SANCHEZ V. SESSIONS

Termination Based on Regulatory Violations in the Ninth Circuit

By Logan Byrne and Lena Graber

I. Introduction[1]

Sanchez v. Sessions, 904 F.3d 643 (9th Cir. 2018) is a Ninth Circuit motion to suppress case where the Coast Guard racially profiled and arrested an undocumented immigrant without a legal basis and in violation of their own regulations. In *Sanchez*, the Court upheld and elaborated on the standard for termination of removal proceedings based on regulatory violations. This case is important because: (1) termination of proceedings as a remedy for regulatory violations was upheld; (2) the Court found that racially discriminatory arrests were violations of 8 C.F.R. § 287.8(b), and then applied this violation to the termination framework; and (3) the standard for termination without prejudice was expanded. This practice advisory will discuss the *Sanchez v. Sessions* decision, analyze the standard for termination of removal proceedings based on regulatory violations, and address the implications of the Ninth Circuit's denial of rehearing en banc.

II. *Sanchez v. Sessions Background*

A. Facts

Sanchez entered the United States without inspection in March 1988, when he was seventeen years old, and has lived here ever since. He was granted Family Unity Benefits and Employment Authorization in 2004, but his benefits expired in 2006 and his reapplication was denied. Thus, he was without legal status when encountered by the Coast Guard in 2010.[2]

In 2010, Sanchez went on a short fishing trip with two friends and a baby. The group traveled a couple miles in a small fishing boat before it broke down. One of Sanchez' friends called 911 and the operator contacted the Coast Guard. The Coast Guard towed the boat back to shore, but then detained the boating party.[3]

The Coast Guard frisked Sanchez and demanded that he turn over his identification documents and belongings.[4] The officers asked Sanchez for his name and address and Sanchez provided the officers with both pieces of information, including a driver's license, which the officers took. The Coast Guard also contacted Customs and Border Protection (CBP), who came to the scene and interrogated Sanchez themselves. During this interrogation,

[1] For questions or comments, please contact Lena Graber: lgraber@ilrc.org. Thanks to Ariel Brown and Annalee Davis for review and editing.

[2] *Sanchez v. Sessions*, 904 F.3d 643, 646-47 (9th Cir. 2018).

[3] *Id*. at 647.

[4] *Id*.

Sanchez told the CBP officers that he entered the United States without inspection. Sanchez was released later that evening.[5]

Subsequent to his release, Sanchez was served with a Notice to Appear for removal hearings. At the hearing, the government submitted CBP's Form I-213 into evidence to establish Sanchez' nationality.[6] Sanchez filed a motion to suppress and terminate removal proceedings, claiming that the Coast Guard arrested him solely based on race, in an egregious violation of the Fourth Amendment. Sanchez also claimed that the detention violated 8 C.F.R. § 287.8(b) and so the proceedings should be terminated because the agency violated its own regulation. The Immigration Judge (IJ) found that Sanchez failed to establish a prima facie case for both arguments. Sanchez appealed to the BIA unsuccessfully and then petitioned the Ninth Circuit for review. The petition for review was granted, the Ninth Circuit ruled in favor of Sanchez, and the case was remanded for further proceedings.[7]

B. Procedural History

Sanchez v. Sessions has a somewhat unusual procedural history once it reached the Ninth Circuit. The Ninth Circuit granted Sanchez' petition for review in August 2017.[8] However, following the death of the Honorable Judge Pregerson, this decision was vacated in July 2018 and replaced by a reconstituted panel decision in September 2018.[9] Then the Court sua sponte requested a vote on rehearing the case en banc. The rehearing was denied, but the justices issued a lengthy written argument over the decision, published in April 2019.[10] This practice advisory discusses the most recent decision from the Ninth Circuit and addresses the discussion included in the denial of re-hearing en banc.

C. Motions to Suppress in Immigration Proceedings

In removal proceedings, the evidence at stake to be suppressed is most often ICE or CBP's own record of an admission of alienage that followed an unlawful search, seizure, or interrogation. However, sometimes the evidence involves physical documents obtained in an illegal search, or some other evidence of foreign birth or immigration status that was obtained as a result of unlawful conduct. A motion to suppress and a motion to terminate proceedings should be filed at the same time because the information being suppressed is frequently the only evidence that ICE possess showing removability. Once the evidence is excluded from proceedings, the case must be terminated because ICE cannot meet its burden.

