LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT

October 6, 2008

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

RE: Matter of Compean (A078-566-977) (BIA May 20, 2008)
Matter of Bangaly (A078-555-848) (BIA Mar. 7, 2008)
Matter of J-E-C-M- (A079-506-797/798/799/800) (BIA Apr. 8, 2008; Oct. 19, 2007)

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT

PLEASE RESPOND TO:
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Dear Attorney General Mukasey:

In the above-captioned cases, you have requested briefing on four far-reaching immigration questions (with several subparts), including the fundamental issue of whether the long-held right of immigrants to obtain a new removal hearing based on the ineffective assistance of counsel should be abolished.

The ACLU does not believe that the Attorney General should be reconsidering these issues at all. Indeed, just five years ago, in *In re Assaad*, 23 I. & N. Dec. 553 (BIA 2003), the Board of Immigration Appeals reconsidered these issues and chose not to overturn long-settled precedent acknowledging the fundamental right of immigrants to obtain a new hearing in cases of counsel error. Any decision to the contrary would be flawed for several reasons.

The outcome of your review has the potential to radically change the immigration system in a fundamental manner. The Board of Immigration Appeals has long held the view that immigrants who lose their cases due to ineffective assistance of counsel are entitled to seek new hearings, and should not be deported solely because of the mistakes of their counsel. If anything, the problems faced by immigrants have gotten worse.

Indeed, the Second Circuit recently remarked 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, 596 (2d Cir. 2008). The Second Circuit further noted that "[t]he importance of quality representation is especially acute to immigrants, a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear. In immigration matters, so much is at stake – the right to remain in this country, to reunite a family, or to work." *Id.* at 600.

The Ninth Circuit has similarly noted that "[r]epresentation 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." *Nehad v. Mukasey* 535 F.3d 962 (9th Cir. 2008) (citation and alteration omitted). The Ninth Circuit has also remarked that "[a]ll too often, vulnerable immigrants are preyed upon by unlicensed notarios and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation. Despite widespread awareness of these abhorrent practices, the lamentable exploitation of the immigrant population continues . . . ." *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008).

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Moreover, your office has scheduled a decision on these issues in a precipitous manner, without affording an adequate opportunity for parties and interested amici to provide full briefing of the serious issues involved. The importance and complexity of these issues cannot be overstated. Not only do they raise constitutional questions, but also practical issues that require extensive factual investigation.

Your initial Order requesting briefing was issued on August 6, in the middle of the summer. Moreover, it was issued only to the petitioners, and was not made public by your office on the Department's website (or anywhere else, as far as we are aware). In fact, it was only after a limited number of organizations were contacted by the EOIR that the Order became more widely known to immigrant advocacy groups and private attorneys.

Once the existence of a request for briefing became known, the ACLU, along with dozens of other groups and prominent attorneys from across the country, requested an extension until November 15, 2008, to file briefs on these critically important issues. In fact, more than 25 partners at some of the country's largest and most respected law firms signed a letter asking you for an extension because they felt strongly that the questions you have raised could fundamentally impact the fairness of the immigration system. Despite these requests for a reasonable extension of the briefing schedule from recognized experts on the relevant law, in an Order dated September 8,

2008, you denied those requests and granted only a short extension, until October 6.

We respectfully submit that there is no good reason for refusing these reasonable requests for an extension of the briefing schedule. None of the petitioners in the case has opposed an extension of the briefing schedule, and at least one requested an extension until November 15. In addition, none of the cases required immediate action.

Your certification of the questions in the above-captioned cases raises complex issues that have long been settled by BIA precedent. Any decision on this issue implicates complex constitutional, statutory and regulatory questions and could profoundly affect the lives of thousands of individuals. Yet your office has failed to provide even minimally adequate time for the deliberation and analysis that should go into such a weighty decision. We respectfully submit that you should not disturb the well-settled BIA precedent establishing the right of immigrants to reopen their removal proceedings when they have received ineffective assistance of counsel. At the least, you should reconsider your decision not to grant an extension of the briefing period so that this matter will receive the careful and thorough analysis that it warrants.

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Respectfully submitted,

Lee Gelernt

Lee Gelernt
Lucas Guttentag
Cecillia D. Wang

CERTIFICATE OF SERVICE

I, Katie Traverso, 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, 18th Floor, New York 10004.

On the 6th day of October, 2008, I emailed the original copy of this Motion to AGCertification@usdoj.gov, and sent three copies by overnight Federal Express to:

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

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Dated: October 6, 2008

Katie Traverso