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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FRED KENNETH MACDONALD, Plaintiff, vs. UNITED STATES OF AMERICA, et al., Defendants.	Case No. 11cv1088 IEG (BLM) DATE: December 5, 2011 TIME: 10:30am CTRM: 1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE INDIVIDUAL DEFENDANTS' MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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I

INTRODUCTION

This lawsuit arises from the improvident commencement of removal proceedings against Plaintiff MacDonald who is a Canadian Indian. According to a 1978 decision of the Board of Immigration Appeals ("BIA"), certain Canadian Indians may not be removed from the United States. MacDonald brings the instant Fourth and Fifth Amendment claims against the individual defendants under a Bivens[1/] theory for unlawful arrest and detention and for failure to afford him due process in his removal proceedings. He also alleges violation of his rights under 18 U.S.C. § 4001 (the Non-Detention Act).

This Court lacks subject matter jurisdiction to hear any of the claims because 8 U.S.C.§1252(g) deprives courts of jurisdiction to hear "any cause or claim arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." It is well-established in the Ninth Circuit that Section 1252(g) deprives courts of subject matter jurisdiction to hear Bivens and other damages claims arising out of the initiation of removal proceedings when alternative habeas remedies are available.

In the alternative, the claims for violation of MacDonald's Fifth Amendment procedural due process rights should be dismissed because they do not articulate any failure to provide notice and an opportunity to be heard. MacDonald's Fourth Amendment claim against Defendant Ed Hughes should be dismissed because he had no involvement whatsoever with the decisions to apprehend and detain MacDonald, and MacDonald does not allege that he did. The Fourth Amendment claims against Defendants Garzon and Baker should be dismissed because MacDonald alleges no personal involvement, and there is no evidence of any personal involvement. The Fourth Amendment claims against Defendant Haroldsen should be dismissed due to his absolute prosecutorial immunity, and due to his qualified immunity because, although the decision to place MacDonald in removal proceedings was later discovered to be improvident,

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[1/] In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court established an implied private right of action against federal officials for tortious deprivations of constitutional rights.

the underlying rule was administrative, not statutory or constitutional, and his error was based upon a reasonable mistake of fact about the import of MacDonald's "S13" classification. And, finally, the claims for violation of the Non-Detention Act must be summarily dismissed as to all defendants, because MacDonald is not a U.S. citizen.

II

STATEMENT OF FACTS

MacDonald complains of his apprehension on September 28, 2009, of his detention from September 28, 2009, until his removal from the United States on November 29, 2009 [Complaint, paras. 49, 68, 98], and of alleged violations of his procedural due process rights. [Complaint, paras. 102-04].

MacDonald is a native and citizen of Canada [Ex. 4][2] and not a U.S. citizen. [Ex. 50.] On May 2, 1995, he was admitted to the United States at Blaine, Washington, under the classification of admission "S13," meaning that he was granted admission pursuant to 8 U.S.C. § 1359 as a qualifying Canadian Indian.[3] [Ex. 4.] Section 1359 reads as follows:

> Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

Id. See also 8 C.F.R. Part 289.

By way of background, the purpose of the statute was to preserve the aboriginal right of Canadian Indians to move freely throughout the territories originally occupied by them on either side of the U.S. Canada border. See Akins v. Saxbe, 380 F. Supp. 1210, 1213-14 (D. Me. 1974).

2/ "Ex." refers to the accompanying true copy of pertinent documents contained in MacDonald's DHS administrative file ("A-File"), No. A73 007 455.

3/ For purposes of this pleading, Defendants do not waive (and to the extent required to preserve a challenge, hereby assert) a challenge to whether MacDonald was lawfully admitted to the United States under the classification S13, since the Squamish Nation is not mentioned in the Jay Treaty (1796), it was not formed until 1923, there exists a "longstanding aboriginal title dispute" with the government of British Columbia, and none of the Squamish Nation's claimed lands lie within the United States. See Treaty of Amity, Commerce and Navigation of 1794 between the United States and Great Britain ("Jay Treaty"), 8 Stat. 116; 8 Stat. 130 (Explanatory Article of 1796), available at http://avalon.law.yale.edu/18th_century/jayex1.asp; Squamish Nation Network, Our Land, available at http://www.squamish.net/aboutus/ourLand.htm. In addition, for benefits purposes, the Squamish Nation is not a federally recognized tribe. See In re Welfare of L.N.B.-L., 237 P.3d 944 (Wash. Ct. App. Div. 2 2010). See note 6 infra, hereby incorporated.

