



**PRACTICE ADVISORY:
PROLONGED MANDATORY DETENTION AND BOND ELIGIBILITY IN THE
THIRD CIRCUIT**

Updated August 19, 2015

This practice advisory reviews the Third Circuit's decisions in:

- [*Diop v. ICE/Homeland Security*](#), 656 F.3d 221 (3d Cir. 2011);
- [*Leslie v. Attorney General of the United States*](#), 678 F.3d 265 (3d Cir. 2012); and
- [*Chavez-Alvarez v. Warden York County Prison*](#), No. 14-1402, 2015 WL 1567019 (3d Cir. 2015).

These decisions reject the government's practice of subjecting individuals to mandatory immigration detention beyond a reasonable period of time. This practice advisory discusses how individuals subject to prolonged detention in the Third Circuit can use these decisions to obtain bond hearings where the government bears the burden of justifying their continued imprisonment.

Specifically, *Diop* 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), to authorize 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. *Diop*, 656 F.3d at 223. *Leslie* further clarified that *Diop* governs not only the detention of individuals with pending administrative removal proceedings before the Immigration Judge ("IJ") or Board of Immigration Appeals ("BIA"), but also the detention of noncitizens who have obtained a stay of removal pending judicial review of their removal orders. *Leslie*, 678 F.3d at 270.

The Third Circuit has declined to adopt a presumptive period of time at which detention without a bond hearing becomes unreasonably prolonged. Instead, "[r]easonableness . . . is a fact-dependent inquiry requiring an assessment of all of the circumstances of any given case." *Diop*, 656 F.3d at 234. However, the Court has provided key guidance, most recently in *Chavez-Alvarez*, to determine when detention becomes unreasonable and a bond hearing is required. *Chavez-Alvarez* focused on three factors to define this tipping point:

- *First*, the Court relied on the presence of a ***good faith challenge to removal***. As the Court explained, good faith claim is one "legitimately raised" and presents "real issues." 2015 WL 1567019 at *5. Critically, an individual may raise a good faith claim even when that claim has been rejected by the IJ and BIA. *Id.*

- *Second*, reasonableness is a “function of the **length** of the detention.” *Diop*, 656 F.3d at 232 (emphasis added). Thus, the Court has emphasized that mandatory detention becomes “more and more [constitutionally] suspect” as it exceeds the average periods contemplated by the Supreme Court in *Demore v. Kim*, 538 U.S. 510 (2003)—47 days to complete removal proceedings before the IJ, and five months for those who appeal their cases to BIA. *Id.* at 234.
- *Third*, courts must look to the **prospect of future proceedings** to determine whether detention has exceeded a reasonable period of time. Thus, on the facts of the case before it, the Court in *Chavez-Alvarez* identified as the tipping point the IJ’s issuance, after nine months of proceedings, of a final order of removal denying the individual’s good faith challenge to removal, as at that point the parties “could have reasonably predicted that [his] appeal would take a substantial amount of time, making his already lengthy detention considerably longer.” *Chavez-Alvarez*, 2015 WL 1567019, at *7.

Critically, the Court has also clarified that detention can become unreasonable when the government has *not* engaged in any delay: “even [where] the Government has handled the removal case in a reasonable way,” detention pending adjudication of a good faith challenge to removal can become unreasonable and require a bond hearing. *Id.* at *4 (citing *Diop*, 656 F.3d at 223). Moreover, although 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,” *Diop*, 656 F.3d at 234, an individual’s good faith efforts to challenge removal do not justify prolonged detention. The Court has made clear that “[a]lthough an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take,” and courts must not “effectively punish [the noncitizen] for pursuing applicable legal remedies.” *Leslie*, 678 F.3d at 271 (internal quotation marks omitted).

The ACLU is monitoring the implementation of *Diop*, *Leslie*, and *Chavez-Alvarez*. Should you have questions or require technical assistance regarding these decisions, please contact Michael Tan at the ACLU Immigrants’ Rights Project, mtan@aclu.org.¹

What did the Third Circuit hold in *Diop*?

