.

89. *Tapley*, 211 F.3d at 1216 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993)).

90. *Id.* at 1215 (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)).

91. *Id.* at 1216 (citing *Blake v. Wright*, 179 F.3d 1003, 1012 (6th Cir. 1999)).

defense will be to provide another layer of protection to those inspectors who were not protected by qualified immunity.

B. *Defining Good Faith*

As it appears that no court will find that the inclusion of a good faith defense abrogates qualified immunity, the next relevant question is how courts will define good faith. Initially, the standard of review in a good faith case has been stated as “whether a reasonable jury on the evidence adduced by the plaintiff and drawing all inferences in plaintiff’s favor, could reasonably have found that the defendants acted in other than subjective good faith.”⁹² To determine what good faith is, it will be necessary to draw parallels from existing statutory schemes. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, also known as the Federal Wiretap Act, contains a good faith defense.⁹³ This act allows someone who has been subjected to illegal surveillance to bring an action for damages, however, “[a] good faith reliance on . . . a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . . is a complete defense against any civil or criminal action brought under this chapter or any other law.”⁹⁴ For purposes of Title III, good faith consists of a subjective good faith belief that the official was acting in compliance with the statute, and that the belief was reasonable in and of itself.⁹⁵

The *Kilgore* court went on to point out that “[i]f the requisites of the statutory good faith defense are met, then the standard for qualified immunity as a defense to Fourth Amendment violations is also satisfied.”⁹⁶ However, this statement was made before the Supreme Court did away with the subjective good faith aspect of qualified immunity in *Harlow*.⁹⁷ Thus, it is not clear from this statement whether the court meant that a finding of statutory good faith satisfied the subjective aspect of qualified immunity in place at that time, or whether the court meant that upon a finding of statutory good faith both the subjective and objective elements of qualified immunity were satisfied. If the court meant the latter, which seems unlikely, the statement is not valid in light of the fact that there is no longer a requirement of subjective good faith for qualified immunity. Otherwise, an employee who violated clearly established case law would still be eligible for a statutory good faith defense merely by ignorance of the relevant case law (which is the cornerstone of the post-*Harlow* qualified immunity defense). Thus, even before the Supreme Court did away with the subjective aspect of qualified immunity, it does not seem that the statement in *Kilgore* was

92. *Wolfel v. Sanborn*, 666 F.2d 1005, 1007 (6th Cir. 1981), *vacated by* 458 U.S. 1102 (1982) (citing *Patzig v. O’Neil*, 577 F.2d 841, 848 (3d Cir. 1978)).

93. 18 U.S.C. §§ 2510-2522 (2000).

94. *Id.* § 2520.

95. *Kilgore v. Mitchell*, 623 F.2d 631, 633 (9th Cir. 1980) (citing *Jacobsen v. Rose*, 592 F.2d 515, 523 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979)).

96. *Id.* at 633-34 (citing *Zweibon v. Mitchell*, 516 F.2d 594, 671 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976)) (citing *Wright v. Florida*, 495 F.2d 1086, 1090 (5th Cir. 1974)).

97. *See* notes 31-35 and accompanying text.

meant to suggest that statutory good faith satisfied both aspects of qualified immunity analysis, but rather that a finding of statutory good faith satisfied the good faith requirement of the qualified immunity analysis.

If this hypothesis, that a finding of statutory good faith was sufficient for a finding of good faith under the pre-*Harlow* qualified immunity standard, is accepted, then the statement from *Kilgore* means that statutory good faith and the good faith question in qualified immunity analysis are roughly the same thing. Therefore, pre-*Harlow* good faith cases may provide insight to what a court would view as statutory good faith after the amendments to 19 U.S.C. § 482. However, such cases will not provide insight into what conduct is currently protected by qualified immunity. With this hypothesis in mind, it is beneficial to consult pre-*Harlow* decisions where qualified immunity was an issue to determine what constituted good faith.