Aside from egregious Fourth Amendment violations, there is a separate basis for exclusion of evidence in removal proceedings based on regulatory violations by the agency.[11] The Board of Immigration Appeals has held that evidence gathered in violation of a federal regulation is suppressible if (1) the regulation was created to serve "a

[5] *Sanchez*, 904 F.3d at 646-47, 648.

[6] The I-213 is a record of an encounter or arrest of an individual by an immigration officer, including details such as how the person was taken into custody and any details they admitted during that time. Frequently, the I-213 includes admissions of alienage and is the primary source of evidence relied upon in removal hearings.

[7] *Sanchez*, 904 F.3d at 647-48, 656-57.

[8] *Sanchez v. Sessions*, 870 F.3d 901, 912 (9th Cir. 2017).

[9] In the revised panel decision, Judge Paez wrote a concurrence endorsing, and quoting in its entirety, Judge Pregerson's previous opinion regarding the unfairness of the government encouraging people to apply for immigration relief, and then using that as evidence against them in removal proceedings. *Sanchez*, 904 F.3d at 657-58.

[10] *Sanchez v. Barr*, 919 F.3d 1193 (9th Cir. 2019).

[11] Only federal officers or agencies governed by immigration regulations are required to follow them (in contrast to, for example, a local police officer). In *Sanchez*, the court held that the Coast Guard officers were acting as immigration officers within the meaning of the regulations, and thus DHS could be held accountable for their violations of the agency's immigration regulations through a motion to terminate. *Sanchez*, 904 F.3d at 649.

purpose of benefit to the alien," and (2) the regulatory violation "prejudiced interests of the alien which were protected by the regulation."[12]

Furthermore, an immigration judge can terminate removal proceedings for a variety of reasons. A respondent will typically file a motion to terminate based on the agency's failure to adequately mount their case in one way or another, which may include substantive and procedural defects.[13] Additionally, under *Matter of Garcia-Flores*, termination may be warranted when the agency has violated its own regulations, if those regulations "serve a purpose of benefit to the alien" and if the violation "prejudiced interests of the alien which were protected by the regulation."[14] This test is functionally identical to the rule for excluding evidence resulting from regulatory violations discussed above. Indeed, *Matter of Garcia-Flores* acknowledged that both exclusion of evidence and termination or invalidation of the proceedings could flow from regulatory violations.[15]

In *Sanchez*, the Court upheld and applied the test for exclusion of evidence based on regulatory violations, holding that Sanchez had made a prima facie showing that the exclusionary rule elements were satisfied and that ICE's evidence could be suppressed.[16] Specifically, the Court found that the Coast Guard violated 8 C.F.R. § 287.8(b)(2) by detaining Sanchez without any reasonable suspicion that he lacked lawful immigration status.[17] See Section A below. However, the Court found that even if the evidence Sanchez sought to suppress was excluded, Sanchez' alienage could have been independently established by other evidence, namely his Family Unity applications from years before. Thus, the violation did not actually prejudice Sanchez in these proceedings. Thereupon, the Court turned to the question of whether the proceedings could be terminated because of the regulatory violations in question, regardless of whether there was admissible evidence of Sanchez' alienage. Adopting a modification of the standard for termination, the Court found that egregious regulatory violations may justify termination of proceedings, even without prejudice to the respondent. See Section B below.

III. Analysis

A. Exclusion of Evidence Based on a Regulatory Violation

In *Sanchez*, although the facts centered on an unlawful seizure without reasonable suspicion, the Court performed its entire analysis in the context of a regulatory violation, instead of the usual Fourth Amendment egregiousness analysis.[18] Under prior Ninth Circuit precedent, three elements must be satisfied in order for evidence to be suppressed because of a regulatory violation: (1) the agency violated a regulation; (2) the regulation was created to serve a "purpose of benefit to the alien"; and (3) the regulatory violation "prejudiced interests of the alien which

[12] *Matter of Garcia-Flores*, 17 I. & N. Dec. 325, 327-29 (BIA 1980).

[13] Termination *with* prejudice means that the government cannot restart the removal proceedings based on allegations that have already been made. Termination *with* prejudice is most common in cases relying on a criminal conviction, where once the underlying conviction changes, there is a basis for termination and the court prevents ICE from asserting that removal ground again. Termination *without* prejudice means that the government can restart the removal proceedings after the case is terminated, but the government has to start over with a new Notice to Appear.