The express language of the statute and regulations exempt qualifying Canadian Indians from entry requirements into the United States. Neither the statutory nor the regulatory provisions expressly prohibit the removal of such aliens from the United States. Indeed, prior to 1978, the BIA initially ruled that qualifying Canadian Indians could be removed from the United States even though they could immediately return pursuant to 8 U.S.C. § 1359. See Matter of B--, 3 I. & N. Dec. 191 (BIA 1948); Matter of D--, 3 I. & N. Dec. 300 (BIA 1948). However, in 1978, the BIA reversed its prior rulings and held, in Matter of Yellowquill, 16 I. & N. Dec. 576, 577 (BIA 1978), that qualifying Canadian Indians could not be deported from the United States on any ground. Published BIA decisions are binding on DHS officials. See 8 C.F.R. § 1003.1(g).

On July 21, 2009, MacDonald was arrested by the San Diego Police Department (SDPD) for possession of cocaine with intent to sell and possession of a dangerous weapon. [Exs. 6-20, 22, 38.] On that same day, DHS officer William Pena lodged a detainer with San Diego County Jail, requesting advance notification of MacDonald's release from custody. [Ex. 5.]

On August 3, 2009, MacDonald pled guilty and was convicted of unlawful possession of cocaine for the purpose of sale and purchase in violation of Cal. Health and Safety Code § 11351. [Exs. 9-11; Complaint, para. 44.] He was sentenced to 120 days in jail with three years of probation. [Ex. 9] MacDonald agreed in his plea agreement that he was subject to removal from the United States:

> I understand that if I am not a U.S. citizen, this plea of Guilty/No Contest may result in my removal/deportation, exclusion from the U.S. . . .

Ex. 10 (item no. 7d.).

Upon his release from state custody, on or about September 28, 2009, MacDonald was taken into DHS custody pursuant to the lodged immigration detainer, to be processed for removal to Canada. [Ex. 21.] DHS officer Kourounis interviewed MacDonald and conducted computer database queries about MacDonald's criminal and immigration history. [Exs. 21-22, 28-49.] Based upon his research, Agent Kourounis recommended that removal proceedings be commenced against MacDonald [Exs. 26-27], and his supervisor, Defendant Haroldsen, approved the recommendation. [Ex. 26.] In the documents that Defendant Haroldsen received from Agent

Kourounis, the only clue that McDonald was not subject to removal was the notation that he had immigrated under the classification "S13." [Exs. 27-28, 30, 32-33, 35, 50.] There was no other indication in the papers that Defendant Haroldsen received from Agent Kourounis that MacDonald was a Canadian Indian.

MacDonald was served with an Arrest Warrant, Notice to Appear, and Custody Determination denying him release on bond. [Exs. 50-53.] All of these documents, which were prepared by Agent Kourounis, were approved by Defendant Haroldsen in his supervisory capacity. The Notice to Appear charged that MacDonald was removable from the United States pursuant to 8 U.S.C. § 1227(a)(2)(B)(i) and (ii) due to his drug conviction. [Exs. 50-52.]

All of MacDonald's actions and inactions during his removal proceedings indicate that he, as well, was unaware that, under BIA decisional law, he was not subject to removal. There is no record that he asserted his immune status to IJ Atenaide during his bond hearing on October 7, 2009 [Ex. 55], or to IJ Renner during his hearing on October 14, 2009. On the contrary, he conceded all of the allegations and all of the charges of deportability [Ex. 50], acknowledged that the IJ's order would result in his loss of LPR status [Ex. 56], and waived appeal from the IJ's decision that he was deportable. [Ex. 57.] There is no indication in the record that any of the DHS attorneys, the two IJs or even MacDonald himself knew that MacDonald's S13 classification precluded his removal from the United States. Indeed, throughout the removal process, MacDonald never challenged or contested his removability. He declined an opportunity to contact the Canadian consulate [Ex. 23] or to telephone someone [Ex. 25]; he conceded his deportability to the Immigration Judge ("IJ") [Ex. 50], acknowledging the loss of his lawful permanent resident status [Ex. 56]; and he requested that he be returned to Kamloops, British Columbia. [Ex. 59.]

