



AMERICAN IMMIGRATION LAW FOUNDATION

February 6, 2009

Attorney General Eric Holder
U.S. Department of Justice
950 Pennsylvania Ave, NW
Office of the Attorney General
Room 5114
Washington, DC 20530

Re: *Matter of Compean, Bengaly, J-C-C- et al*
24 I & N Dec. 710 (A.G. 2009)

Dear Attorney General Holder:

Undersigned amici curiae write in support of Respondents' motions to vacate and reconsider the Attorney General's decision in *Matter of Compean*, 24 I & N Dec. 710 (A.G. 2009). In *Compean*, the outgoing Attorney General employed a rarely used procedural device and after an expedited briefing schedule, issued this sweeping decision rejecting the right to counsel and finding that there is no right to remedy ineffective assistance of counsel. The decision overrules decades of precedential decisions from the Board of Immigration Appeals and disagrees with numerous courts of appeals on an issue of great national significance.

We applaud your statement in your Congressional testimony that you intend to reexamine *Compean*.¹ Amici curiae share your view that the Constitution requires removal proceedings to be fundamentally fair and accordingly, agree that it is appropriate to reexamine *Compean* to ensure that all noncitizens are afforded fair proceedings. Given that

¹ In response to written questions about *Compean* from Senators Hatch and Feingold, Mr. Holder responded, "The Constitution guarantees due process of law to those who are the subjects of deportation proceeding. I understand Attorney General Mukasey's desire to expedite immigration court proceedings, but the Constitution requires that those proceedings be fundamentally fair. For this reason, I intend to reexamine the decision should I become Attorney General." Hearings on the Nomination of Eric Holder to be Attorney General before the Senate Judiciary Committee, 111th Cong. (2009) (statement of Eric Holder in response to questions submitted by Sen. Orrin Hatch and Sen. Russ Feingold), available at <http://judiciary.senate.gov/nominations/AttorneyGeneral-EricHolder-QuestionsForTheRecord.cfm>.

Attorney General Mukasey issued *Compean* just days before the end of his term, it is wholly appropriate for you, as you testified, to reexamine the decision in the spirit of the White House Memorandum of January 20, 2009, 74 Fed. Reg. 4435 (Jan. 26, 2009). In the January 20, 2009 Memorandum, the President directed that all new regulations issued by the departing administration be submitted for review and approval by the new agency heads.

Further, the process by which Attorney General Mukasey reviewed these cases and issued *Compean* was too sudden and hurried for many interested parties to consider and file briefs addressing the wide-ranging questions presented. Those briefs that were filed did not cover all the issues Attorney General Mukasey addressed in *Compean*. We respectfully submit that full briefing by all interested parties on all issues raised by the *Compean* decision will assist you in your thoughtful, deliberate review. Therefore, we urge you to vacate *Matter of Compean* and set a briefing schedule that allows briefing by all parties, including amici curiae.²

A. You Have the Authority to Vacate *Compean* and Institute a Fair Process for Reconsideration.

The Attorney General has the authority both to direct that the BIA refer cases to him for decision and to vacate and reconsider any previous Attorney General decision. *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). *See also* 8 U.S.C. § 103(g) (Attorney General shall review administrative determinations in immigration proceedings as necessary for carrying out his duties). Therefore, you can remedy the hasty decision-making process in *Compean* by vacating the decision and permitting briefing by a wide range of interested parties.

B. The *Compean* Decision was Incorrect for Numerous Reasons.

1. Attorney General Mukasey Reached for and Unnecessarily Determined a Constitutional Question.

Attorney General Mukasey improperly reached for and decided a constitutional question in *Compean*. The Supreme Court has made clear that constitutional questions should be reached only as a last resort. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). The Attorney General's pronouncements on the constitutional questions in *Compean* were not necessary either to resolve these cases or even to provide a modified framework for resolution of all ineffective assistance of counsel claims.

² What follows is a truncated summary of some aspects of the brief filed by the American Immigration Law Foundation and other amici (including some of the amici signing on to this letter) on October 6, 2008, in response to the Attorney General's notice (hereafter "AILF brief"). That brief is attached hereto. AILF and amici were not able to anticipate all of the Attorney General's holdings, and thus respectfully request an opportunity to more fully brief the issues raised in *Compean*.

Further, as discussed below, the Attorney General's decision failed to give meaning to the statutory right to counsel and to the Department of Justice's regulatory scheme ensuring effective assistance for noncitizens in removal proceedings. By giving full effect to statutory and regulatory rights to full and fair proceedings, you will not need to reach the constitutional issue.

2. Attorney General Mukasey's *Compean* Decision Sharply Diverges from Prior Precedent and is in Direct Conflict with all but Two Circuit Courts of Appeals.

