



February 6, 2009

Hon. Eric Holder  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

RE: *Matter of Compean*, 24 I & N Dec. 710 (A.G. 2009)

Dear Attorney General Holder:

The American Civil Liberties Union (ACLU) submits this *amicus* letter-brief in support of petitioner's motion for vacatur and reconsideration of Attorney General Mukasey's decision in *Matter of Compean*, 24 I & N Dec. 710 (A.G. 2009), which eliminated the longstanding legal right to effective assistance of counsel.

The ACLU applauds Attorney General Holder's statement that he will reexamine the *Compean* decision.<sup>1</sup> Consistent with that statement, the ACLU respectfully requests that Attorney General Holder immediately vacate *Compean* to avoid destabilizing the established practice and precedent in the majority of circuit courts and in the Board of Immigration Appeals and to preserve the fundamental fairness of immigration proceedings pending the Attorney General's deliberate and considered reevaluation. Absent vacatur, the federal courts of appeals will be confronted with immediately addressing the contours of the *Compean* ruling, and the Department of Justice will be obliged to decide whether to defend the ruling in potentially hundreds of pending cases throughout the country before the Attorney General has adequately considered whether to adopt the radical departure from precedent that Attorney General Mukasey has imposed.

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<sup>1</sup> See Written Questions for Eric Holder from Senator Hatch, Question 7, *available at* <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/HatchToHolder.pdf> (last checked Feb. 4, 2009); Written Questions for Eric Holder from Senator Feingold, Question 12, *available at* <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/upload/FeingoldToHolder.pdf> (last checked Feb. 4, 2009).

The ACLU further requests that the Attorney General provide a process for all interested parties to fully address this important and complex issue. As would be more fully set forth in such submissions, the Attorney General should reaffirm the enforceable legal right—grounded in the immigration statutes and regulations and constitutional due process principles—to effective assistance of counsel in immigration proceedings. In doing so, the Attorney General should also use this opportunity to ameliorate the several procedural impediments to effectuating this right that have developed.

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## INTRODUCTION

In *Compean*, Attorney General Mukasey issued a ruling on January 7, 2009, less than two weeks before the end of the Bush Administration, that precipitously rejected the long-standing position of seven courts of appeals and the Board of Immigration Appeals (BIA). Attorney General Mukasey's decision overturned the established right to effective assistance of counsel and held that neither the Constitution, statute nor regulations entitled immigrants in removal proceedings to effective legal representation. The decision not only swept away decades of precedent, but did so just days before the end of Attorney General Mukasey's tenure, based on a truncated briefing schedule over the objection of the American Bar Association (ABA), the ACLU, and other organizations. Among the letters seeking additional time was a submission from partners at 25 major law firms that provide *pro bono* representation in immigration proceedings and are familiar with the consequences of deficient legal representation. *See* Attached Law Partners Letter.

The last-minute nature of the *Compean* ruling, its dramatic departure from longstanding precedent, and its significance to the administration of justice and the fundamental fairness of immigration proceedings compels reconsideration. The ruling, issued unilaterally by Attorney General Mukasey, should be subjected to the scrutiny set forth in the White House Memorandum of January 20, 2009, 74 Fed. Reg. 4435 (Jan. 26, 2009), in which the President determined that all new administrative regulations issued by the departing administration should be submitted for review and approval by the new agency heads. Accordingly, Attorney General Holder should exercise his unquestioned authority to vacate *Compean* and to carefully and deliberately consider whether the Department of Justice should

pursue a position so overwhelmingly at odds with the vast majority of courts of appeals and with ensuring fundamental fairness in immigration proceedings.

**I. THE ATTORNEY GENERAL HAS THE AUTHORITY TO VACATE *COMPEAN* AND REEXAMINE IT IN A FAIR AND OPEN PROCESS.**

The Attorney General has the authority both to request that the BIA refer cases to him for decision and to vacate and reconsider previous Attorney General decisions. *See* 8 C.F.R. § 1003.1(h)(1)(i); *Matter of R-A-*, 24 I & N Dec. 629 (A.G. 2008) (vacating stay order issued by previous Attorney General). The Attorney General should therefore remedy the problematic decisionmaking process that led to *Compean* by vacating it and seeking comprehensive input from all interested parties.

