PRACTICE ADVISORY
December 2, 2011

Prolonged Mandatory Detention and Bond Eligibility:
Diop v. ICE/Homeland Security

This advisory concerns the Third Circuit's recent decision in *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011). *Diop* addresses whether the government may subject individuals to mandatory immigration detention for a prolonged period of time. The Court held that the Due Process Clause of the Fifth Amendment permits mandatory detention for only a "reasonable period of time," and construed the mandatory detention statute, 8 U.S.C. § 1226(c), as authorizing mandatory detention only for a reasonable period. When detention exceeds that reasonable period, the noncitizen is entitled to an individualized hearing where the government must show that continued detention is necessary to prevent flight or danger to the community. *Id*. at 223.

This practice advisory discusses how certain detainees can use *Diop* to obtain bond hearings.[1] Notably, although the Court held that reasonableness is a "function of the length of the detention," *id*. at 232, it declined to adopt a presumptive period of time at which mandatory detention becomes unreasonably prolonged. Instead, the Court held that "[r]easonableness . . . is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case." *Id*. at 234. Nonetheless, the Court recognized that reasonableness is largely a function of time, and that the more mandatory detention exceeds the periods contemplated by the Supreme Court in *Demore v. Kim*, 538 U.S. 510 (2003)—45 days to complete removal proceedings before the immigration judge (IJ), and five months for those who appeal their cases to the Board of Immigration Appeals (BIA)—the constitutionality of detention without a bond hearing becomes increasingly "suspect." *Id*. Thus, your client's right to a bond hearing will turn on showing that detention has become "unreasonable" in his or her case, with a significant—but not sole—factor being the length of detention.

The ACLU will be monitoring the implementation of *Diop* on an ongoing basis. Should you have questions or require technical assistance regarding a detention challenge under *Diop*, please contact Michael Tan at the ACLU Immigrants' Rights Project, mtan@aclu.org / 212-284-7303.

[1] *Diop* is not binding outside of the Third Circuit but may serve as persuasive authority. Notably, the Ninth Circuit has taken a different approach to prolonged detention and bond eligibility. For more information, *see* the ACLU Practice Advisory on *Casas-Castrillon v. Dep't of Homeland Security*, dated Sept. 9, 2008, and the ACLU Practice Advisory on *Diouf v. Napolitano*, dated April 21, 2011.

Background

Cheikh Diop, a citizen of Senegal, entered the United States in 1990 at age 19 after family members helped him flee Senegal in the face of political persecution and torture by government officials. The government initiated removal proceedings against him in March 2008, charging him as an alien who had entered unlawfully[2] and as an alien convicted of a crime involving moral turpitude—i.e. a 2005 Pennsylvania conviction for reckless endangerment. In May 2008, the government additionally charged him as removable based on a controlled substance conviction—i.e. a 1995 Pennsylvania conviction for possession with intent to manufacture or deliver.

Mr. Diop obtained several continuances in order to seek counsel and, when he proved unable do so, filed a *pro se* application for asylum and withholding of removal. On October 3, 2008, the IJ held that Mr. Diop had testified credibly, but denied withholding because, among other things, his 1995 drug conviction was "probably" a particularly serious crime rendering him ineligible for relief.[3] Mr. Diop appealed to the BIA. The BIA reversed the IJ's removal order in March 2009, holding that the IJ was required to make an actual finding as to whether the drug conviction was a particularly serious crime.

On remand, Mr. Diop obtained a continuance in another unsuccessful attempt to retain counsel. In June 2009, the IJ held that Mr. Diop's drug conviction was not a particularly serious crime based on Mr. Diop's testimony that he believed it involved marijuana, and not cocaine, and granted withholding of removal. The government appealed to the BIA, providing evidence for the first time that Mr. Diop's drug conviction involved the distribution of cocaine, not marijuana. Mr. Diop was represented on the appeal by a law school clinic.

The BIA reversed the IJ once again in April 2010, holding that the IJ's application of the standard for determining what constitutes a particularly serious crime was unclear. Mr. Diop moved the BIA for reconsideration. That May, the IJ held on remand that Mr. Diop's drug crime was particularly serious and that he was ineligible for withholding of removal. The BIA affirmed in October and denied Mr. Diop's motion for reconsideration. However, the BIA remanded the case yet again so that the IJ could consider whether Mr. Diop might be eligible for deferral of removal under the Convention Against Torture.