In addition, the Canadian government did not alert DHS that MacDonald is a Canadian Indian. On October 16, 2009, DHS contacted the Consul General of Canada in Los Angeles to obtain permission to removal MacDonald to Canada, [Ex. 58] and on November 25, 2009, a Canadian consular employee granted such permission. [Ex. 62.] Accordingly, on November 27, 2009, DHS removed MacDonald to Canada. [Ex. 65.]

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Apparently MacDonald later learned the significance of his status as a Canadian Indian because, upon his return to Canada, he obtained a replacement "Certificate of Indian Status." [Exs. 66-67.] Then, on January 9, 2010, he returned to the United States and demanded replacement evidence of his LPR status and presented documentation to support his discovery that he should not have been removed from the United States. [Exs. 68-71.]

In January or February 2010, he spoke to Defendant U.S. Citizenship and Immigration Services ("USCIS") officer Ed Hughes who had no authority to ignore the executed order of removal that resulted in MacDonald's loss of his LPR status. See 8 C.F.R. § 1001.1(p).[4] Defendant Hughes, took the matter under review [Ex. 71], and DHS eventually realized the improvidence of the removal proceedings and took action to have the removal order vacated and MacDonald's LPR status restored. Specifically, on March 21, 2011, USCIS attorney Lucinda Love informed Immigration and Customs Enforcement ("ICE)" Deputy Chief Counsel Ted Yamada who had the removal proceedings reopened and terminated. [Exs. 72-76.]

On May 16, 2011, MacDonald commenced a "civil rights" tort action in state court against the individual defendants, and on June 8, 2011, after removal of the case to this Court, he filed an amended complaint, adding the United States as a defendant and adding claims under the Federal Tort Claims Act ("FTCA").

III

ARGUMENT

A. SECTION 1252(g) PRECLUDES SUBJECT MATTER JURISDICTION

This case should be dismissed as to all defendants because 8 U.S.C. §1252(g) divests this Court of jurisdiction to consider MacDonald's claims. Section 1252(g) precludes "from judicial review all claims that arise from a decision by the Attorney General to commence proceedings, adjudicate cases or execute removal orders against any alien." In a recent similar case, Judge Burns ruled that Section 1252(g) precluded a Bivens lawsuit against DHS officers who improvidently brought charges of removal. See Pedroza v. Gonzalez, 09-CV-1766-LAB (WVG),

[4] LPR status "terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission."

2010 WL 6052381 (S.D. Cal. Dec. 10, 2010):

> It is evident from these allegations that his claims fall squarely within Section 1252(g), as he challenges the very decision to commence proceedings against him. [citations omitted] This case arises from the type of discretionary decision Congress intended to shield from suit. The Court therefore lacks jurisdiction to hear this case.

Id. at *5 (citing Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 487 (1999); Sissoko v. Rocha, 509 F.3d 947, 950 (9th Cir. 2007)). See also Jimenez-Angeles v. Ashcroft, 291 F.3d 594, 599 (9th Cir. 2000) (stating "§ 1252(g) removes our jurisdiction over 'decision[s] ... to commence proceedings' to include not only a decision in an individual case whether to commence, but also when to commence, a proceeding.").

In Sissoko, the defendant immigration officers had ordered the plaintiff detained after instituting expedited removal proceedings against him. The Ninth Circuit then applied Section 1252(g) and ruled the court lacked subject matter jurisdiction over the plaintiff's Fourth Amendment false arrest claims. Id. District courts in the Ninth Circuit have consistently followed Sissoko in dismissing Bivens and FTCA claims based on false arrest, false imprisonment, and malicious prosecution brought by aliens challenging DHS's immigration arrests and prosecutions. See Rodriguez-Macias v. Holder, 2001 WL 1253742 (D. Ariz. April 4, 2011) (dismissing claims of improperly bringing removal charges against plaintiff based on § 1252(g)); Pedroza v. Gonzalez, 2010 WL 6052381 at *5 (dismissing malicious prosecution and Fifth Amendment claims based on § 1252(g)); and Valencia-Mejia v. United States, CV 08-2943 CAS (PJWx), 2008 WL 4286979 at *4 (C.D. Cal. Sept. 15, 2008) (dismissing Bivens and FTCA claims pursuant to § 1252(g) since decision to detain alien until his hearing arose from the decision to commence proceedings).