In contrast to an open and fair process, *Compean* was issued with no public notice and without a reasonable time for input. On August 6, 2008, Attorney General Mukasey issued an order indicating that he would reconsider the established nationwide BIA precedent governing ineffective assistance of counsel. He did so by issuing an order addressed only to the actual parties in the case. The order was not made public on the Department's website, nor is amicus aware of any publication on any readily available electronic database such as Lexis or Westlaw. Only after a select few organizations were contacted by the Executive Office for Immigration Review (EOIR) (not the Attorney General) did the Order become known to most immigration lawyers, advocacy organizations and the private bar. As soon as the request for briefing became known, the ACLU, along with dozens of non-profit organizations and prominent attorneys from across the country, requested an extension to file amicus briefs on the critically important issues raised in the Order. Among the requesters were partners from many of the country's largest and most respected law firms who recognized the extraordinary nature of the Attorney General's announced action. The requests were all denied, and Attorney General Mukasey allowed only a short three week extension to address issues of pervasive importance. As a result, many recognized experts were unable to submit briefs.

No urgent circumstances or emergent reasons warranted denying ample time for briefing. The respondents themselves either sought or did

not oppose the requests for extension of time. Attorney General Mukasey nonetheless insisted on a limited briefing schedule, seemingly so that a final decision could issue before the new Administration took office.

## II. THE *COMPEAN* DECISION DRAMATICALLY DIVERGES FROM PRIOR PRECEDENT AND WILL HAVE IMMEDIATE CONSEQUENCES FOR THE FUNDAMENTAL FAIRNESS OF IMMIGRATION PROCEEDINGS AND IMMIGRATION LITIGATION IN THE FEDERAL COURTS.

Careful reconsideration is also critical because the *Compean* decision departs dramatically from longstanding agency precedent and from the view taken by the majority of courts of appeals on an issue of great significance. If the decision is not vacated immediately, immigration judges, the Board of Immigration Appeals, and the courts of appeals will be forced to confront an abrupt change in agency position. Vacatur will permit the Attorney General to carefully consider all possible approaches to the serious problem of ineffective assistance of counsel without the impediment of the *Compean* decision.

The *Compean* decision overrules the agency's own longstanding position, first announced twenty years ago in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). Although immigrants do not have a right to government appointed counsel, the BIA in *Lozada* recognized that ineffective assistance of counsel in immigration proceedings may violate the legal right to a fair proceeding. *Compean*, 24 I & N Dec. at 712. Moreover, just five years ago, the BIA, after careful consideration, reaffirmed *en banc* its view that an immigrant has a legal right to raise a claim of ineffective assistance of counsel in immigration proceedings. See *Matter of Assaad*, 23 I & N Dec. 553, 554 (BIA 2003). *Lozada* and *Assaad* have been routinely applied by the BIA over the past twenty years in cases finding that an immigrant's right to effective assistance of counsel was violated. See, e.g., *Matter of Cortez-Bravo*, 2008 WL 5537824 (BIA Dec. 23, 2008); *Matter of Weiqing He*, 2008 WL 5244716 (BIA Dec. 2, 2008).

The *Compean* decision did not just depart from longstanding agency precedent – it is in direct conflict with the decisions of seven federal courts of appeals. The First, Second, Third, Sixth, Ninth, Tenth and Eleventh Circuits have all held that ineffective assistance of counsel in immigration proceedings can violate the right to a fair proceeding, a right grounded in both the Immigration and Nationality Act (INA) and the Fifth Amendment's

Due Process Clause. See, e.g., *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Aris v. Mukasey*, 517 F.3d 595, 600-01 (2d Cir. 2008); *Fadiga v. Attorney General*, 488 F.3d 142, 155 (3d Cir. 2002); *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). See also *Barthold v. INS*, 517 F.2d 689, 690 (5th Cir. 1975) (assuming, without deciding, that an alien is entitled to effective assistance of counsel).<sup>2</sup>

The consequences of *Compean*'s radical departure from agency practice and circuit law are substantial. Deportation is a severe consequence that the Supreme Court has observed "may result in the loss 'of all that makes life worth living.'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945). At the same time, ineffective assistance of counsel in immigration proceedings is both frequent and serious. The Second Circuit recently noted, for example, that "[w]ith disturbing frequency, this Court encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country," *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008). In fact, *Compean* itself acknowledges that "[t]he deficiencies of the immigration bar are well known." 24 I & N Dec. at 728 (quoting *Stroe*, 256 F.3d at 504). Judge Robert Katzman of the Second Circuit has made similar observations. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 9 (2008).