[14] *Garcia-Flores*, 17 I. & N. Dec. at 327-29 (citing and adopting the rule from *United States v. Calderon-Medina*, 591 F.2d 529, 531-32 (9th Cir. 1979)).

[15] Id.

[16] *Sanchez*, 904 F.3d at 650.

[17] *Id.* 8 C.F.R. § 287.8(b)(2) provides that: "If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning."

[18] The original Ninth Circuit *Sanchez* decision analyzed the case as a Fourth Amendment question. *See Sanchez v. Sessions*, 870 F.3d 901, 912 (9th Cir. 2017).

were protected by the regulation."[19] In *Sanchez*, the Court concluded that Sanchez made a prima facie showing that all three of these conditions had been met.[20]

Sanchez satisfied the first prong of the test because he made a prima facie showing that the Coast Guard violated 8 C.F.R. § 287.8(b)(2). 8 C.F.R. § 287.8(b)(2) requires reasonable suspicion that a person is unlawfully present in the country based on "specific articulable facts" before officers can detain a person. The Court said, "It is beyond question that detentions and interrogations based on racial or ethnic profiling and stereotyping egregiously violate § 287.8(b)(2)'s requirement that all detentions be based on reasonable suspicion." The Court emphasized that "race and ethnicity alone can never serve as the basis for reasonable suspicion."[21]

Sanchez was able to show that the regulation at 8 C.F.R. § 287.8(b)(2) was created for the benefit of petitioners like him, under the second prong of this test, because the regulation was designed to parallel the Fourth Amendment's search and seizure standards. The Court ruled that 8 C.F.R. 287.8(b)(2) "was promulgated for the benefit of petitioners like Sanchez," and so the second prong of the test was satisfied. Finally, Sanchez satisfied the third prong of the test because "the regulation [was] mandated by the Constitution, [so] prejudice may be assumed."[22]

These holdings are significant because the Court found prima facie evidence of a racially motivated arrest based mainly on the fact that the officers lacked any particular reason to detain Sanchez, and that they called CBP. Sanchez alleged that the seizure was based on his race, and the Court agreed. This clear finding from the Court supports practitioners moving for suppression and termination when ICE stops their Latinx or other non-white clients without justification, because it shows that the court can recognize the operation of racial prejudice even without specific evidence about officers using racial slurs or other more blatant evidence of animus.[23]

However, the Court held that Sanchez' Family Unity Benefits and Employment Authorization applications were admissible to prove alienage and were unrelated to the unlawful arrest. Thus, the Court found that suppression of the Form I-213 would not help Sanchez because the government would still be able to prove that he entered the country without inspection.[24]

B. Termination of Proceedings

In the Ninth Circuit, prior to *Sanchez*, the standard for when a court should terminate removal proceedings because of regulatory violations by the agency was identical to the test for exclusion of evidence based on regulatory

[19] *Chuyon Yon Hong v. Mukasey*, 518 F.3d 1030, 1035-36 (9th Cir. 2008) (applying the regulatory exclusionary rule from *Matter of Garcia-Flores*). When the BIA adopted this rule from *Calderon-Medina*, supra fn. 15, the test was phrased with only two elements: (1) the regulation was created to serve "a purpose of benefit to the alien," and (2) the regulatory violation "prejudiced interests of the alien which were protected by the regulation." *See Garcia-Flores*, 17 I. & N. Dec. at 327-29. These tests are equivalent; the BIA assumed but did not explicitly enumerate the Ninth Circuit's first prong of the test, which was that the agency did in fact violate a regulation.

[20] *Sanchez*, 904 F.3d at 650.

[21] *Id*. at 649, 656.

[22] *Id*. at 652.

[23] ""[W]e have long regarded racial oppression as one of the most serious threats to our notion of fundamental fairness and consider reliance on the use of race or ethnicity as a shorthand for likely illegal conduct to be `repugnant under any circumstances.'" *Sanchez*, 904 F.3d at 656. (citing *Gonzalez-Rivera v. INS,* 22 F.3d 1441, 1449 (9th Cir. 1994)) (quoting *United States v. Martinez-Fuerte,* 428 U.S. 543, 571 n.1 (1976)).