As both the Ninth Circuit and the Supreme Court have explained, Section 1252(g) "was aimed at preserving prosecutorial discretion." Barahona-Gomez v. Reno, 236 F.3d 1115, 1119 (9th Cir. 2001); see also Reno, 525 U.S. at 483-85 (1999). The Attorney General's exercise of his discretion, by choosing whether to commence proceedings or when to commence removal proceedings, was one area that Congress sought to insulate from lawsuits. See id. at 486 (explaining that Section 1252 as a whole was aimed at protecting the Executive's discretion).

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Section 1252(g) applies in MacDonald's case because his Fourth Amendment claims arise from the decision to commence removal proceedings against him and to adjudicate the case. They do not arise from actions or events that were only tangentially related to the removal proceedings, and MacDonald acknowledges this fact in his complaint. [Complaint, para. 51 ("MacDonald was seized and incarcerated for deportation purposes by the Department of Homeland Security and its defendant agent/employees.").] Section 1252(g) therefore precludes MacDonald's Bivens claims because they arise from the very type of discretionary decision that Congress intended to shield from suit. See also Guardado v. United States, 744 F. Supp.2d 482, 487 (E.D. Va. 2010) (The use of the word "any" obviated the need for the statute to list out every possible cause or claim it barred"); Khorrami v. Rolince, 493 F. Supp.2d 1061, 1068 (N.D. Ill. 2007) ("Since I find that Plaintiff's Fourth Amendment claim…'arises from' the decision to commence removal proceedings, I find that § 1252(g) divests this Court of subject matter jurisdiction to hear it."). But see Medina v. United States, 92 F. Supp.2d 545, 554 (E.D. Va. 2000).

This case against the individual defendants should therefore be dismissed in its entirety for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(1) & (6).

B. THE NON-DETENTION ACT

MacDonald contends that Defendants are liable for false imprisonment under the Non-Detention Act, which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (emphasis added). Yet MacDonald is not a U.S. citizen. The claim should therefore he dismissed for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

C. NO ALLEGATIONS TO SUPPORT A DUE PROCESS CLAIM

MacDonald's Fifth Amendment procedural due process claim should be dismissed as to all defendants, because he does not allege any failure by anyone to provide notice or opportunity to be heard as to his immigration status. See Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (elements of a due process claim); Hoye v. Sullivan, 985 F.2d 990, 992 (9th Cir. 1992) (the plaintiff must allege "facts sufficient to state a violation of substantive or procedural due process."). MacDonald

alleges in his complaint only that the defendants "did not 'process' that he was an American Indian," that they "erroneously processed him as an immigrant who was subject to deportation," and that they failed "to process plaintiff correctly under the Act." [Complaint, paras. 102-04.] Such allegations do not state that MacDonald was deprived notice and an opportunity to be heard. In fact, MacDonald was served with a Notice to Appear and allowed an opportunity to plead his case before an Immigration Judge. [Exs. 50-54, 57.] Therefore, this claim should be dismissed for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

D. ED HUGHES

MacDonald has not articulated any Fourth or Fifth Amendment claims against Defendant Hughes. He certainly does not allege that Defendant Hughes had any involvement in the decision to apprehend MacDonald, to commence or prosecute removal proceedings against him, or to detain him. MacDonald complains only of Defendant Hughes' actions after the completion of removal proceedings and execution of the final order of removal. [Complaint, para. 7.] Furthermore, MacDonald alleges only that Defendant Hughes "played a role in 'misleading' him about his rights to work and live in the United States." [Complaint, para. 7 (emphasis added); see also Complaint, para. 115 (accuses Defendant Hughes of making a "misrepresentation" or providing "inaccurate" information).] MacDonald does not contend that such alleged misrepresentation constitutes a Fourth or Fifth Amendment violation. Rather, in his causes of action [Complaint, paras. 93-115], MacDonald mentions the alleged misrepresentation only in the context of his common law tort claim under the FTCA. [Complaint, paras. 110-15.]