In November 2010, the Pennsylvania Court of Common Pleas vacated Mr. Diop's 1995 drug conviction under *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), holding that his attorney failed to render effective assistance of counsel by not advising him of the

[2] Although Mr. Diop maintained that he was inspected and formally admitted, the government could find no record of his admission, and hence he was treated in his removal proceedings as "inadmissible" rather than "deportable."

[3] *See* 8 U.S.C. § 1231(b)(3)(B)(ii).

immigration consequences of his offense. The state of Pennsylvania appealed. Mr. Diop returned to the IJ in December 2010, arguing that the vacatur of his conviction now rendered him eligible for withholding of removal. After initially arguing that Mr. Diop was ineligible for withholding pending resolution of the state's appeal, on the eve of oral argument on Mr. Diop's prolonged detention appeal, the government reversed its position and conceded Mr. Diop's eligibility for relief. On February 22, 2011, the IJ granted Mr. Diop withholding of removal, the government waived appeal, and after nearly three years in detention (all of this time without a bond hearing), Mr. Diop was finally released.

Mr. Diop was initially taken into ICE custody at the outset of his removal proceedings, on March 19, 2008. In August 2009, at which point Mr. Diop had already been subjected to nearly 17 months of mandatory detention, he filed a *pro se* habeas petition in federal district court arguing that his prolonged mandatory detention under 8 U.S.C. § 1226(c) was unconstitutional. Although at the time Mr. Diop had won withholding of removal from the IJ, and ICE's appeal of this decision to the BIA had been pending for several months, the district court denied Mr. Diop's habeas petition in October 2009, holding that, *inter alia*, under the Supreme Court's decision in *Demore v. Kim*, 538 U.S. 510 (2003), the government could constitutionally subject Mr. Diop to mandatory detention while his removal proceedings were pending, regardless of how long those proceedings took to conclude. At the time of the district court's decision, Mr. Diop had been detained 19 months.

What did the Third Circuit hold?

The Third Circuit held (1) that the Due Process Clause of the Fifth Amendment prohibits mandatory detention beyond a "reasonable period of time" and (2) that the mandatory detention statute, 8 U.S.C. § 1226(c) authorizes detention for only that reasonable period. *Diop*, 656 F.3d at 222.[4]

[4] The court addressed two other issues that this advisory does not discuss. First, the court held that Mr. Diop's appeal was not moot despite his release from detention. As the court explained, Mr. Diop's prolonged mandatory detention was "capable of repetition, yet evading review" as there was a reasonable possibility that he would be re-detained if the state court reversed the vacatur of his conviction, rendering him ineligible for withholding of removal, and the government reopened his removal proceedings. *Diop,* 656 F.3d at 227-28.

In addition, the court held that, under *Matter of Joseph*, 22 I&N Dec. 660, 668 (BIA 1999), the government had met its burden of showing there was "reason to believe that [Mr. Diop] was convicted of a crime covered by the [mandatory detention] statute"—in this case, his 2005 conviction for a crime of moral turpitude. However, the court reserved the question of the constitutionality of the *Joseph* standard as the issue was not presented. *Diop,* 656 F.3d at 230; *see also id*. at 231 n.8 (noting that "at least one circuit judge has expressed grave doubts as to whether *Joseph* is consistent with due process of law" (citing *Tijani v. Willis*, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring)).

As the Court explained, although the Supreme Court in *Demore* upheld the constitutionality of mandatory immigration detention, it did not uphold mandatory detention for as long as removal proceedings take to conclude. Rather, as Justice Kennedy explained in his concurrence, mandatory detention may come to violate due process "if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Citing Justice Kennedy's concurrence, the Third Circuit concluded that

> the constitutionality of [mandatory detention] is a function of the length of the detention. At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community.

Diop, 656 F.3d at 232. Thus, "when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the Government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute." *Id*. at 233.

The Court declined to set forth a point in time at which detention becomes presumptively unreasonable. Rather, as the Court explained, reasonableness is "necessarily . . . a fact-dependent inquiry that will vary depending on individual circumstances." *Id*.; *accord id*. at 234. However, the Court emphasized that *Demore* understood the purposes of detention to be fulfilled in the vast majority of cases in the "brief" period of time necessary to complete removal proceedings—"roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which an alien chooses to appeal [to the BIA]." *Demore*, 538 U.S. at 530. As a result, the "constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past those thresholds." *Diop*, 656 F.3d at 234.