The most useful cases for this analysis are those that roughly follow the theories that individuals assert against Customs employees. As stated, suits for violations of Fourth Amendment rights are brought against Customs employees under *Bivens*.⁹⁸ Suits against state employees for violation of federal civil rights are brought pursuant to 42 U.S.C. § 1983 (“§ 1983”). For purposes of qualified immunity analysis, suits brought under *Bivens* and § 1983 are treated similarly.⁹⁹ In fact, the rule seems to be that the defenses available to law enforcement officers under either theory are the same.¹⁰⁰ The notion that the defense of good faith applies to both *Bivens* and § 1983 cases is summed up in the following quote from *Brubaker*:

The test, thus, under § 1983 is not whether the arrest was constitutional or unconstitutional or whether it was made with or without probable cause, but whether the officer believed in good faith that the arrest was made with probable cause and whether that belief was reasonable. It is now clear that an identical standard is to be applied in civil rights claims against federal officials based on the Fourth Amendment.¹⁰¹

Now that it is clearly established that the good faith standard applied to § 1983 cases is also applicable to *Bivens* cases, the question becomes what is good faith in either context. It is also beyond dispute that whatever the level of good faith that is required, the belief that the conduct was reasonable is essential to

98. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1999).

99. “[F]or the most part, courts have applied [§] 1983 law to *Bivens* [sic] cases.” *Rodriguez v. Ritchey*, 539 F.2d 394, 399 (5th Cir. 1976) (citing *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974)).

100.

We need not decide whether, under the facts of this case, it was appropriate to proceed against the federal defendants on the § 1983 theory since we are convinced that the standard for what constitutes a defense for a law enforcement officer is identical under § 1983 and the Fourth Amendment.

Brubaker, 505 F.2d at 536.

101. *Id.* at 536-37.

avoiding liability.¹⁰² Finally, the defense of qualified immunity must be pled and proven by the defendant.¹⁰³ It is reasonable to assume that the same is true for a purely good faith defense. Some courts have shirked the question of what defines good faith. For instance, in *Procunier* the Supreme Court did not define what level of conduct would evidence a lack of good faith, but instead simply stated that the conduct in that case did not rise to the requisite level of malice, hinting that negligence in and of itself was not enough to deny the defense.¹⁰⁴ However, this reasoning is useful because it indicates that some sort of intentional injury is required.

Under this definition, good faith appears to merely be the absence of bad faith, with negligence not negating the protections offered by the defense. In fact, in *Shelton*, the court noted that there was "no evidence that [the Customs agents] acted other than in good faith."¹⁰⁵ Other courts have honed in on this reasoning and identified the difficult fact issues to which it gives rise. In *Putman* the court noted that reasonable minds might differ as to whether the conduct of the officer involved demonstrated a reasonable use of force to prevent a prisoner from escaping, or an unlawful and malicious intent to cause injury.¹⁰⁶ This argument again identifies the fact that the question of good faith is often not amenable to a summary judgment motion.

While good faith is often a fact based inquiry, some plaintiffs have argued that good faith is not available where the mistake was a mistake of law rather than a mistake of fact. Under this logic, an officer who made an arrest because of a misunderstanding of the law would not be entitled to immunity for his actions, and if the facts of the case were not in dispute, then the plaintiff may actually be able to prevail in early stages of litigation.

This argument was made in *Benson*, a case in which Customs agents executed a warrant based on probable cause that the plaintiffs were smuggling South African gold pieces (Krugerrands) without declaring them.¹⁰⁷ As it turned

102. *Wood v. Strickland*, 430 U.S. 308 (1974).

The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

Id. at 321.

103. *Landrum v. Moats*, 576 F.2d 1320, 1329 (8th Cir. 1978).

104. The Court stated that liability was authorized

where the official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury." This part of the rule speaks of "intentional injury," contemplating that the actor intends the consequences of his conduct . . . To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us.

Procunier v. Navarette, 434 U.S. 555, 566 (1978).

105. *Shelton v. U.S. Customs Serv.*, 565 F.2d 1140, 1142 (9th Cir. 1977).

106. *Putman v. Gerloff*, 639 F.2d 415, 422 (8th Cir. 1981).