In effect, then, MacDonald has sued Defendant Hughes in his individual capacity for the alleged commission of a common law tort. Yet, it is well-settled law that federal employees are absolutely immune from liability for common law torts, and the United States is the only proper defendant in an FTCA action. See Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act"), Pub. L. No. 100-694, 102 Stat. 4563, 28 U.S.C. § 2679(b) (federal employees are immune from liability for common law torts that they commit in the course of their duties); Woods v. United States, 720 F.2d 1451, 1452 n.l (9th Cir. 1983) ("the United States is the only proper defendant in an action brought under the Federal Tort Claims Act.").

Finally, as a matter of law and undisputed fact, Defendant Hughes' advice to MacDonald was correct since Hughes was bound by the status of the official record which showed that MacDonald had lost his LPR status in removal proceedings. Defendant Hughes was an employee of USCIS, not of ICE, which is the prosecuting branch of DHS. Therefore, Defendant Hughes took the correct action by promptly referring the matter to ICE. [Ex. 71.]

Defendant Hughes should therefore be dismissed from this action for MacDonald's failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

E. JOHN GARZON

MacDonald does not allege that Defendant Garzon had any personal involvement in any of the alleged conduct in this case. His only allegations are that "John Garzon is . . . a field office director responsible for the detention of persons being subjected to deportation in San Diego" [Complaint, para. 5] and that "Defendant Garzon is responsible for MacDonald's incarceration." [Complaint, para. 56.] Such conclusory pleading fails to state a claim under the rules articulated in Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937 (2009). As noted by the Supreme Court,

> [T]he pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation . . . A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do."

Id. at 1949. Moreover, a pleading must do more than allow a court to infer the "possibility" of misconduct. Id. at 1950. Rather, it must show that the pleader is entitled to relief. Id.

Here, although MacDonald alleges that Defendant Garzon was "responsible for" his incarceration, he does not specify the nature of Defendant Garzon's personal involvement. In particular, MacDonald's allegations do not reveal whether Garzon was ever even aware that removal proceedings were being contemplated or initiated against MacDonald. Indeed, a review of the record reveals no personal participation by Garzon whatsoever in the initiation of removal proceedings and/or MacDonald's arrest and detention. Rather, MacDonald appears to have named Garzon simply because he was one of the people who oversaw ICE detention operations in San Diego. MacDonald has therefore failed to state a Bivens claim against Defendant Garzon because an individual cannot be held liable for constitutional violations under a respondeat superior theory.

Bibeau v. Pacific Northwest Research Foundation Incorporated, 188 F.3d 1105, 1114 (9th Cir. 1999); Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991). Instead, liability must be based on the individual's own misconduct. Iqbal, 129 S.Ct. at 1949. Since MacDonald has failed to plead any personal involvement on the part of Defendant Garzon, as required by Iqbal, the Fourth and Fifth Amendment claims against Defendant Garzon should be dismissed.

F. ROBIN BAKER

Likewise, MacDonald does not allege that Defendant Baker had any personal involvement in any of the alleged conduct in this case. His only allegation is that Baker "is believed to have played a role in the incarceration and deportation as alleged herein." [Complaint, para. 6.] As set forth above, such conclusory pleading fails to state a claim under the rules articulated in Iqbal. Liability must be based on the individual's own misconduct. Since MacDonald has failed to plead any personal involvement on the part of Defendant Baker, as required by Iqbal, the Fourth and Fifth Amendment claims against Defendant Baker should be dismissed.

