



***Compean* Decision By Attorney General Mukasey Regarding Ineffective Assistance of Counsel In Immigration Proceedings**

1. WHAT DOES THE DECISION SAY?

In a highly unusual move at the very end of the outgoing administration, Attorney General Mukasey issued the *Compean* decision on January 7, 2009, holding that there is no constitutional or statutory right to effective assistance of counsel in immigration proceedings. The *Compean* decision was rushed through without input from many groups and individuals—such as the American Bar Association and more than 25 partners from some of the most prestigious law firms in the country—who sought but were denied a meaningful extension of time to file briefs. Attorney General Mukasey’s last-minute decision overrules the agency’s longstanding position—first announced in 1988 (*In re Lozada*) and reaffirmed after careful consideration in 2003 (*In re Assaad*)—and renders immigration proceedings fundamentally unfair.

The decision also contradicts the rulings of **seven** U.S. Courts of Appeals, which have held that an immigrant has a constitutional due process right to effective assistance of counsel, including:

- * *Aris v. Mukasey*, 517 F.3d 595, 600-01 (2d Cir. 2008) (holding that “due process concerns may arise when retained counsel provides representation in an immigration proceeding that falls so far short of professional duties as to ‘impinge[] upon the fundamental fairness of the hearing’”)
- * *Fadiga v. Attorney General*, 488 F.3d 142, 155 (3d Cir. 2007) (“A claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment—i.e., as a violation of that amendment’s guarantee of due process.”)¹

2. WHAT ARE THE CONSEQUENCES OF THE DECISION FOR THE FAIRNESS OF THE SYSTEM AND THE RIGHTS OF VULNERABLE IMMIGRANTS?

The decision **fundamentally undermines the fairness of deportation proceedings**. Deportation is an extremely serious consequence that the Supreme

¹ See also *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane v. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2005). Only two courts of appeals (the Fourth and Eighth) have issued decisions that appear to categorically reject a due process right to effective assistance of counsel, and those decisions were issued recently, in response to a major assault by the Bush Administration in the courts on the constitutional, legal right to effective assistance of counsel. See *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008); *Afanwi v. Mukasey*, 526 F.3d 788, 798-99 (4th Cir. 2008).

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Court has observed “may result in the loss ‘of all that makes life worth living.’” *Bridges v. Wixon*, 326 U.S. 135, 147 (1945). Immigrants are especially vulnerable to fraudulent and incompetent attorneys due to language barriers, lack of familiarity with the U.S. legal system, and the inability to take any meaningful action against an incompetent attorney after deportation. Absent a remedy for ineffective assistance of counsel, deportation decisions are less likely to be based on an accurate assessment of the law and the facts, and more likely to be based on the errors of an incompetent attorney.

The decision will have **tragic consequences for vulnerable immigrants**. The federal courts recognize that immigrants with meritorious claims and their families too frequently lose their deportation cases due to ineffective assistance. Robert A. Katzmann (Judge of the U.S. Court of Appeals for the Second Circuit), *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008) (noting that, as a federal appellate judge he has often seen cases in which, “if only the immigrant had secured adequate representation at the outset, the outcome might have been different”).

Prior to the *Compean* decision, Courts of Appeals have protected such immigrants by holding that they were entitled to a new hearing when ineffective assistance of counsel was proven:

- * Garfield Aris had come to the United States lawfully at the age of twelve, and his wife, daughter, stepdaughter, and mother were U.S. citizens. He was nevertheless ordered deported because his attorney did not submit his immigration application on time and wrongly told him he had no immigration hearing, causing him to miss his court date. Even worse, his lawyer never told him he had lost his case and for the next ten years he lived under the mistaken belief that his immigration problems were resolved, until he was suddenly arrested by immigration authorities. *Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008).
- * Fridoon Nehad came to the United States lawfully at the age of 16 from Afghanistan. He wished to apply for asylum because his father worked as a translator for the U.S. forces at Guantanamo, and the family members of other Guantanamo translators had been killed by the Taliban in Afghanistan. The attorney Nehad hired, however, misled him about the law and unethically threatened to withdraw just two hours before his hearing if Nehad filed the asylum application. Nehad therefore did not file the application and was ordered deported. *Nehad v. Mukasey*, 535 F.3d 962 (9th Cir. 2008).
- * Marta Ahmed, an immigrant from Ethiopia, married a U.S. citizen and wished to adjust her status to that of a lawful permanent resident. Her attorneys, however, filed her application 240 days late and lied to her about both the law and the lateness of the application. As a result of the lateness, the Board of Immigration Appeals refused to permit her to apply for adjustment. *Ahmed v. Mukasey*, 548 F.3d 768 (9th Cir. 2008).