The *Compean* decision departs dramatically from longstanding agency precedent and from the majority of courts of appeals on this issue of exceptional importance. The decision overrules the agency's longstanding position, first announced twenty years ago in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988), that ineffective assistance of counsel in immigration proceedings may violate the Fifth Amendment Due Process Clause. Just five years ago, after careful consideration of these very issues, the BIA, sitting *en banc*, reaffirmed *Lozada* in *Matter of Assaad*, 23 I. & N. Dec. 553, 554 (BIA 2003). The BIA has applied *Lozada* and *Assaad* in scores of cases to conclude that an immigrant's right to effective assistance of counsel was violated. See, e.g., *Matter of Grijalva*, 21 I & N Dec. 472 (BIA 1996); *Matter of Cortez-Bravo*, 2008 WL 5537824 (BIA Dec. 23, 2008); *Matter of Weiqing He*, 2008 WL 5244716 (Dec. 2, 2008). For more than 20 years, neither Congress nor prior Attorney Generals took any steps to overrule (or undermine) *Lozada*'s protection of the right to effective assistance of counsel. Courts look very skeptically at and will not defer to sudden, material alterations to a 20-year old administrative scheme. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987); *Batanic v. INS*, 12 F.3d 662 (7th Cir. 1993).

Not only did Attorney General Mukasey suddenly overturn longstanding agency precedent, but he also issued a decision in direct conflict with the majority of United States Courts of Appeals. Despite the government's frequent urgings otherwise,³ the courts of appeals continue to affirm that noncitizens have a constitutional right under the Fifth Amendment Due Process Clause to fundamentally fair removal proceedings, and that incompetent counsel may deprive people of that right. *Guerrero-Santana v. Gonzales*, 499 F.3d 90, 93 (1st Cir. 2007) (ineffective assistance of counsel in a removal proceeding may constitute a denial of due process if, and to the extent that, the proceeding is thereby rendered fundamentally unfair); *Aris v. Mukasey*, 517 F. 3d 595, 600-601 (2d Cir. 2008) (the Fifth Amendment requires that deportation proceedings comport with due process; due process concerns may arise when retained counsel provides immigration representation that falls so short of professional duties as to impinge upon the fundamental fairness of the

³ See, e.g., *Ouyoung v. Mukasey*, 07-3867, 2009 U.S. App. LEXIS 224, *2-3 n.2 (2d Cir. Jan. 8, 2009) (unpublished) ("Contrary to the government's argument, it is well-established that claims of ineffective assistance of counsel raised to the BIA in motions to reopen are rooted in the Fifth Amendment Due Process Clause, and in the statutory right to counsel..."); *Al Roumy v. Mukasey*, 07-3328, 2008 U.S. App. LEXIS 18472, *18 n.3 (6th Cir. Aug. 27, 2008) (unpublished) (noting that the government argued that there is no right to effective assistance of counsel and rejecting such position as conflicting with controlling precedent).

hearing); *Fadiga v. Att’y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007) (a claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment as a violation of the guarantee of due process); *Sako v. Gonzales*, 434 F.3d 857, 863-64 (6th Cir. 2006) (to prove he has suffered a violation of due process, the petitioner needs to establish that ineffective assistance of counsel prejudiced him or denied him fundamental fairness); *Jeziarski v. Mukasey*, 543 F.3d 886, 890 (7th Cir. 2008), *petition for cert. filed*, 08-656 (Nov. 17, 2008) (“The complexity of the issues, or perhaps other conditions, in a particular removal proceeding might be so great that forcing the [noncitizen] to proceed without the assistance of a competent lawyer would deny him due process of law....”); *Nehad v. Mukasey*, 535 F.3d 962, 973 (9th Cir. 2008) (an attorney’s deficient performance and the prejudice resulting from it can result in a violation of the Fifth Amendment right to due process); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002) (“...a petitioner like Osei can state a Fifth Amendment violation if he proves that retained counsel was ineffective and, as a result, the petitioner was denied a fundamentally fair proceeding.”); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2004) (It is well established in this Circuit that a noncitizen in civil deportation proceedings has the constitutional right under the Fifth Amendment Due Process Clause to a fundamentally fair hearing, including *effective* assistance of counsel.) (emphasis in original).⁴

3. The Attorney General Failed to Give Meaning to the Statutory Right to Counsel, and Disregarded the Justice Department’s Own Significant Involvement and Interest in Ensuring Counsel’s Performance.

In addition, Attorney General Mukasey’s *Compean* decision fails to give meaning to the statutory right to counsel provided in INA § 292, 8 U.S.C. § 1362, and INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A). *See Sanchez v. Keisler*, 505 F.3d 641, 649 (7th Cir. 2007) (the attorney’s performance was so deficient that Sanchez did not have the fair hearing to which the immigration statutes entitle her); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) (“... aliens in deportation proceedings have a statutory right to be represented by counsel at their own expense.”); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) (“[A]liens have a statutory right to counsel, see 8 U.S.C. § 1362 Implicit in the right to counsel is the requirement that the assistance rendered not be ineffective.”). *See also* discussion in AILF brief at 20-23.

Moreover, the *Compean* decision also discounted the role of the Justice Department itself in authorizing, investigating, and disciplining representatives who appear in immigration proceedings. *See* AILF brief at 4-10.