G. KENT HAROLDSEN

1. Absolute Prosecutorial Immunity

MacDonald's Bivens claims against Defendant Haroldsen should be dismissed because of Defendant Haroldsen's absolute prosecutorial immunity. Relying on information provided to him by subordinates, Defendant Haroldsen alone executed the charging document (Notice to Appear) against MacDonald and caused it to be filed with the Immigration Court for the commencement of removal proceedings. [Exs. 50-53.] DHS attorneys then prosecuted the case before two IJs. [Exs. 55, 57.] In a recent similar case, Judge Burns ruled that DHS agents who had brought removal charges against the Bivens plaintiff enjoyed absolute prosecutorial immunity because they "performed a quasi-judicial function." Pedroza v. Gonzalez, 2010 WL 6052381 at *7.

Prosecutors are absolutely immune from civil suits for damages which challenge activities related to the initiation and presentation of criminal prosecutions. See Imbler v. Pachtman, 424 U.S. 409, 422 (1976). Prosecutorial immunity extends to those who perform quasi-judicial tasks in civil actions. See Butz v. Economou, 438 U.S. 478, 512-13 (1978) (extending the immunity to federal administrative agency proceedings). Prosecutorial immunity applies to non-attorneys

whose roles are an integral part of the quasi-judicial process. See Butz, 438 U.S. at 512, 516-17 (civil enforcement of Department of Agriculture regulations); Meyers v. Contra Costa County Dep't of Social Servs., 812 F.2d 1154, 1157 (9th Cir. 1987) (absolute immunity of social service caseworkers in initiating and pursuing child dependency proceedings); Coverdell v. Dep't of Social & Health Servs., 834 F.2d 758, 765 (9th Cir. 1987) (absolute immunity of child protective services worker who executes a court order for seizure and placement of a child is entitled to absolute immunity).

The Ninth Circuit has found absolute prosecutorial immunity even when a plaintiff alleges that the prosecutor went forward with a prosecution he believed not to be supported by probable cause. Milstein v. Cooley, 257 F.3d 1004, 1009 n.3 (9th Cir. 2001) (discussing Imbler, 424 U.S. at 416, 431). Thus, even charges of malicious prosecution, falsification of evidence, coercion of perjured testimony, and concealment of exculpatory evidence will be dismissed on grounds of prosecutorial immunity. See Imbler, 424 U.S. at 431-32 n.34 (explaining that "the deliberate withholding of exculpatory information" is included within the "legitimate exercise of prosecutorial discretion."); Manning v. Bogan, 320 F.3d 1023, 1030 (9th Cir. 2003) ("A prosecutor is also absolutely immune from liability for the knowing use of false testimony at trial.").

Given his authority and duty to commence removal proceedings against aliens by charging them with deportability, Defendant Haroldsen clearly falls within the intended scope of prosecutorial immunity. Thomas v. City of Peoria, 580 F.3d 633, 638 (7th Cir. 2009) ("The work of prosecutors requires them constantly to be inflicting costs on private citizens, so that without immunity they would be the targets of continuous litigation that would make it impossible for them to perform their duties."). The Court in Imbler acknowledged that the prosecutorial immunity doctrine leaves a genuinely wronged person without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. However, the Court found that the alternative of qualifying the prosecutor's immunity would disserve the broader public interest and the proper functioning of the judicial system. Imbler, 424 U.S. at 427-28. The doctrine of prosecutorial immunity seeks to insulate the judicial process where the aggrieved has other avenues of redress. See Butz, 438 U.S. at 514 (holding federal hearing examiners are absolutely

immune and the aggrieved "must seek agency or judicial review" for corrective relief rather than sue for damages).

Although civil damages are not available to MacDonald, he could have sought habeas corpus relief during his removal proceedings. Instead, he sought no relief whatsoever, because he was not aware of his own virtual immunity from removal. As explained below, apart from whether Defendant Haroldsen enjoys absolute prosecutorial immunity, he enjoys qualified immunity because, given the circumstances, his error was based upon a reasonable mistake of fact which was shared by everyone else who participated in the removal process, including at least two DHS attorneys, two Immigration Judges, and MacDonald himself. Due to his own ignorance of the import of his status as a Canadian Indian, MacDonald did not reveal or assert that he was a Canadian Indian, he conceded in his criminal case that his conviction could subject him to removal [Ex. 10], he declined legal representation, he declined contact with the Canadian embassy, he declined the opportunity to make phone calls, he conceded his deportability to the IJ, and he pursued no administrative and judicial review of the IJ's bond and removal decisions.