The Court also held that, in light of the serious constitutional problems presented by prolonged mandatory detention without a bond hearing, the mandatory detention statute, 8 U.S.C. § 1226(c), must be construed as authorizing detention for only a reasonable period of time. As the Court explained, neither the statute nor any legislative history indicated that Congress "intended to authorize prolonged, unreasonable, detention without a bond hearing." Thus, under the canon of constitutional avoidance, the Court construed § 1226(c) to contain an "implicit limitation of reasonableness" in order to avoid the serious due process concerns raised by unreasonably prolonged mandatory detention. *Id*. at 235 (citing *Zadvydas v. Davis*, 533 U.S. 678, 682, 699 (2001)).

What factors are relevant to determining whether mandatory detention has become unreasonable in length?

As the Court explained, reasonableness is a "function of the length of the detention." *Id*. at 232. Thus, an initial period of mandatory detention will become "unreasonable" at some point in time. *Id*. Although the Court did not set a specific length of time at which mandatory detention becomes "unreasonable," it made clear that the "constitutional case for continued detention without inquiry into its necessity becomes more and more suspect as detention continues past [the one-and-a-half to five-month] thresholds" for removal proceedings contemplated by *Demore*. *Id*. at 234. Furthermore, habeas courts "cannot simply rely on the Government's determination of what is reasonable," but rather "must exercise their independent judgment as to what is reasonable." *Id*. (citing *Zadvydas*, 533 U.S. at 699).

Although *Diop* does not expressly address the issue, courts should arguably also consider the length of future detention in determining whether mandatory detention has become unreasonable.[5] Thus, mandatory detention should be found unreasonable where, for example, a mandatory detainee will not receive a merits hearing or decision from the IJ for some months; anticipates lengthy detention during the pendency of a BIA appeal; has a stay of removal pending decision on a petition for review in the court of appeals; or is likely to be remanded back to immigration court for further proceedings.[6]

Importantly, *Diop* also makes clear that the reasonableness inquiry does not require a showing of error on the part of the government or IJ/BIA. Rather, the Court specifically recognized that "individual actions by various actors in the immigration system, each of which takes only a reasonable amount of time to accomplish, can nevertheless result in the detention of a removable alien for an unreasonable, and ultimately unconstitutional, period of time." *Id*. at 223.

However, where error by the government or IJ/BIA has prolonged your client's removal case, it should be especially clear that mandatory detention has exceeded a reasonable period. *See id*. at 234 (explaining that, in Mr. Diop's case, "the immigration judge's

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[5] *See, e.g*., *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (noting, in granting petitioner relief, that the "the foreseeable process" of his appeal of removal "is a year or more"); *Alli v. Decker*, 644 F. Supp. 2d 535, 543 (M.D. Pa. 2009) (considering the "probable extent of future removal proceedings"); *Madrane v. Hogan*, 520 F. Supp. 2d 654, 667 (M.D. Pa. 2007) (considering "the forecast of additional future appeals or proceedings that could result in Petitioner being detained for many [additional] months").

[6] Data on backlogs for your immigration court are available through TRAC Immigration. In 2010, the median time from filing to final disposition of administrative agency appeals for Second and Third Circuits was 12.7 and 12.9 months, respectively. *See* James C. Duff, Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts: 2010 Annual Report of the Dir. 109, tbl. B-4C (2010).

numerous errors, combined with the Government's failure to secure, at the earliest possible time, evidence that bore directly on the issue of whether Diop was properly detained, resulted in an unreasonable delay").

Such errors may include, but are not limited to:

- Reversible errors by the IJ/BIA, resulting in remands for further proceedings.[7]
- Failure by the IJ to prepare a proper record for appeal.
- Failure by the government to plead all the charges of removability promptly.[8]
- Failure by the government to produce evidence of your client's criminal history promptly.[9]
- Failure by the government to initiate removal proceedings while your client was serving his criminal sentence.[10]
- Unreasonable delays in the scheduling of removal hearings before the immigration court (e.g., because of extensive backlogs), in an IJ's issuance of a decision following a removal hearing,[11] or in the BIA's adjudication of an appeal.[12]
- Unreasonable delays by the government in the processing of applications for relief that would render an individual non-removable.[13]

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[7] *See Diop*, 656 F.3d at 234 (noting numerous reversible errors by the IJ resulting in multiple remands from the BIA).