In *Diop*, 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.

¹ *Diop*, *Leslie*, and *Chavez-Alvarez* are 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 by adopting a uniform six-month limit to detention without a bond hearing, rather than an individualized analysis to determine whether such detention has become unreasonable in each case. For more information, see [ACLU Advisory: Bond Hearings for Certain Immigrants Subject to Prolonged Immigration Detention Under *Rodriguez v. Robbins*](#); [ACLU Practice Advisory on *Diouf v. Napolitano*](#), dated April 21, 2011; and the [ACLU Practice Advisory on *Casas-Castrillon v. Dep’t of Homeland Security*](#), dated Sept. 9, 2008.

1) Prolonged Mandatory Detention Violates Due Process

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 further explained its due process analysis of prolonged mandatory detention in *Chavez-Alvarez*:

[D]ue process requires us to recognize that, at a certain point—which may differ case by case—the burden to an alien’s liberty outweighs a mere presumption that the alien will flee and/or is dangerous. At this tipping point, the Government can no longer defend the detention against claims that it is arbitrary or capricious by presuming flight and dangerousness: more is needed to justify the detention as necessary to achieve the goals of the statute.

Chavez-Alvarez, 2015 WL 1567019, at *4.

The due process concerns presented by prolonged immigration detention are heightened by the fact that although immigration detention is civil rather than criminal in nature, noncitizens are typically held in conditions of confinement that are identical to those for convicted criminals. *See id.* at *7 (noting that “the reality that merely calling a confinement ‘civil detention’ does not, of itself, meaningfully differentiate it from penal measures.”).²

On the other side of the scale, the government’s interest in mandatory detention decreases as detention grows in length. This is because, as detention becomes prolonged, the government will have had “sufficient time to examine information about [the detainee] to assess whether he truly posed a flight risk or presented any danger to the community.” *Id.*

² *See also Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999) (“It is . . . unrealistic to believe that . . . INS detainees are not actually being ‘punished’ in some sense for their past conduct.” (internal citations omitted)).

2) Prolonged Mandatory Detention Violates the Statute.

The Court in *Diop* 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 detention without a bond hearing has become unreasonable in length?

The Third Circuit has declined to adopt a presumptive period of time at which detention without a bond hearing 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. Critically, 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).

The Court in *Chavez-Alvarez* recently focused on three key factors to determine when detention becomes unreasonably prolonged:

1) Good Faith Challenge to Removal

First, the Court relied on the presence of a good faith challenge to removal. As the Court explained, a good faith claim is one “legitimately raised” and “challenges aspects of the Government’s case that present real issues, for example: a genuine factual dispute; poor legal reasoning; reliance on a contested legal theory; or the presence of a new legal issue.” 2015 WL 1567019 at *5.

Chavez-Alvarez rejected the government’s argument that an individual fails to raise a good faith claim simply because that claim has been denied by the IJ and BIA. *Id.* at *5 (explaining that the analysis does not involve simply “counting wins and losses”). Again, the question is merely whether the challenge to removal has been “legitimately raised” and “present[s] real issues.” *Id.*

2) Length of Detention

Second, reasonableness is a “function of the *length* of the detention.” *Diop*, 656 F.3d at 232 (emphasis added). Thus, an initial period of detention without a bond hearing will become “unreasonable” at some point in time. *Id.* The Court has emphasized that both Congress and *Demore* understood the purposes of detention to be fulfilled 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; *see also Diop*, 656 F.3d at 233-34. 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.” *Id.* at 234.³

3) Prospect of Future Proceedings

Third, courts should look to the prospect of future proceedings to determine whether detention has exceeded a reasonable period of time. Thus, on the facts of the case before it, the Court in *Chavez-Alvarez* identified as the tipping point the IJ’s issuance, after nine months of proceedings, of a final order of removal denying the individual’s good faith challenge to removal, as at that point the parties “could have reasonably predicted that [his] appeal would take a substantial amount of time, making his already lengthy detention considerably longer.” *Chavez-Alvarez*, 2015 WL 1567019, at *7. Under this reasoning, mandatory detention likewise should be found unreasonable where, for example, a detainee will not receive a merits hearing or decision from the IJ in the near future;⁴ anticipates lengthy detention during the pendency of a BIA appeal;⁵ has a stay of removal pending decision on a petition for review in the court of appeals;⁶ or is likely to be remanded back to immigration court for further proceedings.⁷