The fundamental fairness of immigration proceedings depends on the right of immigrants to obtain a remedy when they receive ineffective assistance of counsel. Absent a remedy for ineffective assistance, the accuracy of the proceedings by which the government determines whether to

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<sup>2</sup> *Compean* wrongly suggests that the Seventh Circuit has rejected the constitutional right to effective assistance of counsel in immigration proceedings. 24 I & N Dec. at 713. After expressing some hesitancy about the issue, see *Stroe v. INS*, 256 F.3d 498, 501 (7th Cir. 2001), the Seventh Circuit has more recently recognized that deficient performance of counsel may constitute a violation of the Fifth Amendment. See *Jeziarski v. Mukasey*, 543 F.3d 886, 890 (7th Cir. 2008) ("The complexity of the issues, or perhaps other conditions, in a particular removal proceeding might be so great that forcing the alien to proceed without the assistance of a competent lawyer would deny him due process of law.") (per Posner), *pet. for cert. filed*, 08-656 (Nov. 17, 2008). Only two courts of appeals have held that there is no constitutional, legal right to effective assistance of counsel in removal proceedings, and they have done so only recently in response to a major initiative by the Bush administration in the courts on the constitutional right to 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), *pet. for cert. filed*, 08-906 (Jan. 16, 2009).

subject an immigrant to the severe consequence of deportation is left in doubt; the government may obtain final orders of removal based not on a careful adjudication of the relevant facts and law, but rather on the unprofessional errors of an incompetent attorney. See Katzmann, *The Legal Profession*, at 9 (noting that as a federal appellate judge he often sees cases in which “the outcome might have been different” if the immigrant had “adequate counsel”). The *Compean* decision will thus have immediate consequences for immigrants who will now face a greater risk of being deported through no fault of their own.

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Furthermore, if not withdrawn, the *Compean* opinion will have immediate practical consequences for immigration adjudication in the BIA and the federal courts, and for the ability of the Attorney General to carefully consider all aspects of the problem. The decision instructs the BIA and immigration judges to apply the *Compean* framework *even in those circuits that have held that there is a constitutional right to effective assistance of counsel*. *Compean*, 24 I & N at 730 n.8. Given the longstanding rule that the BIA and immigration judges must comply with the constitutional decisions of the circuit in which the case arises, the BIA will struggle with conflicting dictates from the courts and the Attorney General. Any decision to ignore circuit law based on *Compean*'s dictate will almost immediately lead to litigation in the courts of appeals that will compel the Attorney General to defend or address the flawed *Compean* ruling before he has had the opportunity to adequately reconsider the issue.

More generally, the Attorney General will confront *Compean* in the many cases raising ineffective assistance of counsel in immigration proceedings that appear in the courts of appeals on a near daily basis. The *Compean* decision and the ensuing immediate litigation in the courts of appeals will prevent the Attorney General from carefully considering all possible approaches to the very serious problem of ineffective assistance of counsel, including, for example, promulgation of regulatory provisions setting forth a fair, workable and constitutionally-adequate framework for ensuring the right to effective assistance of counsel.

Given the incredible import of the *Compean* decision, the Attorney General should vacate the opinion and take a careful and deliberate look at all of the legal and practical issues related to ineffective assistance of counsel.

### III. **COMPEAN FAILED TO CAREFULLY ADDRESS THE COMPLEX LEGAL QUESTIONS UNDERLYING A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**

Reconsideration of *Compean* is also required because it did not sufficiently acknowledge and examine the many complex legal issues raised by ineffective assistance of counsel in immigration proceedings. Among the failings of *Compean* are the following:

1. In rejecting a legal basis for the right to effective assistance of counsel, the *Compean* decision did not take sufficient account of the fact that immigration proceedings are unlike the other types of proceedings discussed in the decision. Indeed, courts have long recognized that immigration proceedings are unique in a number of important ways.