[8] *See id*. at 224 (noting that the government did not charge Mr. Diop with removal for his controlled substance offense until some months after he was initially placed in removal proceedings).

[9] *See id*. at 224-25, 234.

[10] *See, e.g.*, 8 U.S.C. § 1228 (providing for expedited removal of noncitizens with aggravated felony convictions).

[11] *See Ly v. Hansen*, 351 F.3d 263, 265-66, 272 (6th Cir. 2003) (holding that IJ's delay in issuing removal order by several months after the merits hearing unreasonably extended the petitioner's detention).

[12] *See Tijani*, 430 F.3d at 1249 (Tashima, J., concurring) (noting that BIA's 13-month delay in adjudicating appeal unreasonably prolonged the petitioner's detention).

[13] *See Alli v. Decker*, No. 4:09-cv-00698, slip op. at 13 (M.D. Pa. Jan. 26, 2010) (finding that one-year delay in adjudicating I-130 petition unreasonably prolonged the petitioner's detention).

Diop also holds that the "reasonableness determination must take into account a given individual detainee's need for more or less time, as well as the exigencies of a particular case." *Id*. The government may invoke this language to argue that a noncitizen may be subject to prolonged detention without a bond hearing merely because he has challenged his removal by submitting applications for relief which take time to prepare and adjudicate or sought continuances to obtain counsel or submit new evidence. However, *Diop* in no way holds prolonged mandatory detention is justified merely where a detainee has reasonably taken steps to challenge his removal. Indeed, that would mean that a noncitizen detainee could be "effectively punished for pursuing applicable legal remedies." *Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004) (Vanaskie, J.) (rejecting this position).[14] To the contrary, *Diop* expressly recognizes that entirely "reasonable" actions in a removal case "can nevertheless result in the detention of a removable alien for an unreasonable, and ultimately unconstitutional, period of time." *Diop*, 656 F.3d at 223. Moreover, the assertion that a detainee's choice to challenge his removal renders his prolonged mandatory detention proves too much, since in order for detention to be prolonged, a detainee will *always* have chosen to prosecute his case. Instead, properly read, *Diop* requires the lower courts to account for whether, based on the "exigencies of [his] case," *id*. at 234, a detainee reasonably needs time he has taken to prosecute his removal challenge, or has engaged in dilatory actions—such as seeking unreasonable continuances or filing frivolous applications for relief or appeals that may justify continued mandatory detention.[15] In contrast, the government may not justify prolonged mandatory detention based on a detainee's reasonable efforts to litigate bona fide challenges to removal.

In addition, the Court held that the error by the IJ and the government trumped any actions by Mr. Diop that extended his detention. *See Diop*, 656 F.3d at 234 (holding that delay and government error rendered petitioner's prolonged mandatory detention unreasonable, notwithstanding petitioner's application for relief, continuances to obtain counsel, and multiple appeals). Thus, error by the government or IJ/BIA that has prolonged removal proceedings should similarly trump any actions by the noncitizen that extend his removal case in assessing whether mandatory detention is has become unreasonably prolonged.

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[14] *See also Ly*, 351 F.3d at 272 (holding that "[a]n alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him"); *Alli*, 644 F. Supp. 2d at 545; *Madrane*, 520 F. Supp. 2d at 666; *Gupta v. Sabol*, No. 1:11–CV–1081, 2011 WL 3897964, at *3 (M.D. Pa. Sept. 6, 2011) (applying *Diop* and reaching the same conclusion).

[15] *See Ly*, 351 F.3d at 272 (noting that "[w]ithout consideration of the role of the alien in the delay, we would encourage deportable criminal aliens to raise frivolous objections and string out the proceedings in the hopes that a federal court will find the delay 'unreasonable' and order their release").

What types of cases does *Diop* apply to?

> Diop *directly applies to individuals subject to prolonged detention under § 1226(c) and whose removal cases are pending before the IJ or BIA.*

Pursuant to *Diop*, a detainee subject to unreasonably prolonged detention under § 1226(c) is entitled to a bond hearing where the government must show that continued detention is necessary to prevent flight risk or danger.