107. *Benson v. Hightower*, 633 F.2d 869 (9th Cir. 1980).

out, the Krugerrands were not subject to a requirement of declaration to Customs because they were currency. Due to this mistake the plaintiffs brought an action for violation of their Fourth Amendment rights.¹⁰⁸ The court did not dispute that the agents were entitled to qualified immunity, but the plaintiff argued that qualified immunity was not available where the agent's mistake was a mistake of law (the mistake being that the Krugerrands were declarable items).¹⁰⁹ The plaintiffs based their argument on the Restatement (Second) of Torts, which states in relevant part "no protection is given to a peace officer, who however reasonably, acts under a mistake of law other than a mistake as to the validity of a statute or ordinance."¹¹⁰ Luckily for the Customs agents, the court was not persuaded by the logic of the Restatement. While the court did not hold that qualified immunity is always available when there is a mistake of law, it did hold that on the particular facts, including the fact that the arrest had followed after a successful search with a warrant which indicated that there had been a showing of probable cause by a magistrate, the justifications for applying qualified immunity were present.¹¹¹ This case again illustrates how strongly the courts have opposed attempts to chip away at protections offered to those in the public service. The court recognized that where the mistake was one of law, the plaintiff might have a valid argument that qualified immunity should not apply, but that argument was dependent on the facts of the case.¹¹²

While *Harlow* did away with the good faith aspect of qualified immunity because it dealt with objective factors, it did not hold that the defense was purely objective.¹¹³ In fact, courts have held that the good faith defense can apply to reliance on regulations,¹¹⁴ and even to operating procedures of local police departments.¹¹⁵ Some courts have held, under certain statutory schemes, that subjective good faith alone does not suffice for a showing of good faith.¹¹⁶ For instance, to show good faith under the Fair Labor Standards Act the official must

108. *Id.* at 870.

109. *Id.*

110. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 121 cmt. i (1965)).

111. *Id.* at 871.

112. *Id.*

113. "Although the *Harlow* Court indicated that the good-faith defense turns *primarily* on objective factors, it did not hold that an *exclusively* objective standard was to be applied to claims that proceeded to trial. Thus, the County's argument that the standard for good-faith immunity must be purely objective, is untenable. . . ." *Vizbaras v. Prieber*, 761 F.2d 1013, 1016 (4th Cir. 1985) (quoting *McElveen v. County of Prince William*, 725 F.2d 954, 957-58 (4th Cir. 1984)).

114. Reliance on a policy that is later invalidated by a court is still grounds for good faith as long as the reliance occurred before the policy was invalidated. *Kilgore v. Mitchell*, 623 F.2d 631, 635 (9th Cir. 1980).

115. "Police officers also have a good faith reliance on standard operating procedures, if at the time of the incident they relied on the standard operating procedures of their institution when responding to an incident and when such reliance is honest and [sic] in its intention and reasonable." *Vizbaras*, 761 F.2d at 1015 (quoting jury instructions).

116. *Int'l Ass'n of Firefighters, Local 349 v. City of Rome, Ga.*, 682 F. Supp. 522, 532 (N.D. Ga. 1988).

show that he acted in reliance on a written agency interpretation.¹¹⁷ This requirement is not a creature of the courts, but is actually a requirement in the statute.¹¹⁸

Sometimes officials find that offering proof that they relied on agency procedures is the easiest way to show that they acted in good faith. Courts have proven receptive to such arguments, and it seems to be one of the most objective arguments available for proving good faith. In one case, officers were able to avoid liability for shooting an unarmed man because they relied on department procedure.¹¹⁹ Under the revisions of 19 U.S.C. § 482 Customs inspectors will likewise be able to argue that they relied on their department procedures to avoid liability.

A related argument that defendants have made in good faith cases is that the defendant relied on orders from a superior. In a case in which a sheriff's deputy made a similar argument, the court stated that "[T]he fact that the actions are taken pursuant to orders and instructions is not a defense in and of itself, although it may be relevant to a claim of good faith and the defense of qualified immunity."¹²⁰

In addition to looking at pre-*Harlow* qualified immunity cases, it is also beneficial to look at other statutory schemes that provide a good faith defense. While an in-depth analysis of these other schemes is not necessary, it is useful to consider whether the courts utilize a different analysis than under a qualified immunity standard. Title III of the Omnibus Crime Control and Safe Streets Act provides a good faith defense when a law enforcement agent acts in good faith and reliance on a court order or legislative authorization.¹²¹ Cases, such as *Burkhart v. Saxbe*, that arise under this act often involve placement of wiretaps since that is one avenue that the act allows for in protecting the public.¹²² This case was brought after the plaintiff's conversations were overheard during warrantless surveillance. Attorney General John Mitchell authorized the wiretaps without judicial authorization.¹²³ The plaintiffs contended that the wiretaps (which were not on their phones but on the phones to which the plaintiffs made calls) violated their Fourth Amendment rights and Title III of the

117. *Id.*

118. 29 U.S.C. § 259 (2000).