⁴ Only two Courts of Appeals have held that there is no constitutional right to effective assistance of counsel in removal proceedings. *See Afanwi v. Mukasey*, 526 F.3d 788, 798-99 (4th Cir. 2008) *petition for cert. filed*, 08-906 (Jan. 16, 2009), and *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). Despite Attorney General Mukasey’s suggestion otherwise, the Seventh Circuit has sided with the majority and just recently affirmed that deficient performance of counsel might constitute a violation of the Fifth Amendment. *See Jeziarski v. Mukasey*, 543 F.3d 886, 890 (7th Cir. 2008), *petition for cert. filed*, 08-656 (Nov. 17, 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.”).

4. By Issuing *Compean*, Attorney General Mukasey Created Confusion and the Potential for Inconsistencies among the Immigration Courts and the Federal Courts.

In *Compean*, Mukasey directed the BIA and immigration judges to “apply the framework set forth below *in toto*, even in circuits that have previously held that there is a constitutional right to effective assistance of counsel.” 24 I & N Dec. at 730 n 8. This direction contradicts the BIA’s own precedent requiring it to acquiesce to circuit court decisions even if there is a contrary BIA decision. *Matter of Cazares*, 21 I & N Dec. 188 (BIA 1966); *Matter of Olivares*, 23 I & N Dec. 148 (BIA 2001). See *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 350 n.10 (2005) (“[T]he BIA follows the law of the circuit in which the individual case arises”); *Singh v. Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995) (holding that the BIA “is obligated to follow circuit precedent in cases originating within that circuit”).

Thus, *Compean*’s directive will create confusion among the immigration judges and for the members and panels of the BIA itself. The federal courts will be left to sort out the mess, likely leading to even more confusion and inconsistent results.

5. The Attorney General’s Decision Failed to Acknowledge the Many Compelling Cases Where Compliance with even *Lozada*’s Requirements Worked a Significant Hardship.

As AILF and amici argued, many courts have found it necessary to relax even the standards and requirements outlined in *Lozada* because they were so inflexible. See AILF brief at 28-37. Further, there is an urgent need for a system to remedy simple errors, the less serious mistakes that may not rise to the level of “egregious” but that nevertheless deprive people of valuable rights.

The Attorney General and federal courts, including the Supreme Court, already provide some such mechanisms through regulations⁵ and rules.⁶ Amici curiae urge you to

⁵ For example, 8 C.F.R. § 1208.4(a)(5)(v) anticipates the situation where an asylum applicant files the application before the one-year asylum application filing deadline but the application is rejected as not properly filed. If the applicant refiles “within a reasonable period thereafter,” this qualifies as an “extraordinary circumstance” excusing the failure to meet the asylum one-year filing deadline.

⁶ For example, Supreme Court Rule 14.5 says: “If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk’s letter will be deemed timely.”

Rule 60 (b)(1) of the Federal Rules of Civil Procedure provides: b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect.

expand these mechanisms, which will serve the goals of reducing ineffective assistance claims, easing the burden on immigration judges, the BIA, and federal courts, and avoiding wasting resources.

Conclusion

For the foregoing reasons and authorities, we support your decision to reexamine *Compean*. We respectfully urge you to vacate the decision and provide an opportunity for all interested parties to fully brief these important questions. We urge you to issue a new decision affirming the statutory and constitutional rights to counsel and to a remedy for ineffective assistance of counsel. We urge you to establish, perhaps through rule-making, an accessible system to remedy *de minimus* errors made in immigration proceedings.

Respectfully submitted this 6th day of February, 2009.
American Immigration Law Foundation

As listed directly below, more than 130 organizations, law firms, and individuals support the arguments in this brief.

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American Immigration Lawyers Association
American Friends Service Committee Immigrant Rights Program, Newark, New Jersey
ASISTA Immigration Assistance
Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Charities of Louisville
Central American Legal Assistance
Community Legal Services & Counseling Center, Cambridge, MA
Florence Immigrant & Refugee Rights Project
Florida Immigrant Advocacy Center
Human Rights First
Immigrant and Refugee Appellate Center, LLC
Immigrant Legal Resource Center
Immigrant Rights Clinic at NYU School of Law
Immigration Equality
Immigration Law Clinic, University of Detroit Mercy School of Law
Kentucky Coalition for Immigrant and Refugee Rights (KCIRR)
Kentucky May Day Coalition
Mental Health Advocacy Services, Inc.; Los Angeles, CA
Mexican American Legal Defense and Educational Fund
National Immigrant Justice Center, a program of the Heartland Alliance for Human Needs
and Human Rights
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
National Lawyers Guild-Massachusetts Chapter
Northwest Immigrant Rights Project
The Advocates for Human Rights

The Hebrew Immigrant Aid Society, World Headquarters, New York, NY
Tulsa Immigrant Resource Network of the University of Tulsa College of Law
Washington Defender Association's Immigration Project

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