> Diop *also directly applies to individuals subject to prolonged detention under § 1226(c) and whose removal cases are pending before the IJ or BIA for a second or third time after remand from the court of appeals.*

Diop also directly applies to detainees under § 1226(c) who are facing administrative removal proceedings for a second or third time after remand from the court of appeals. Indeed, such detainees are especially vulnerable to unreasonably prolonged periods of detention without a bond hearing in light of the time necessary for a court to adjudicate a petition for review.[16]

The government may argue that, in determining whether continued mandatory detention is reasonable, the court should discount any period of detention while your client's petition for review was pending because the post-final order detention statute, 8 U.S.C. § 1231, and not the pre-final order statute, § 1226, governed detention during that time. *See* discussion, *infra*. However, as numerous courts have recognized, the court should take the full period of your client's detention pending both administrative removal proceedings and judicial review into account in assessing the reasonableness of his continued mandatory detention. As long as a detainee has not received a bond hearing, "simple fairness, if not basic humanity, dictates that a court should take into consideration the entire period in which a person has lost his liberty." *Bourguignon v. MacDonald*, 667 F. Supp. 2d 175, 183 (D. Mass. 2009).[17]

Diop also arguably applies to the following individuals as well:

1) *Individuals who have obtained a stay of removal pending adjudication of a petition for review.*

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[16] *See* Duff, *supra* n.6 (reporting median time of 12.7 and 12.9 months from filing to final disposition of administrative agency appeals for Second and Third Circuits, respectively, in 2010).

[17] *See also, e.g., Tijani*, 430 F.3d at 1242; *Wilks v. Dep't Homeland Security*, No. 1:CV-07-2171, 2008 WL 4820654, at *2-3 (M.D. Pa. Nov. 3, 2008); *Villareal-Rodriguez v. Kane*, No. 07- 1549, 2008 WL 2757063, *2 (D. Ariz. July 14, 2008) (all counting the periods of detention before and after entry of removal order together to determine if detention was unreasonably prolonged)

Under *Diop*, prolonged detention without adequate review raises serious constitutional concerns as it begins to exceed the "reasonable period" imposed by the Due Process Clause. *See Diop*, 656 F.3d at 234. Because detention pending judicial review inevitably extends far beyond this "reasonable" period, individuals whose removal order has been detained pending judicial review should be entitled to a bond hearing.

There is a threshold question regarding what statute governs the detention of detainees with a final order of removal that has been stayed pending review by the court of appeals: § 1226, which authorizes the detention of noncitizens "pending a decision" on their removal, or § 1231, which generally provides for detention of noncitizens after entry of the removal order. Courts that have addressed the issue have held that, where removal is judicially stayed, § 1226—and not § 1231—continues to govern detention.[18] This follows from the plain language of § 1231(a), which provides for detention only "during" and "beyond" the 90-day removal period after entry of a final order of removal. Because the removal period does not begin when a removal order has been stayed pending court of appeals review, *see* 8 U.S.C. § 1231(a)(1)(B), courts that have addressed the issue have held that § 1231 does not govern such detention; rather, § 1226 applies.[19]

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[18] *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1059-60 (9th Cir. 2008)*; Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942, 947 (9th Cir. 2008); *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003); *see also Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001), *abrogated on other grounds by Fernandez–Vargas v. Gonzales*, 548 U.S. 30 (2006) (holding that § 1231 does not authorize detention pending judicial stay of removal); *but see Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.4 (11th Cir. 2002) (assuming, without analysis, that a stay serves to "interrupt[]" the removal period, and that detention pending a judicial stay is therefore governed by § 1231(a)(2)).

[19] Specifically, the Ninth Circuit recognized in *Casas-Castrillon* that § 1226(a), and not § 1226(c), governs when a removal order is stayed pending judicial review. Moreover, the implementing regulations provide for bond hearings for individuals detained under § 1226(a). *See* 8 C.F.R. § 1236.1(d). This interpretation of the statute is supported both by *Demore*, which noted that "§ 1226(c) was intended only to 'govern[ ] detention of deportable criminal aliens *pending their removal proceedings*,'" 538 U.S. at 527-28 (emphasis in original), and the regulations implementing § 1226(c), which interpret the statute as applying only "during removal proceedings." 8 C.F.R. § 1236.1(c)(1)(i). In contrast, § 1226(a) governs detention "pending a decision on whether the alien is to be removed from the United States"—a period which includes not only the administrative removal process but also the process of judicial review. *See Casas-Castrillon*, 535 F.3d at 948.