119. *Landrum v. Moats*, 576 F.2d 1320 (8th Cir. 1978). In this case the officers justified their use of deadly force on a directive in their department giving them the authority to use a firearm to aid the arrest or capture, and to prevent the escape, of a person who the officer has reasonable grounds to believe has committed a felony. *Id.* at 1323.

120. *Putman v. Gerloff*, 639 F.2d 415, 422-23 (8th Cir. 1981). The court cited *Forsyth* for the proposition that agents acting in good faith while following instructions would not be liable, but that agents that knew or should have known that they were violating the rights of a plaintiff could not "hide behind the cloak of institutional loyalty." *Id.* at 423 (quoting *Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3d Cir. 1979)).

121. 18 U.S.C. § 2520 (2000).

122. 448 F. Supp. 588 (E.D. Pa. 1978).

123. *Id.* at 591.

Act.¹²⁴ The defendants responded that the wiretaps were authorized by the Attorney General and were exempt from Title III and from a requirement of prior judicial approval.¹²⁵

The standard for good faith relied on by the court was that the defendants reasonably did not know that conducting the surveillance without a warrant violated the Fourth Amendment and that the agents acted without malicious intention to deprive the plaintiffs of constitutional rights, or to cause them to suffer some other injury.¹²⁶ The court went on to note that negligent interference with a plaintiff's rights was not a basis for denying the defense because there was no "intentional injury" to the plaintiffs.¹²⁷ Given these fact intensive standards, it is not surprising that the motions for summary judgment were denied so factual issues could be resolved.¹²⁸

V. GOOD FAITH UNDER 19 U.S.C. § 482(b)

The task now arises of putting these conflicting standards into some order to roughly determine what the good faith defense provided by 19 U.S.C. § 482(b) really means. A few seemingly universal guidelines arise out of the preceding sections. Procedurally, the defendant has the burden of proving all elements of the defense to the satisfaction of the jury.¹²⁹ There must be some showing of an intentional injury. Mere negligence does not suffice to overcome the defense of good faith.¹³⁰ Also, the defendant's belief that his conduct was not unconstitutional must be reasonably held.¹³¹ Finally, the defendant will likely be allowed to plead reliance on agency regulations as a defense to liability.¹³²

As to the requirement that the belief be reasonably held, it has already been illustrated that both an objective and subjective showing of reasonableness is required, and that ignorance of the applicable constitutional standards is no defense to liability.¹³³ Therefore, the courts seem to be saying that Customs officers will be charged with knowledge of existing established constitutional principles when making determinations as to the reasonableness of inspectors' actions. If those actions violate such well established law, it appears that the inspectors will not be entitled to protection offered by the defense even if they were not aware of the law. On this level, the defense of good faith mirrors the post-*Harlow* analysis of qualified immunity—namely that the defendant will be held liable if his conduct violates established constitutional principles of which

124. *Id.*

125. *Id.* at 592.

126. *Id.* at 608-09 (citing *Skehan v. Bd. of Trs.*, 538 F.2d 53, 62 (3d Cir. 1976) (en banc)).

127. *Id.* at 609-10 (citing *Procunier v. Navarette*, 434 U.S. 555, 556 (1978)).

128. *Id.* at 610.

129. *Landrum v. Moats*, 576 F.2d 1320, 1329 (8th Cir. 1978).

130. *See supra* text accompanying note 104.

131. *Brubaker v. King*, 505 F.2d 534, 536-37 (7th Cir. 1974).

132. *See supra* note 119 and accompanying text

133. *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

he knew or reasonably should have known.¹³⁴ Good faith immunity will allow other means for Customs employees to avoid liability for their actions, but similar to qualified immunity, it will not allow them to avoid liability for actions that they knew or should have known were illegal.