[24] *Id*. at 653. Note that in *Pretzantzin v. Holder*, the Second Circuit found that a Guatemala birth certificate obtained from the consulate could still be suppressed, because ICE did not admit how or why they asked for it, and it was possibly obtained solely on the basis of a name given in an unlawful search and seizure, and thus was still fruit of the poisonous tree. *Pretzantzin v. Holder*, 736 F.3d 641, 651 (2d Cir. 2013).

violations discussed above.[25] In *Sanchez*, the Court slightly modified this test by adopting the standard from a Second Circuit case: *Rajah v. Mukasey*.[26] In *Rajah*, the Second Circuit reviewed various regulatory violations by the INS and held that such violations are not grounds for termination "absent prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights."[27] On the facts in *Rajah*, the Second Circuit ruled that this standard had not been met; the violations were "harmless" and "non-egregious."[28]

The *Sanchez* Court adopted this language from *Rajah* in modifying the prior test for termination: a petitioner is entitled to termination where "(1) the agency violated a regulation; (2) the regulation was promulgated for the benefit of petitioners; and (3) the violation was egregious, meaning that it involved conscience-shocking conduct, deprived the petitioner of fundamental rights, or prejudiced the petitioner."[29]

Notably, under this test, the respondent may seek to terminate proceedings if the agency's violation *either* prejudiced the respondent *or* the violation was egregious. Prior to *Sanchez* adopting this standard, respondents in the Ninth Circuit had to show prejudice in order to terminate proceedings; egregiousness or conscience-shocking conduct were not factored into the analysis.[30] According to *Sanchez* (and *Rajah*), either prejudice or egregiousness may justify termination. That means that in cases of egregious violations, the respondent is not required to show prejudice, and likewise a respondent who can show prejudice may not need to show egregiousness. This is a significant win for petitioners who can now seek termination in egregious cases even if they cannot show prejudice resulting from the violations.

As discussed above, Sanchez was able to show that the Coast Guard violated 8 C.F.R. § 287.8(b)(2) and that the regulation was designed for the benefit of petitioners like Sanchez. Unlike *Rajah*, where the Court found the violations 'harmless,' the Ninth Circuit found that Sanchez made a prima facie showing that the Coast Guard egregiously violated 8 C.F.R. § 287.8(b)(2) when they detained him without justification, from which the Court inferred racial discrimination. The Court stood by longstanding precedent that racially motivated arrests are egregious violations,[31] finding that "[t]he violation alleged by Sanchez here is egregious both for its grotesque nature and its patent unlawfulness."[32] This satisfies the third prong of the termination test: even though the violation did not prejudice Sanchez' case overall, because ICE had alternative evidence of alienage, racial profiling is per se egregious.[33] Following *Sanchez*, petitioners may seek termination of proceedings when ICE or CBP has detained them on the basis of race.

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[25] *Calderon-Medina*, 591 F.2d at 531.

[26] *See Rajah v. Mukasey*, 544 F.3d 427, 447 (2d Cir. 2008) (denying termination for regulatory violations that the Court did not find sufficiently egregious).

[27] *Rajah*, 544 F.3d at 448. The *Rajah* Court distinguished between "pre-hearing" violations such as those before them from those in prior Second Circuit precedents that occurred "during a deportation hearing." *Id.* at 546-47. In *Sanchez,* the Ninth Circuit found that violations during a hearing may warrant a new hearing, while egregious pre-hearing violations can only be remedied with termination and entirely new proceedings. *Sanchez*, 904 F.3d at 655.

[28] *Id.*

[29] *Sanchez*, 904 F.3d at 655.

[30] *See Calderon-Medina*, 591 F.2d at 531.

[31] *See Orhorhaghe v. INS*, 38 F.3d 488, 492 (9th Cir. 1994).

[32] *Sanchez*, 904 F.3d at 656.

[33] *Id*. at 656.

The third prong of *Sanchez*' termination test allows for termination if there is an egregious regulatory violation or when the regulatory violation prejudiced the petitioner.[34] In many incidents, egregious regulatory violations will also prejudice the petitioner, most clearly in cases where compliance with the regulation is mandated by the Constitution.[35] But the two categories are not identical. The *Sanchez* holding becomes a helpful tool for practitioners because it allows for termination when the regulatory violation is egregious, even when the petitioner cannot effectively show prejudice.