³ Several courts interpreting *Diop* have emphasized the importance of the *Demore* thresholds for determining whether detention has become unreasonably prolonged. *See, e.g., Bautista v. Sabol*, 862 F. Supp. 2d 375, 381 (M.D. Pa. 2012) (concluding that “[w]hile courts have declined to establish concrete rules for appropriate detention periods, there exists a point—somewhere around the seven-month mark—where pre-removal detention becomes universally questionable”); *Nwozuzu v. Napolitano*, No. 12-3963, 2012 WL 3561972, at *4 (D.N.J. Aug. 16, 2012) (“any detention exceeding five months is presumptively unreasonable”).

⁴ *See Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 549 (S.D.N.Y. 2014) (more than six months of mandatory detention unreasonable where upcoming IJ hearing would likely not resolve petitioner’s immigration status and his detention “may continue for a long time while he pursues relief from removal”); *Gordon v. Shanahan*, No. 15 Cv. 261, 2015 WL 1176706, at *5 (S.D.N.Y. Mar. 13, 2015) (more than eight months of mandatory detention unreasonable given lack of “any evidence that [the petitioner’s] removal proceedings will end soon,” petitioner “had applied for relief from removal,” and “the immigration judge’s eventual order [would] be subject to review by the Board of Immigration Appeals and potentially by a court of appeals.”).

⁵ *See Chavez-Alvarez*, 2015 WL 1567019 at *7. Notably, the Court in *Chavez-Alvarez* declined to rely on the mere fact that the government had sought summary affirmance by the BIA as a basis to find that the petitioner did not face prolonged detention in the future. *See id.*

⁶ *See Diouf v. Napolitano*, 634 F.3d 1081, 1091 n.13 (9th Cir. 2011) (noting that when a court “grants a stay of removal in connection with an alien’s petition for review from a denial of a motion to reopen, the alien’s prolonged detention becomes a near certainty”).

⁷ Data on immigration court backlogs are available at [TRAC Immigration](http://www.trac.org/trac/immigration). In 2014, the median time from filing to final disposition of agency appeals for Second and Third Circuits was 15.7 and 7.6 months, respectively. *See* Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts: 2014 Annual Report of the Dir., tbl. B-4C (2014), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2014/appendices/B04CSep14.pdf>.

Several district courts have applied a similar analysis and found comparable periods of mandatory detention to be unreasonable.⁸

4) Actions by the Parties

Critically, the Court has also rejected the view that detention is only unreasonable when the government or IJ/BIA has engaged in delay or committed error. As the Court recognized in *Diop*, “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.” *Diop*, 656 F.3d at 223. Thus, “even [where] the Government has handled the removal case in a reasonable way,” detention pending adjudication of a good faith challenge to removal can become unreasonable and require a bond hearing. *Chavez-Alvarez*, 2015 WL 1567019, at *4.

However, where delay or error by the government or IJ/BIA has prolonged your client’s removal case, it should be especially clear that detention without a bond hearing has exceeded a reasonable period.⁹ Such errors or delays may include, but are not limited to:

- Reversible errors by the IJ/BIA, resulting in remands for further proceedings.¹⁰
- Failure by the IJ to prepare a proper record for appeal.¹¹
- Failure by the government to plead all the charges of removability promptly.¹²
- Failure by the government to produce evidence of your client’s criminal history promptly.¹³

⁸ See, e.g., *Araujo-Cortes*, 35 F. Supp. 3d at 548 (finding more than six months of mandatory detention unreasonable); *Gordon*, 2015 WL 1176706, at *4 (finding more than eight months of mandatory detention unreasonable); *Francois v. Napolitano*, No. 12–2806, 2013 WL 4510004, at *4 (D.N.J. Aug. 23, 2013) (finding one year of mandatory detention unreasonable); *Martinez v. Muller*, No. 12–1731, 2012 WL 4505895, at *5 (finding ten months of mandatory detention unreasonable) (D.N.J. Sept. 25, 2012); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458-59 (S.D.N.Y. 2010) (finding that eight months of mandatory detention raised serious constitutional concerns).