The fact that good faith and qualified immunity defenses both attribute knowledge of well established constitutional principles to the defendant will largely negate the aspect of the good faith defense that would allow a defendant to avoid liability for actions that he or she truly believed, although erroneously so, to be valid. However, there are other benefits to the good faith defense that will still allow employees to avoid liability even when qualified immunity may not. Perhaps the most important of these means is that Customs employees will be able to prove good faith by reliance on agency procedures. In fact, because the good faith defense will likely have an objective component, reliance on agency procedures will likely be the most common means that Customs employees attempt to avoid liability. In the case of Customs, these procedures will likely come out of the *Personal Search Handbook* of the Customs Service.¹³⁵ In fact, throughout many of the existing cases against Customs employees, the employees cite their reasoning for conducting inspections to aid in their defense.¹³⁶ While it is unclear which of these reasons are specifically listed in the *Personal Search Handbook*, it is clear that courts do consider them as justifications for the decision to conduct a search. The result of this is that Customs inspectors will likely be able to plead and prove good faith by reliance on custom as well as written agency procedure. Of course there is no requirement that courts accept all proffered justifications for a search as establishing good faith when those justifications are not in writing,¹³⁷ but when the procedures are in writing, it seems likely that courts will not hold inspectors liable for conduct that conforms to that policy.

134. See *supra* note 32.

135. See *Bradley v. United States*, 299 F.3d 197, 204 (3d Cir. 1985) (discussing probable cause requirements contained in the *Personal Search Handbook*).

136. See *Montoya de Hernandez v. Hernandez*, 473 U.S. 531, 533-34 (1985) (citing such facts that plaintiff had arrived from a "source city" for narcotics, plaintiff spoke no English, and plaintiff carried large quantity of cash, plaintiff had only one pair of shoes); see also *Brent v. Ashley*, 247 F.3d 1294, 1297 n.1 (11th Cir. 2001) (justifying a strip search and x-ray that plaintiff fit the profile of African-American women on the same flight as Nigerian men, that she had arrived from a "source country," that she disapproved of the treatment of the only other black passenger on the flight, that the ticket had been purchased by a friend with a credit card at the same travel agency where the only other black passenger had purchased his ticket, she wore inexpensive clothes, and she became nervous and agitated when confronted).

137. See *Brent*, 247 F.3d at 1299 (stating that the fact that the inspectors saw the plaintiff shake her head in disapproval of the treatment of another black passenger was not sufficient to find reasonable suspicion to conduct a search).

VI. THE DEBATE

More can be said about what will constitute good faith in Customs inspection cases. Hypotheticals could be offered to illustrate when the good faith defense may protect inspectors in situations where qualified immunity fails to, or vice versa. However, these are issues that will be addressed by courts over time, using the framework and reasoning already discussed in this note. What remains then is not to better understand how the good faith defense will work, but why it is necessary at all. Obviously, there must have been some concern when the Trade Act was passed that led Congress to take such drastic action. In the remainder of this Note I will discuss both positions for and against the addition of this layer of protections for Customs employees, and attempt to balance those interests to see if the defense is a legitimate expansion of a necessary protection or overreaching legislation capitalizing on the tragedy of September 11, 2001.

To begin, it is useful to understand the context that suits against Customs officers will be brought. Customs inspectors search incoming shipments of merchandise at sea ports. They also search people and merchandise at inland ports of entry on the Canadian and Mexican borders as well as international airports. Because inspections at ports of entry include people and not just merchandise, and because there is no requirement of probable cause for normal searches conducted at the borders,¹³⁸ the issue of racial profiling will often come up in the context of Customs searches.