As a result of *Compean*, countless immigrants and their families will now lose their cases—and thus be deported—through no fault of their own.

3. DO IMMIGRANTS HAVE ANY REMEDY LEFT FOR INEFFECTIVE ASSISTANCE OF COUNSEL?

Compean purports to substitute a new, inadequate and unreasonable procedure in place of the pre-existing rules governing ineffective assistance of counsel. Immigrants are left with a

process that will cause many to be deported without a meaningful opportunity to demonstrate that they were victims of ineffective assistance.

- * *Compean* replaces the legal right to ineffective assistance of counsel with a “discretionary” administrative remedy in an apparent attempt to minimize judicial protection for immigrants.
- * *Compean* raises the measure of proof required to show ineffective assistance of counsel to an unreasonable level that is not required by any Court of Appeals.
- * *Compean* creates new onerous mandatory procedural requirements for an immigrant attempting to demonstrate ineffective assistance, making it likely that immigrants’ claims will be denied for purely technical reasons.
- * Finally, the government can deport individuals before they have even received an administrative decision on their ineffective assistance argument, potentially nullifying any remedy.

4. DOES THE NEW ATTORNEY GENERAL HAVE AUTHORITY TO RECONSIDER COMPEAN?

Yes. The Attorney General has authority under current regulations to reconsider decisions by the Board of Immigration Appeals (8 C.F.R. 1003.1(h)(1)(i)) and nothing precludes reconsideration by the Attorney General of a decision his office has previously issued. *See Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008) (vacating stay order issued by previous Attorney General). As *Compean* was issued at the very end of the outgoing administration, would impose drastic and systemic change in substantive rules governing removal proceedings, and was issued with minimal input, the decision should be subject to the same principles as the White House Memorandum of January 20, 2009, 74 Fed. Reg. 4435 (Jan. 26, 2009), in which the President requested that all new regulations issued by the departing administration be submitted for review and approval by the new agency heads. By immediately vacating *Compean*, the Attorney General can undo the precipitous and lasting damage it would impose while carefully and deliberately considering whether and how the Department of Justice may want to address a matter that is essential to fundamental fairness and is embedded in the jurisprudence of the Courts of Appeals.

5. WHAT SPECIFIC ACTIONS SHOULD THE ATTORNEY GENERAL TAKE?

The new Attorney General should immediately vacate the *Compean* decision, restoring the pre-*Compean* status quo, and consider whether and how interested parties may address the questions raised by the ineffective assistance of counsel issue.

6. WAS COMPEAN LEGALLY FLAWED?

Yes. The decision reached a result contrary to the holdings of seven U.S. Courts of Appeals. Among other things, the *Compean* decision did not take sufficient account of the fact that immigration proceedings are different than the other proceedings examined by Attorney General Mukasey.

- * Contrary to *Compean*’s suggestion, in immigration proceedings, unlike virtually all other civil proceedings, an individual’s **liberty** is at stake. *See INS v. St. Cyr*, 433 U.S. 289, 300, 308 (immigrants may challenge their deportation in a habeas corpus petition because

their liberty is at stake); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (deportation “is a penalty” that deprives an immigrant of his liberty and “[m]eticulous care must be exercised lest the procedure by which he is deprived of that *liberty* not meet the essential standards of fairness”) (emphasis added); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir.1999) (aliens have a right to effective assistance of counsel under the Due Process Clause because deportation proceedings implicate an alien's liberty interest); *Rosales v. Bureau of Immigration and Customs Enforcement*, 426 F.3d 733, 735 (5th Cir. 2005) (“[A] final deportation order subjects an alien to a restraint on liberty sufficient to place the alien ‘in custody’”).

- * Immigration proceedings, unlike many other civil administrative proceedings, are adversarial, with a trained government attorney prosecuting each case.
- * Immigration judges and the Board of Immigration Appeals, unlike members of the federal and state judiciary, are subordinate to the Attorney General and other employees of the Executive Branch, which decides whether to institute immigration proceedings.
- * Immigration proceedings are unusually complex and immigrants often face serious obstacles—such as language and cultural barriers—in understanding the proceedings. *See Zhang v. United States*, 506 F.3d 162, 169 (2d Cir. 2007) (“Immigration law is a notoriously complex and constantly shifting area of law.”).