⁹ See *Diop*, 656 F.3d at 234 (explaining that, in Mr. Diop’s case, “the immigration judge’s 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”).

¹⁰ See *Diop*, *id.* (noting reversible IJ errors resulting in multiple remands from BIA).

¹¹ See *Leslie*, 678 F.3d at 267-68, 271 (noting delay caused by “clerical errors” of IJ requiring remand to prepare a complete transcript).

¹² See *Diop*, 656 F.3d at 224 (noting that the government did not charge Mr. Diop with removal for his controlled substance offense until months after initiating removal proceedings).

- Failure by the government to initiate removal proceedings while your client was serving his criminal sentence.¹⁴
- Delays in the scheduling of removal hearings before the immigration court (e.g., because of extensive backlogs),¹⁵ in an IJ's issuance of a decision following a removal hearing,¹⁶ or in the BIA's adjudication of an appeal.¹⁷
- Delays by the government in the processing of applications for relief.¹⁸

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.” *Diop*, 656 F.3d at 234. The government may invoke this language to defend your client’s 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 has sought continuances to obtain counsel or submit new evidence.

However, *Leslie* and *Chavez-Alvarez* make clear that detention is not reasonable merely where an individual has chosen to pursue a good faith challenge to his removal. As the Court explained in *Leslie*, “[a]lthough an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take.” *Leslie*, 678 F.3d, at 271 (quoting *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003)). “To conclude that [a detainee’s] voluntary pursuit of such challenges renders the corresponding increase in time of detention reasonable, would ‘effectively punish [him] for pursuing applicable legal remedies’”—a result the Court has squarely rejected. *Id.* (quoting *Oyedeki v. Ashcroft*, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004) (Vanaskie, J.)); accord *Chavez-Alvarez*, 2015 WL 1567019, at *6. Indeed, for detention to be prolonged, a detainee always will have chosen to pursue his case.

¹³ See *id.* at 224-25, 234.

¹⁴ See, e.g., 8 U.S.C. § 1228 (providing for expedited removal of noncitizens with aggravated felony convictions).

¹⁵ See *Leslie*, 678 F.3d at 270-71 (noting nearly seven month delay in scheduling immigration court hearing after remand from Court of Appeals).

¹⁶ See *Ly v. Hansen*, 351 F.3d 263, 265-66, 272 (6th Cir. 2003) (IJ’s delay in issuing removal order by several months after the merits hearing unreasonably extended petitioner’s detention).

¹⁷ See *Tijani v. Willis*, 430 F.3d 1242, 1249 (9th Cir. 2004) (Tashima, J., concurring) (noting that BIA’s 13-month delay in adjudicating appeal unreasonably prolonged the petitioner’s detention); see also *Nwozuzu*, 2012 WL 3561972, at *5 (noting BIA took six months to decide appeal).

¹⁸ 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).

This reasoning should apply especially to brief continuances necessary for the detainee to seek counsel. As the Third Circuit has recognized, noncitizens have a statutory and constitutional right to seek counsel in removal proceedings.¹⁹ The right to counsel is a fundamental component of the noncitizen's right to fairly present his claims.²⁰ Nor are continuances to obtain counsel unusual, but rather are the most common reason for adjournment.²¹ And the government itself has acknowledged that allowing a detainee to obtain counsel promotes the speedier resolution of immigration proceedings.²²

Instead, properly read, *Diop* at most requires the lower courts to account for whether, based on the “exigencies of [his] case,” *Diop*, 656 F.3d at 234, a detainee reasonably needs the 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.²³ In contrast, the government may not justify prolonged mandatory detention based on a detainee's reasonable efforts to litigate good faith challenges to removal.