The possibility that racial profiling may occur, coupled with the possibility that an inspector guilty of profiling may be able to avoid liability by claiming he or she acted in good faith, is a strong argument against the addition of the defense. To make a claim for violation of equal protection rights in the racial profiling context, the claimant will have to prove that the actions taken by government officials had a discriminatory effect, and were motivated by a discriminatory purpose.¹³⁹ In order to prove discriminatory effect the claimant has the burden of showing that he or she is a member of a protected class and that he or she was treated differently from similarly situated individuals in an unprotected class.¹⁴⁰

One can see the difficulties facing a claimant attempting to make a charge of racial profiling against Customs in the context of a search, in order to prove that he or she was treated differently from other members of a protected class. The plaintiff will not have access to this information short of extensive discovery, which is very costly to perform. Many individuals who feel their rights have been violated may not have the means to hire a lawyer and look into allegations of wrongdoing, much less the means to pay for extensive discovery. Further complicating the task of a claimant attempting to protect their civil rights is the fact that qualified immunity often arises in the early stages of litigation.

138. *See supra* note 52.

139. *Bradley*, 299 F.3d at 205 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977)) (citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976)) (citing *Chavez v. Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001)).

140. *Id.* at 206 (citing *Chavez*, 251 F.3d 612 at 636).

Therefore, Customs may be able to win on a motion for summary judgment before the claimant even knows what discovery he or she must conduct. This is exactly what happened in *Bradley*. There, the plaintiff alleged that the district court restricted discovery and then granted summary judgment even though further discovery was necessary to her case. The circuit court upheld the ruling of the lower court, noting that *Bradley* had the responsibility under the Federal Rules of Civil Procedure, Rule 56 (f), to file an affidavit that specifically identified the information sought, how that information would preclude summary judgment, and why it had not been obtained earlier.¹⁴¹ This argument is not presented to suggest that the plaintiff's failure to follow procedural rules should be excused. Instead, it is offered as one more illustration of how high the burden is on a plaintiff complaining against the Customs Service. Not only is it difficult to obtain a favorable ruling against the government, but also it is difficult to be able to make a claim against the government given the procedural safeguards in place. Of course, with the passage of the good faith defense, even if a plaintiff is able to successfully survive the discovery and summary judgment stages of litigation, claims for racial profiling will still be difficult to win given the fact that inspectors will be able to plead reliance on agency procedures as a defense.

In support of the defense, there is no question that some protections must be afforded to the government in order to avoid unchecked litigation and frivolous lawsuits. The government must be able to function and perform its duties to the public in general without fear of liability from lawsuits filed by overly litigious citizens, and without fear of defending frivolous lawsuits beyond the earliest stages of litigation. In fact, the societal costs of extended litigation to the public, and the resulting loss to society of productive use of governmental assets, are among the very justifications put forth for the qualified immunity defense in *Harlow*.¹⁴² However, the addition of a good faith defense to Customs' arsenal of defenses to liability flies directly in the face of concerns regarding the amount of litigation the government must contend with, and is not justified by any failure of the existing defenses to adequately protect Customs employees from liability.

It has been illustrated that the question of good faith will require determinations of fact in most cases where qualified immunity fails to protect the inspector, especially those where the inspector is not found to act in good faith on reliance of agency procedures. It is clear that the question of good faith will not come into play until the motion for summary judgment has been denied. Once an inspector's claim of qualified immunity is denied on summary judgment, the inspector still has the opportunity to defend the lawsuit on the merits. Only at this stage of litigation, when the inspector is forced to defend the lawsuit on the merits, will the issue of good faith begin to be litigated. Therefore, arguments that society's resources should not be wasted in litigating frivolous lawsuits do not support passage of the good faith defense because lawsuits where good faith is at issue are ultimately going to be litigated. In effect, the good faith defense simply provides another method of avoiding liability during the trial without serving the goals of qualified immunity, which include conservation of

141. *Id.* at 206-07.

142. *See supra text* accompanying note 31.

government resources and allowing the government to function efficiently.