The *Sanchez* Court found that in this case, suppressing the evidence in response to the agency's violation would not cure the harm that the egregious violation caused, because ICE had alternative evidence. Therefore, termination of the proceedings was the only way to truly cure the harm. The Court concluded that the prima facie showing of an egregious violation justified a remand to the immigration court, to afford the Government the opportunity to rebut the prima facie showing.[36]

C. Denial of Rehearing en Banc

The Honorable Judge O'Scannlain of the Ninth Circuit requested a vote to hear *Sanchez v. Sessions* en banc, but the vote failed to pass.[37] Nonetheless, the en banc denial included lengthy arguments from the judges. In defense of the panel decision, Judge Paez said, "slap-on-the-wrist repudiations that permit the agency to pick up where it left off despite racial profiling do little to safeguard individuals in this country from immigration enforcement practices that 'teeter[ ] on the verge of the ugly abyss of racism.'"[38] The dissent, led by O'Scannlain, claimed that the *Sanchez v. Sessions* termination analysis's "irredeemable flaw is its attempt to cure an illegal arrest—a quintessential Fourth Amendment violation—with a remedy that the Fourth Amendment would never authorize."[39] Thus, the dissent claimed that the Fourth Amendment allows for the exclusion of evidence, but does not allow for termination.[40] However, this argument did not carry the day.

Practitioners concerned about future rulings from the Ninth Circuit on this question should argue that the Court's decision in *Sanchez* is not curing a Fourth Amendment violation, rather, the Court is curing the harm caused by an egregious violation of a federal regulation, and longstanding precedent in the Ninth Circuit has recognized this remedy.[41] This federal regulation is designed to parallel the Fourth Amendment in order to grant immigrants adequate protection from unreasonable searches and seizures. Furthermore, in *Perez Cruz v. Barr*, the Ninth Circuit reiterated its holding from *Sanchez* that seizures without individualized suspicion violate 8 C.F.R. § 287.8(b)(2), and because this regulation is mandated by the Constitution, prejudice is presumed.[42]

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[34] *Id*. at 655.

[35] *Garcia Flores,* 17 I. & N. Dec. at 329.

[36] *Id*. at 655-57.

[37] *Sanchez v. Barr*, 919 F.3d 1193, 1194 (9th Cir. 2019). Six justices joined in a dissent of the denial of rehearing en banc.

[38] Barr, 919 F.3d at 1196 (Paez, J., concurring) (quoting *Maldonado*, 763 F.3d at 174 (Lynch, J., dissenting)).

[39] *Id*. at 1198.

[40] *Id*.

[41] *See United States v. Calderon-Medina*, 591 F.2d 529, 531-32 (9th Cir. 1979) (holding that violation of a regulation may be ground to invalidate a removal order if the regulation serves a purpose of benefit to the respondent and the respondent was prejudiced by the violation).

[42] *Perez Cruz v. Barr*, 926 F.3d 1128, 1145 (9th Cir. 2019) (granting suppression of evidence of alienage obtained by ICE in a workplace raid, where the respondent was seized, handcuffed, and interrogated about his immigration status without any individualized suspicion that he was not a citizen).

IV. Key Takeaways from *Sanchez v. Sessions*

- In *Sanchez v. Sessions*, the Ninth Circuit adopted a broader standard for termination based on regulatory violations from the Second Circuit. Practitioners can now request the termination of a removal case based on an egregious regulatory violation, even if they cannot show prejudice to the respondent from the regulatory violation.
- *Sanchez v. Sessions* does not alter the exclusionary rule. Practitioners can still request the suppression of evidence if they have been prejudiced by a regulatory violation that led to that evidence, or if officers committed an egregious Fourth Amendment violation.
- *Sanchez* does not raise the standard for termination based on regulatory violations; it expands the standard by allowing termination of proceedings in the case of egregious regulatory violations.
- In the regulatory violation context, because the requirements for suppression of evidence require prejudice, but termination requires either prejudice or egregiousness, the requirements for termination are satisfied whenever the motion to suppress standard is satisfied.
- *Sanchez* and *Perez Cruz* found that 8 C.F.R. 287.8(b)(2) requires the agency to have particularized suspicion in order to seize someone, and that violations of this regulation can justify both suppression and termination. Because the regulation parallels the Fourth Amendment, it is mandated by the Constitution and prejudice to the respondent as a result of the violation is presumed.
- Detentions and interrogations based solely on racial and ethnic profiling are per se egregious violations of 8 C.F.R. 287.8(b)(2). In *Sanchez*, the Ninth Circuit cited no specific facts that showed racial animus; the mere detention of Latinx men on a boat without any particular suspicion while they called Customs and Border Protection was enough for a prima facie case of a racially motivated arrest. This clear finding from the Ninth Circuit helps practitioners move for termination when ICE or CBP stop their clients without justification, even if they don't have smoking gun evidence about officers using racial slurs or other clear evidence of racial prejudice.

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