¹⁹ *Leslie v. Attorney General*, 611 F.3d 171, 180-81 (3d Cir. 2010); *see also* 8 U.S.C. § 1229a(b)(4)(A).

²⁰ *See Leslie*, 611 F.3d at 181; *see also Ardestani v. INS*, 502 U.S. 129, 138 (1991) (noting that “the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important”); *see also Francois*, 2013 WL 4510004 at *5 (“The Third Circuit has made clear that continuances related to a petitioner's attempts to secure counsel and to pursue bona fide challenges to removal should not count against the reasonableness of the length of that petitioner's detention.”).

Notably, a study of the immigration cases of New York residents—which covered the cases of many individuals detained in New Jersey and Pennsylvania—determined that “having representation and being free from detention” are the two most important variables affecting the ability to win a removal case. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 3 (2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf. Detainees with counsel were almost six times more likely to win their cases than detainees without counsel. *Id.* at 19-20.

²¹ *See* Office of the Inspector General, Management of Immigration Cases and Appeals by the Exec. Office for Immigration Rev. 31 (2012), available at <https://oig.justice.gov/reports/2012/e1301.pdf>.

²² *See id.* at 33.

²³ *See Chavez-Alvarez*, 2015 WL 1567019, at *5 (noting that “[a]n argument could be made that aliens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get under the statute” but reserving the question of whether “an alien's delay tactics should preclude a bond hearing” since petitioner did not act in bad faith); *see also 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”).

Finally, the Court in *Diop* held that the error by the IJ and the government trumped any actions by Mr. Diop that extended his detention.²⁴ 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 detention without a bond hearing has become unreasonably prolonged.

What types of cases does *Diop* apply to?

1) 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.

2) Individuals who have obtained a stay of removal pending adjudication of a petition for review of a removal order.

Diop also applies to individuals who have obtained a stay of removal pending court of appeals review of their removal order. Indeed, such detainees are especially vulnerable to unreasonably prolonged periods of detention without a bond hearing in light of the time necessary for the court to adjudicate a petition for review.²⁵

In *Leslie v. Attorney General*, the Third Circuit resolved 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: 8 U.S.C. § 1226, which authorizes the detention of noncitizens “pending a decision” on their removal, or 8 U.S.C. § 1231, which generally provides for detention of noncitizens after entry of the removal order. Joining the other circuits that have addressed the issue, the Court held that where removal is judicially stayed, § 1226—and not § 1231—continues to govern detention. *Leslie*, 678 F.3d at 270.²⁶ Moreover, such detention is subject to the reasonableness analysis set forth in *Diop*. *Id.*²⁷

²⁴ 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).

²⁵ See Admin. Office, *supra* n.7 (reporting median time of 15.7 and 7.6 months from filing to final disposition of administrative agency appeals for Second and Third Circuits, respectively, in 2012); see also *Diouf*, 634 F.3d at 1091 n.13 (noting that when a court “grants a stay of removal in connection with an alien’s petition for review from a denial of a motion to reopen, the alien’s prolonged detention becomes a near certainty”).

²⁶ *Accord 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)

3) 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 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.

In addition to these groups of detainees, the reasoning of *Diop* arguably applies to:

4) 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. *See* 8 U.S.C. § 1225(b). At least one district court has recognized that, under the reasoning of *Diop*, detention without a bond hearing beyond a reasonable period of time under § 1225 violates the Due Process Clause.²⁸ Notably, the Ninth Circuit has held that § 1225 must be construed to authorize only “brief and reasonable” detention.²⁹

5) Individuals subjected to prolonged detention pending withholding-only proceedings.

DHS may reinstate a removal order to a noncitizen if it finds that the noncitizen “has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal.” 8 U.S.C § 1231(a)(5); 8 C.F.R. § 241.8. However, if the noncitizen establishes a reasonable fear of persecution or torture, he is referred for withholding-only proceedings before an IJ. Individuals subject to a final administrative removal order under 8

(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)).