However, even if § 1226(c) governs detention where a removal order has been stayed pending judicial review, your client should still be entitled to a bond hearing as his detention inevitably has exceeded the brief period of mandatory detention contemplated in *Demore* and is unreasonably prolonged within the meaning of *Diop*.

However, regardless of what statute governs detention pending court of appeals review—§ 1226 or § 1231—*Diop*'s reasoning supports the position that prolonged detention during this period must be justified by the government in a bond hearing. Because there is no evidence in § 1226 or § 1231 that Congress intended to authorize the unreasonably prolonged detention of noncitizens whose removal is stayed pending judicial review, at least in the absence of a constitutionally adequate bond hearing, both detention statutes must be construed as requiring such a hearing whenever detention becomes—or will inevitably become—unreasonably prolonged.[20]

2. *Individuals detained pursuant to 8 U.S.C. § 1225(b) for a prolonged period while litigating their cases before the IJ or the BIA and who have never received a bond hearing.*

Section 1225 authorizes the detention of individuals, including asylum-seekers and some lawful permanent residents, who are seeking admission to the United States.[21] Arguably, under the reasoning of *Diop*, § 1225 should be construed to authorize detention without a bond hearing for only a reasonable period of time. Notably, the Ninth Circuit has held that § 1225 must be construed to authorize only "brief and reasonable" detention.[22]

What should I do to obtain a bond hearing for my client under *Diop*?

Like Mr. Diop himself, your client can file a habeas petition in federal district court for a bond hearing on the grounds that he has been subject to mandatory detention for an unreasonable period of time, in violation of both the statute and the Due Process Clause.[23]

Your client also may be able to seek a "reasonableness" determination at a hearing pursuant to *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), where the IJ reviews

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[20] *See Diop*, 656 F.3d at 235 (construing § 1226(c)); *Casas-Castrillon*, 535 F.3d at 950-51 (construing § 1226(a)); *Diouf v. Napolitano*, 634 F.3d 1081, 1086 (9th Cir. 2011) (holding that "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise serious constitutional concerns" and "find[ing] no basis for withholding from aliens detained under § 1231(a)(6) the same procedural safeguards accorded to aliens detained under [§ 1226]" (internal quotation marks and citation omitted)).

[21] *See* 8 U.S.C. § 1225(b) (requiring detention of applicant for admission "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted").

[22] *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076-79 (9th Cir. 2006)

[23] *See* 28 U.S.C. § 2241.

whether the noncitizen is "properly included" within the mandatory detention statute. *See also* 8 C.F.R. § 1003.19(h)(1)(ii) (providing that detainee may "seek[ ] a determination by an immigration judge that [he] is not properly included within [the mandatory detention statute]"). However, it is unclear whether the immigration court has authority under *Joseph* to determine whether mandatory detention is unreasonably prolonged, and thus whether a detainee is bond eligible.[24]

If my client obtains a bond hearing, what will the bond hearing entail?

Diop does not address *who* should conduct the bond hearing—i.e. the habeas court or the IJ. Courts in the Third Circuit have taken different approaches to this issue.[25]

If your client obtains a bond hearing, the hearing should largely resemble a bond redetermination hearing under 8 U.S.C. § 1226(a), except that the government, and not your client, bears the burden of proof and must establish flight risk or danger.[26] At the bond hearing, the habeas court or IJ should determine whether your client should be released based on two factors: (1) whether your client is a flight risk, and (2) whether your client is a danger to the community.[27] If the court finds that your client is neither a flight risk nor a danger to the community, the court should set bond or order release on recognizance.

Although the government bears the burden of proof, the court will likely expect your client to present evidence showing that he or she is not a flight risk or danger to the community, regardless of whether the government presents any evidence. Your client should be prepared to present testimonial and documentary evidence about the following:

1) Criminal history: details regarding arrests and convictions; rehabilitation, including programs during detention; reasons why your client will not engage in criminal activity if released.

[24] *See Joseph*, 22 I&N Dec. at 800 (holding that a detainee may show he is not "properly included" under the mandatory detention statute by demonstrating that the government is "substantially unlikely" to establish the charges subjecting him to mandatory detention).