2. Defendant Haroldsen's Qualified Immunity

In the alternative, MacDonald's Bivens claims against Defendant Haroldsen should be dismissed because of Defendant Haroldsen's qualified immunity.[4/] Qualified immunity shields government officials so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Mattos v. Agarano, -- F.3d --, 2011 WL 4908374 at *5 (9th Cir. Oct. 17, 2011). Also, Defendant Haroldsen enjoys qualified immunity from liability if his action was based on a reasonable mistake of fact. Saucier v. Katz, 533 U.S. 194, 205 (2001); Mattos at *5 (citing Pearson v. Callahan, 555 U.S. 223 (2009) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[5/] This Court should not reach the question of whether Defendants Garzon, Hughes and Baker enjoy qualified immunity, because they did not participate in any of the alleged misconduct, and MacDonald does not allege that they did. To the extent that any participation is found or deemed by this Court, Defendants Garzon, Hughes and Baker hereby claim qualified immunity according to the analysis here set forth. There is no evidence that they had any more, if any, knowledge than Haroldsen regarding MacDonald's immigration status. Hughes, in particular, acquired his knowledge of MacDonald's status after MacDonald had already been removed from the United States, and MacDonald does not allege any constitutional violations by Hughes.

a. Not "Clearly Established"

Although it is arguable that MacDonald's virtual immunity from removal proceedings was clearly established by the BIA in its 1978 Matter of Yellowquill decision, an administrative decision alone does not constitute sufficient "existing precedent" to defeat a qualified immunity motion. See Ashcroft v. al-Kidd, 131 S.Ct. 2074, 2083 (May 31, 2011) ("we do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."); Davis v. Scherer, 468 U.S. 183, 193-96 (1984) (officials "do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."). Cf. Alexander v. Perrill, 916 F.2d 1392, 1398 (9th Cir. 1990) (finding BOP regulations sufficient to create a clearly established right for Bivens claims).

In this case, MacDonald's immunity from removal is nowhere expressed in either the underlying statute or regulation. Apart from the BIA's Yellowquill decision, there is no statutory or regulatory language which states that aliens with a classification of S13 are not subject to removal proceedings. See 8 U.S.C. § 1359; 8 C.F.R. § 289. As the BIA noted in its Yellowquill decision, it had initially ruled that Canadian Indians were subject to removal, after the passage of 8 U.S.C. § 1359 in 1928. 16 I. & N. Dec. at 577. See Matter of A, 1 I. & N. Dec. 600 (BIA 1943) (holding that Canadian Indians may be deported), overruled by Matter of Yellowquill. The Yellowquill decision is the BIA's opinion concerning the implications of Section 1359, but Section 1359 contains no express language that Canadian Indians may not be removed from the United States, and there is no case law, let alone controlling case law, on the subject. On Westlaw, the undersigned has located only one judicial decision that even cites Matter of Yellowquill, namely the unreported decision in Perrault v. Larkin, 03-3069-RDR, 2005 WL 2455351 (D. Kan. Oct. 5, 2005), which does not even concern the issue of a Canadian Indian's removability.

To determine whether a constitutional or statutory right is clearly established for qualified immunity purposes, the Ninth Circuit first looks to binding judicial precedent. Boyd v. Benton County, 374 F.3d 773, 781 (9th Cir. 2004) ("If the right is clearly established by decisional authority of the Supreme Court or of this Circuit, our inquiry should come to an end."). In the absence of such binding precedent, the Ninth Circuit "look[s] to whatever decisional law is

available ... including decisions of state courts, other circuits, and district courts." Id. (internal quotation marks omitted).

Indeed, this Court is not bound by Yellowquill, and could rule that Yellowquill was wrongly decided. Because the BIA is an administrative tribunal within the Department of Justice, its rulings are not considered binding precedent in federal court. See, e.g., Edu v. Holder, 624 F.3d 1137, 1142 (9th Cir. 2010) (stating that BIA's interpretations and applications of immigration law are only "subject to established principles of deference."). BIA rulings are legal interpretations which are binding only upon DHS employees and Immigration Judges. See 8 C.F.R. § 1003.1(g).