²⁷ Detainees whose removal is stayed pending judicial review currently receive administrative “file reviews” over their custody. *See* 8 C.F.R. §§ 241.4, 241.13. Notably, *Leslie* recognized that such reviews are no substitute for a bond hearing. *Leslie*, 678 F.3d, at 267 n.2 (holding that a file custody review where “neither Leslie nor counsel . . . was present” and no actual hearing was held was not a “bond hearing”). The Ninth Circuit has specifically held the custody review process to be inadequate to safeguard the liberty interests threatened by prolonged detention. *Diouf*, 634 F.3d at 1091 (concluding that “[t]he regulations do not afford adequate procedural safeguards because they do not provide for an in-person hearing, they place the burden on the alien rather than the government and they do not provide for a decision by a neutral arbiter such as an immigration judge”).

²⁸ *See Bautista*, 862 F. Supp. at 379-82.

²⁹ *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076-79 (9th Cir. 2006).

U.S.C. § 238(b); 8 C.F.R. § 238.1, are also referred for withholding-only proceedings upon establishing a reasonable fear of persecution or torture.

There is a dispute in the federal district courts about what statute governs detention pending withholding-only proceedings: i.e., § 1226 or § 1231.³⁰ However, regardless of what provision applies, under the reasoning of *Diop*, the statute arguably should be construed to require a bond hearing over prolonged detention where the government bears the burden of justifying continued detention.³¹ Indeed, government data shows that detention pending withholding-only proceedings is typically prolonged in nature.³²

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

Your client can file a habeas petition in federal district court for a bond hearing on the grounds that he has been subject to detention without a bond for an unreasonable period of time, in violation of both the statute and the Due Process Clause. *See* 28 U.S.C. § 2241.

Pursuant to governing regulations, your client also should be able to seek a “reasonableness” determination from the immigration court. *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]”). A sample motion to the immigration court is attached to this advisory.

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.³³

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. *See Diop*, 656 F.3d at 235. 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 danger to the community, and (2) whether your client is a flight risk.³⁴ If the court finds that your client is not a danger to the community, it should then

³⁰ Compare, e.g., *Guerrero v. Aviles*, No. 14-4367, 2014 WL 5502931 (D.N.J. Oct. 30, 2014) (holding that § 1226 applies) with *Santos v. Sabol*, No. 3:14-cv-00635 (M.D. Pa. June 5, 2014) (locating detention authority under § 1231).

³¹ *See Diouf*, 634 F.3d at 1086 (construing § 1231 to require a bond hearing over prolonged detention).

³² *See* Fact Sheet: Withholding-Only Cases and Detention (Apr. 2015), <https://www.aclu.org/fact-sheet/fact-sheet-withholding-only-cases-and-detention>.

³³ *See, e.g., Leslie*, 678 F.3d at 271 (granting habeas petition and remanding to the district court for a bond hearing within ten days of the order); *Alli*, 644 F. Supp. 2d at 541 (reviewing cases ordering bond hearing before habeas court or IJ).

³⁴ *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).

determine if your client poses a flight risk, and if so, whether bond and/or other conditions of release would sufficiently address these concerns.

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.
- 2) Likelihood of success in removal case: the merits of your client's removal case and why he or she is likely to eventually 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 posting a bond, to reporting requirements and/or 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").³⁵

³⁵ *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.

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*, 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)).³⁶

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.³⁷ 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 assistance with evaluating the merits of a case outside the Third Circuit, please contact Michael Tan at the ACLU Immigrants' Rights Project, mtan@aclu.org.³⁸

³⁶ 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).

³⁷ See *id.* at 1208 (holding that "due process requires a contemporaneous record of [prolonged detention] hearings").