Contrary to Attorney General Mukasey's suggestion, *see Compean*, 24 I & N Dec. at 718 n.3, the Supreme Court has made clear that *liberty* is at stake in deportation proceedings. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001); *id.* at 308 (citing a long line of historical habeas immigration cases and stating that "consistent with its common-law antecedents" immigrants may challenge their deportation "in a habeas corpus petition" because their liberty is at stake); *Bridges*, 326 U.S. at 154 ("[In a deportation proceeding,] the liberty of an individual is at stake. . . . Though deportation is not technically a criminal proceeding . . . [it] is a penalty" and "[m]eticulous care must be exercised lest the procedure by which [an immigrant] is deprived of . . . liberty not meet the essential standards of fairness."); *see also Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999) (noting that aliens have a right to effective assistance of counsel under the Due Process Clause because deportation proceedings implicate an alien's liberty interest).

Moreover, in immigration proceedings the individual's liberty is put in jeopardy by an enforcement action *initiated by the government*. Congress is thus constitutionally required by both the Due Process Clause and the Suspension Clause to provide for full and fair administrative hearings and judicial review. *See St. Cyr*, 433 U.S. at 308.

Immigration proceedings are different in many other significant ways as well. As many courts have noted, immigration proceedings are enormously complex and immigrants often face serious obstacles—such as language and cultural barriers—in effectively presenting their cases. *See, e.g., Nehad*, 535 F.3d at 967 (“Representation by competent counsel is particularly important in removal proceedings because the proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.”) (internal quotation marks omitted); *Aris*, 517 F.3d at 600 (noting that competent representation is especially important for immigrants in removal proceedings due to language and cultural barriers); *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007) (same). And, unlike many civil administrative proceedings, immigration proceedings are adversarial, with a trained government attorney prosecuting each case.

Given these significant and well-recognized differences between immigration proceedings and other proceedings in which there is no right to appointed counsel, Attorney General Mukasey’s single footnote in *Compean* suggesting that there is no relevant “liberty” at stake in immigration proceedings is plainly wrong and insufficient to justify the sweeping evisceration of fundamental fairness that *Compean* erects. *See Compean*, 24 I & N Dec. at 718 n.3.

2. *Compean* also conclusorily rejects, in two sentences, the view that “a non-constitutional source of law—either the immigration statutes or departmental regulations—entitle an alien to reopen his removal proceedings based on his lawyer’s deficient performance.” *See Compean*, 24 I & N at 727. In fact, there are a number of statutory and regulatory grounds on which the BIA can and should provide a remedy for ineffective assistance of counsel.

The Immigration and Nationality Act (INA) and BIA regulations contain a detailed scheme guaranteeing the right to counsel and a system of fair proceedings. *See, e.g.*, 8 U.S.C. §§ 1362, 1229a(b)(4)(A) (creating a statutory right to counsel); 8 C.F.R. § 287.3(c) (government must inform person of the right to counsel and provide list of free legal services); 8 U.S.C. §§ 1229(a)(1)(E) (same). In addition to the right to secure counsel, immigrants are guaranteed by statute the right to a reasonable opportunity to examine the evidence; the right to present evidence; the right to cross-examine witnesses; the right to an administrative appeal; and the right to



seek judicial review. See 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 3.1(b); 8 U.S.C. § 1101(a)(47)(B); 8 U.S.C. § 1252(a).

As courts of appeals have recognized, incompetent counsel may abrogate these statutory rights and render the proceeding fundamentally unfair. See *Sanchez v. Keisler*, 505 F.3d 641, 648 (7th Cir. 2007) (observing that “aliens have a statutory right to retain counsel, and . . . adequacy of representation is an important factor in assuring that the statutory right to a fundamentally fair proceeding is respected”); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) (“[A]liens have a statutory right to counsel” and “[i]mplicit in the right to counsel is the requirement that the assistance rendered not be ineffective.”).