[25] *See Alli*, 644 F. Supp. 2d at 541 (reviewing cases).

[26] *See Diop*, 656 F.3d at 235.

[27] *See Diop*, 656 F.3d at 232-33; *see also Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). The IJ has discretion to consider any information that your client or the government presents. 8 C.F.R. § 1003.19(d).

2) Likelihood of success in removal case: the merits of your client's removal case and why he or she is likely eventually to succeed on his or her claim to relief or defense against removal.

3) Activities in detention: organized activities and positive activities that your client participated in while detained (reading, exercise, attending church, participating in skills programs, etc.).

4) Other information: family and community ties, education, work history, etc.

5) If the government argues that your client is a flight risk, you should also identify alternatives to detention that are available to address the government's concerns, ranging from reporting requirements to electronic monitoring.

You should also make sure to put the length of your client's detention into the record.

Because your client will have been detained for a prolonged period of time, you should argue that the justification for detention must be stronger than in typical bond cases, and must take into account the availability of less restrictive alternatives to detention that would address the government's interests. Significantly, the Third Circuit has held with respect to even excludable aliens that "[w]hen detention is prolonged, special care must be exercised so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable," and that the government must consider alternatives. *Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999); *see also id*. (faulting the government for "[making] no effort to determine if [flight] could be discouraged by requiring appropriate surety").[28]

Moreover, the court should address the detainee's *current* risk of flight or danger. As the Third Circuit has explained, "[t]he fact that some aliens posed a risk of flight in the past does not mean they will forever fall into that category. Similarly, presenting danger to the community at one point by committing crime does not place them forever beyond redemption." *Id*. "Due process is not satisfied . . . by rubberstamp denials based on temporally distant offenses," but rather "requires an opportunity for an evaluation of the individual's current threat to the community and his risk of flight." *Id*.; *see also Diop*,

[28] *Ngo* involved an individual who had been finally ordered removed—i.e., who had exhausted all administrative and judicial challenges to removal and whose removal order could have been effectuated if a country had been willing to take him back. In addition, *Ngo* involved an "excludable alien"—a class of noncitizens "traditionally . . . afforded less constitutional protection than deportable [i.e., admitted] aliens." *Patel v. Zemski*, 275 F.3d 299, 310 (2001), *overruled on other grounds*, *Demore v. Kim*, 538 U.S. 510 (2003). Noncitizens who have been admitted to the country—and, in particular, as lawful permanent residents—hold even greater due process rights, *see Zadvydas*, 533 U.S. at 693; *see also Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982), and thus even greater care must be exercised with respect to their prolonged confinement.

656 F.3d at 231 (requiring "an individualized inquiry into whether detention is still *necessary* to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community" (emphasis added)).[29]

Finally, if your bond hearing is held in immigration court, you should request an audio recording of the hearing in order to preserve the record for appeal.[30] A sample request for such recording is attached to this practice advisory.

What if my client is detained outside the Third Circuit?

Diop is not binding outside the Third Circuit but may serve as persuasive authority. For more information on filing a habeas petition and assistance in evaluating the merits of a case outside the Third Circuit, please contact Michael Tan at the ACLU Immigrants' Rights Project, mtan@aclu.org / 212-283-7303.[31]

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[29] The Ninth Circuit has held, moreover, that where detention is prolonged, the government must justify continued imprisonment by clear and convincing evidence of flight risk or danger. *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011).

[30] *See Singh*, 638 F.3d at 1208 (holding that "due process requires a contemporaneous record of [prolonged detention] hearings").

[31] The Ninth Circuit has taken a different approach to prolonged detention and bond eligibility. For more information, *see* the ACLU practice advisories cited *supra*, n.1.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
[CITY, STATE]

In the Matter of:	)	
,	)	In Bond Proceedings
A#	)	
	)	
Respondent	)	

REQUEST FOR AUDIO RECORDING OF HEARING

I respectfully request that the Immigration Court audio record my bond redetermination hearing. Due process requires a "contemporaneous record" of my bond redetermination hearing to facilitate review by the Board of Immigration Appeals should such review be necessary. *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011) (requiring audio recordings for hearings conducted pursuant to prolonged detention hearings).

Respectfully submitted this _____ day of _____, 20___,

_____
Respondent, *pro se*