³⁸ 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
IMMIGRATION COURT
[CITY, STATE]

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

MOTION FOR CUSTODY DETERMINATION UNDER *DIOP V. ICE/HOMELAND SECURITY* AND FOR BOND REDETERMINATION HEARING

Pursuant to 8 C.F.R. § 1003.19(h)(2)(ii), Respondent **INSERT NAME** requests a determination that **he/she** is not “properly included” under Immigration and Nationality Act (“INA”) § 236(c) because **his/her** mandatory detention has exceeded a “reasonable period of time.” See *Diop v. ICE/Homeland Security*, 656 F.3d 221, 223 (3d Cir. 2011). Respondent further requests an immediate bond hearing where the government bears the burden of showing that **his/her** continued detention is justified.

The grounds for this motion are as follows:

1. In *Diop*, the Third Circuit 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, INA § 236(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. *Diop*, 656 F.3d at 223.

2. The governing regulations vest this Court with jurisdiction to determine whether Respondent's mandatory detention is unreasonably prolonged under *Diop* and therefore not authorized by INA § 236(c). See 8 C.F.R. § 1003.19(h)(2)(ii) (noncitizen may "[seek] a determination by an immigration judge [IJ] that [he] is not properly included within" the mandatory detention statute). Immigration courts and the BIA routinely hear claims by detainees that they are not subject to INA § 236(c). See, e.g., *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999) (addressing whether detainee is "deportable" or "inadmissible" within meaning of the statute); *In re Acosta*, A043 971 319, 2010 WL 2224587 (BIA May 12, 2010) (addressing claim that detainee was not taken into immigration custody "when released" from criminal custody); *In re Adreenko*, A070 529 130, 2010 WL 1747388 (BIA Apr. 19, 2010) (same); *In re Christmas*, A40 164 143, 2006 WL 3485565 (BIA Oct. 27, 2006) (same).

3. Although this Court lacks jurisdiction to consider constitutional challenges to immigration statutes and regulations, see *Matter of Fede*, 20 I&N Dec. 35, 36 (BIA 1989), the Third Circuit has interpreted the statute to prohibit mandatory detention beyond a reasonable period of time. See *Diop*, 656 F.3d at 223. Thus, this Court clearly has authority under applicable regulations to determine whether Respondent is still "properly included" under INA § 236(c) where **his/her** mandatory detention has extended beyond a reasonable period. See 8 C.F.R. § 1003.19(h)(2)(ii).

4. *Insert the following paragraph if your client has petitioned for review of his removal order and obtained a judicial stay of removal:* Respondent presently has a stay of removal from the [INSERT COURT NAME] Circuit granted pending adjudication of his petition for review of his removal order. As a result, his detention is governed by INA § 236(c),

and subject to the constraints set forth in *Diop*. See *Leslie v. Attorney Gen. of the United States*, 678 F.3d 265, 270 (3d Cir. 2012).

5. As *Diop* 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,” the Court has provided key guidance, most recently in *Chavez-Alvarez v. Warden York County Prison*, No. 14-1402, 2015 WL 1567019 (3d Cir. 2015), as to when detention crosses this tipping point. The Court in *Chavez-Alvarez* focused on three critical factors.

6. First, the Court relied on the presence of a “good faith” challenge to removal. As the Court explained, good faith claim is one “legitimately raised” and presents “real issues.” 2015 WL 1567019 at *5. [Include if applicable to your case: Critically, an individual may raise a good faith claim even where that claim has been rejected by the IJ and BIA. *Id.* (explaining that the analysis does not involve simply “counting wins and losses”).]

7. Second, the Court focused on the *length* of detention. Specifically, the Court emphasized that “Congress and the Supreme Court believed those purposes would be fulfilled in the vast majority of cases within a month and a half, and five months at the maximum”—i.e. the average time for removal proceedings contemplated by the Supreme Court in *Demore v. Kim*, 538 U.S. 510, 530 (2003)—and that “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; see also *Chavez-Alvarez*, 2015 WL 1567019 at *4.

8. Third, the Court focused on the prospect of future proceedings to determine whether detention has exceeded a reasonable period of time. Thus, on the facts of the case before

it, the Court in *Chavez-Alvarez* identified as the tipping point the IJ's issuance, after nine months of proceedings, of a final order of removal denying the individual's good faith challenge to removal, as at that point the parties "could have reasonably predicted that [his] appeal would take a substantial amount of time, making his already lengthy detention considerably longer."