In three recent cases involving claims against Customs inspectors, qualified immunity failed to protect the inspector in only one instance. In *Saffell v. Crews*, inspectors were not held liable for a partial strip search because a bulge in the claimant's pelvic region was grounds for reasonable suspicion of contraband.¹⁴³ No drugs were found on the plaintiff, but the court still found that the inspectors were entitled to qualified immunity for their actions. As discussed in *Bradley*, the inspectors were not held liable because their conduct was held not to be the subject of a requirement of reasonable suspicion.¹⁴⁴ Only in *Brent* were the inspectors denied the protection of qualified immunity.¹⁴⁵

It is therefore clear that qualified immunity is not failing to meet its goals of both protecting the civil rights of citizens and protecting the government (specifically Customs) from frivolous lawsuits. What then is a reasonable explanation of why more protections were required for the inspectors in these cases? One possible explanation is that in a knee-jerk reaction to September 11, 2001, public concern over the protection of the nation's borders was high enough that this provision passed Congress without much concern over the possibility that it would be abused. Another possibility is that the amendment passed simply because it was buried in a massive Trade Act. Indeed, because of the sheer size of the Trade Act of 2002, debate over the specific amendment to 19 U.S.C. § 482 is scarce, but what is there is very revealing of the concerns attendant with the legislation. Numerous civil rights organizations, including the NAACP, Leadership Conference on Civil Rights, ACLU, and the Council on American Islamic Relations all expressed strong opposition to passage of the amendment to § 482.¹⁴⁶ Beyond special interest groups, a number of members of Congress expressed concern over the provisions of the Trade Act dealing with Customs immunity. Perhaps the most compelling statements against the passage of the amendment dealt with a report by the General Accounting Office ("GAO"). This report, which focused on racial profiling, found that African-American women were nine times more likely than Caucasian women to be the subjects of intrusive searches while they were only half as likely as Caucasian women to be found carrying contraband.¹⁴⁷

Some representatives focused on the obvious need to protect national security, but emphasized that this need should not come at the expense of civil rights.¹⁴⁸ One congressman specifically emphasized that the amendment was a capitalization on the tragedy of September 11, 2001, which was being used to justify offenses to the Constitution.¹⁴⁹ The same congressman went on to note that Customs had not provided any justification why qualified immunity was not

143. See *supra* note 3 and accompanying text.

144. See *supra* note 70 and accompanying text.

145. See *supra* notes 74-85 and accompanying text.

146. 148 CONG. REC. H5980-H5982 (daily ed. July 26, 2002).

147. *Id.* at H5978-H5979 (statement of Rep. Jackson-Lee).

148. *Id.* at H5979.

149. *Id.* at H5979 (statement of Rep. Conyers).

protection enough, especially in light of the GAO's study.¹⁵⁰

Aside from concerns about the amendment, the statements of the representatives during the debates over the Act provide some insight into how the members of Congress understood the good faith defense would operate. There was concern that an officer "could engage in blatantly discriminatory conduct, but if he in 'good faith' believed that he was justified in doing so, he could not be held liable," and that a claimant would be entitled to no relief unless the inspector acted in "bad faith."¹⁵¹ There was also concern about how the proposal would affect the population.¹⁵² Unfortunately, based on the analysis of what constitutes good faith in the law enforcement context, these statements are entirely accurate as to what the effect of this legislation will likely be.

The arguments made in Congress sufficiently state the issue. No clear reason exists to justify giving Customs officials more immunity than any other law enforcement agency. Good faith was originally a factor in the qualified immunity analysis that the Supreme Court later did away with in *Harlow* because it would waste too many government resources in litigation. Now Customs employees have the benefits of good faith immunity, possibly even if they reasonably should have known that their actions violated clearly established law, without the benefits to society that stem from qualified immunity. Given the past holdings in cases dealing with challenges to searches conducted under the authority of 19 U.S.C. § 482, there is no showing of necessity for this extra layer of protection. Obviously, the events of September 11, 2001, and the resulting war on terror have increased the public's concern about who and what are entering the country, but should rights that have been fundamental since the adoption of the Constitution be sacrificed in a knee-jerk reaction to those events? Given the delicate balance that courts have sought to achieve since the adoption of qualified immunity, and the lack of sound policy supporting the additional protections afforded to Customs in this instance, it is difficult to see this legislation as anything but a reflex to September 11, 2001, that may lead to unintended consequences.

150. *Id.*

151. 148 CONG. REC. H5979 (daily ed. July 26, 2002).

152. "This proposal would hurt real people. It would increase the likelihood of meritorious claims being thrown out. Parties would end up fighting at length over whether an official did or did not subjectively believe his conduct to be lawful—even if existing law clearly established that it wasn't." *Id.* at H5980.