Accordingly, apart from the fact that Defendant Haroldsen was not even aware of MacDonald's virtual immunity from removal, this Court should rule that Yellowquill did not "place[] the statutory or constitutional question beyond debate." Al-Kidd, 131 S.Ct. at 2083.

b. "Reasonable Mistake of Fact"

Defendant Haroldsen's ignorance of the import of MacDonald's S13 classification, shared by all others in the process including MacDonald himself, does not rise to the level of a constitutional tort because it constituted a "reasonable mistake of fact." Saucier v. Katz, 533 U.S. 194, 205 (2001). Qualified immunity affords government officials with "ample room for mistaken judgments by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (quoting Malley v. Briggs, 475 U.S. 335, 341, 343 (1986)). The Supreme Court has recently warned lower courts, the Ninth Circuit in particular, "not to define clearly established law at a high level of generality." Al-Kidd, 131 S.Ct. 2074, 2084 (2011). Courts may conduct the qualified immunity analysis in accordance with fairness and efficiency and in light of the circumstances of a particular case. Pearson v. Callahan, 555 U.S. 223, 236 (2009). The U.S. Supreme Court has held that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." Anderson v. Creighton, 483 U.S. 635, 641 (1987). When that happens, the officials "should not be held personally liable." Id.

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Defendant Haroldsen's error is confined to his supervisory approval of paperwork to commence removal proceedings against MacDonald. He did not lodge the initial detainer [Ex. 5]; he did not take MacDonald into custody [Exs. 21-22]; he did not interview MacDonald [id.]; he did not research the A-File and DHS computer databases [Exs. 37]; and he did not prepare the charging documents. [Exs. 50-51.] As a supervisor, he reasonably relied upon the research that had been conducted by his subordinates. The only clue that Defendant Haroldsen had that MacDonald was a Canadian Indian was his "S13" classification. Apparently MacDonald never announced that he was a Canadian Indian and did not provide his Certificate of Indian Status. [Exs. 66-67.] The only fact that was known to Defendant Haroldsen and, subsequently, to two Immigration Judges was that MacDonald was an LPR and that his classification when he immigrated to the United States in 1994 was "S13." The reasonableness of Defendant Haroldsen's failure to know the import of the S13 classification is proven by the fact that at least two DHS attorneys, two Immigration Judges and even MacDonald himself did not know the import of that classification.

Defendant Haroldsen's motion for qualified immunity should therefore be granted because his action was based upon a reasonable mistake of fact. See Fed. R. Civ. Proc. 12(b)(6) and 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).6

It is not otherwise disputed that, but for MacDonald's classification, there was probable cause to believe that, as an LPR, he was subject to removal from the United States at the time of his arrest given his drug conviction. He was an alien who was convicted of a drug crime and, as such, he was deportable under 8 U.S.C. § 1227(a)(2)(B)(i).

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6/ Defendant Haroldsen does not waive, and to the extent required to preserve the a challenge, hereby asserts, a challenge to whether MacDonald was lawfully admitted to the United States under classification S13. See note 3 supra, hereby incorporated. Regarding admissions to the United States that are not lawful, see Monet v. INS, 791 F.2d 752, 753 (9th Cir. 1986) ("Admission is not lawful if it is regular only in form. The term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity.").

IV

CONCLUSION

All of MacDonald's claims should be dismissed because they are precluded by 8 U.S.C. § 1252(g). In the alternative, the claim under the Non-Detention Act should be dismissed because MacDonald is not a U.S. citizen. The procedural due process claims under the Fifth Amendment should be dismissed because MacDonald does not allege any failure by anyone to provide notice or opportunity to be heard in his removal proceedings. All claims against Defendants Garzon, Baker, and Hughes should be dismissed because MacDonald has not alleged any personal participation by any of them in his arrest, detention, and/or removal proceedings. The common law tort claim (misrepresentation) against Defendant Hughes should be dismissed because federal employees are absolutely immune from common law tort liability. The claims against Defendant Haroldsen should be dismissed due to his absolute prosecutorial immunity and/or his qualified immunity.

DATED: October 31, 2011

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