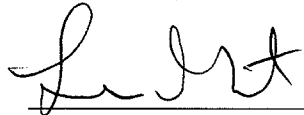
3. Further, *Compean* fails to carefully assess the procedural requirements that have presented serious impediments to pursuing ineffective assistance of counsel claims. Rather than considering the problems associated with implementation of *Lozada*, *Compean* introduced even more burdensome procedural hurdles to ineffective assistance of counsel claims. In *Lozada*, the BIA created three procedural requirements for reopening immigration proceedings based on ineffective assistance of counsel. See *Lozada*, 19 I & N Dec. at 639. Several courts of appeals have concluded that strict compliance with these procedural steps is not required. See, e.g., *Dakane v. Attorney General*, 399 F.3d 1269, 1274 (11th Cir. 2004) (observing that “exact” compliance with the procedural requirements of *Lozada* is not obligatory); *Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) (noting that “we have not hesitated to address ineffective assistance of counsel claims even when an alien fails to comply strictly with *Lozada*”). Rather than addressing these deficiencies, *Compean* imposed additional requirements and stated that all requirements are now “mandatory,” despite contrary holdings in the courts of appeals. Reconsideration of *Compean* would provide an opportunity to reassess and consider reforming procedural hurdles that have proven inappropriate.

In sum, *Compean* departs dramatically from existing precedent and undermines fundamental fairness. The ACLU respectfully requests that the Attorney General immediately vacate *Compean* and permit interested parties to provide briefing on this weighty issue.

## CONCLUSION

Petitioner's motion for reconsideration should be granted, *Compean* should be vacated, the Attorney General should determine whether further consideration is warranted, and all interested parties should be invited to submit full and deliberate briefing on the issues relevant to this important question.

Respectfully submitted,



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**Attachment**

OFFICE OF THE ATTORNEY GENERAL  
Washington, DC

ORDER NO. 2990-2008

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In the Matter of J-E-C-M	)	
	)	
	)	
	)	File Nos.: A079 506 797
	)	A079 506 798
	)	A079 506 799
	)	A079 506 800
	)	
Review of Board of Immigration	)	
Appeals Decision by Attorney	)	
General	)	

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ORDER NO. 2991-2008

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In the Matter of Bangaly	)	
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	)	File No.: A078 555 848
	)	
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Review of Board of Immigration	)	
Appeals Decision by Attorney	)	
General	)	

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ORDER NO. 2992-2008

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In the Matter of Compean	)	
	)	
	)	
	)	File No.: A078 566 977
	)	
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	)	
Review of Board of Immigration	)	
Appeals Decision by Attorney	)	
General	)	

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September 4, 2008

BY HAND

The Honorable Michael B. Mukasey  
Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Office of the Attorney General, Room 5114  
Washington, DC 20530

Re: Right to Counsel – Immigration Proceedings

Dear Attorney General Mukasey:

The undersigned potential amici respectfully submit this letter to support the request of petitioners in the above-captioned matters for an extension of time to file briefs to November 15, 2008. As partners in law firms that provide pro bono legal representation to aliens seeking asylum, withholding of deportation and other relief in immigration cases, we are familiar with the poor quality of legal services many aliens receive in the immigration system. The cases are legion in which aliens are not informed of their rights, are victims of counsel or other authorized representatives who take their trust and money but then do not provide competent service, if any, to them, or are not even informed of basic matters such as the dates of hearings or final dispositions.

The answers to the four questions on which the Attorney General has requested briefing could have a profound impact on our immigration system and the quality of legal representation those who are indigent receive in what is frequently their first experience with the U.S. justice system. Those four issues each also present difficult constitutional or legislative questions and shape the quality of justice and fairness in the civil administration of the Immigration and Nationality Act. The brief extension of time requested will help ensure that the answers to those questions - whatever they may be - are reached after a process that in fact and in perception permits the views of all interested parties to be fully presented and fully considered.

Respectfully Submitted,

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<sup>1</sup> The law firm of each signatory hereto is listed for identification purposes only and not to suggest that the law firm itself subscribes to these views. This group of lawyers is still in formation.

## CERTIFICATE OF SERVICE

I, Konny Huh, declare as follows:

I am employed in the City, County and State of New York. I am over the age of eighteen years and am not a party to the within action. My business address is the American Civil Liberties Union Foundation, Immigrants' Rights Project, 125 Broad Street, 18<sup>th</sup> Floor, New York 10004.

On the 6th day of February, 2009, I emailed the original copy of this Letter-Brief to [AGCertification@usdoj.gov](mailto:AGCertification@usdoj.gov), and sent three copies by overnight Federal Express to:

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I also mailed a copy of this Letter-Brief by United States Postal Service, first class mail to the following:

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Dated: February 6, 2009

  
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