Chavez-Alvarez, 2015 WL 1567019, at *7.

9. Respondent's prolonged mandatory detention clearly exceeds a reasonable period of time. Respondent has been detained **INSERT PERIOD OF TIME** while pursuing a good faith challenge to removal [**DESCRIBE YOUR CLIENT'S CHALLENGE TO REMOVABILITY AND/OR CLAIMS FOR RELIEF**].

- *Consider framing the length of your client's detention in terms of the thresholds in Demore. For example: "Respondent's more than two and a half years of detention far exceeds these thresholds. **His/Her** imprisonment surpasses by nearly 20 times the average 47 days Demore contemplated for the 85% of detainees whose cases conclude before the IJ, and by more than six times the average five month period contemplated for those 15% of detainees who appeal their cases to the BIA. See Demore, 538 U.S. at 529-30."*

8. In addition, Respondent faces an unreasonable period of future mandatory detention.

- *Explain. For example, your client may 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. Such*

review could take months or years to conclude, during which time Respondent would be subject to further unreasonably prolonged mandatory detention.

See Chavez-Alvarez, 2015 WL 1567019, at *7 (finding mandatory detention unreasonable where the parties can “reasonably predict[]” that a case will “take a substantial amount of time, making . . . already lengthy detention considerably longer”).

9. Critically, Respondent’s prolonged detention is unreasonable *regardless* of whether government delays or errors have extended **his/her** removal case. As the Court made clear in *Chavez-Alvarez*, “detention may be unreasonable even though the Government has handled the removal case in a reasonable way.” *Chavez-Alvarez*, 2015 WL 1567019, at *5. Rather, “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.” *Diop*, 656 F.3d at 223. Thus, individuals are *not* required to show error or delay on the part of the government in order for mandatory detention to be unreasonably prolonged.

10. *Include if applicable:* However, as in *Diop*, the error and delay in Respondent’s case make it especially clear that **his/her** detention is unreasonably prolonged. *See Diop*, 656 F.3d at 234 (citing government’s failure to produce evidence of petitioner’s criminal history promptly and IJ’s errors as unreasonably prolonging petitioner’s mandatory detention).

Explain. Such errors or delay may include, but are not limited to:

- Reversible errors by the IJ/BIA, resulting in remands for further proceedings. *See Diop*, 656 F.3d at 234 (noting numerous reversible errors by the IJ resulting in multiple remands from the BIA).
- Failure by the IJ to prepare a proper record for appeal. *See Leslie*, 678 F.3d at 267-68, 271 (noting delay caused by “clerical errors” of IJ requiring remand to prepare a complete transcript).

- Failure by the government to plead all the charges of removability promptly. *See Diop*, 656 F.3d 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).
- Failure by the government to produce evidence of your client’s criminal history promptly. *See id.* at 224-25, 234.
- Failure by the government to initiate removal proceedings while your client was serving his/her criminal sentence. *See, e.g.*, 8 U.S.C. § 1228 (providing for expedited removal of noncitizens with aggravated felony convictions).
- Unreasonable delays in the scheduling of removal hearings before the immigration court (e.g., because of extensive backlogs), *see Leslie*, 678 F.3d at 270-71 (noting nearly seven month delay in scheduling immigration court hearing after remand from Court of Appeals), in an IJ’s issuance of a decision following a removal hearing, *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), or in the BIA’s adjudication of an appeal. *See Tijani v. Willis*, 430 F.3d 1241, 1249 (9th Cir. 2004) (Tashima, J., concurring) (noting that BIA’s 13-month delay in adjudicating appeal unreasonably prolonged the petitioner’s detention); *Nwozuzu v. Napolitano*, No. 12-3963, 2012 WL 3561972, at *5 (D.N.J. Aug. 16, 2012) (noting BIA took six months to decide appeal).
- Unreasonable delays by the government in the processing of applications for relief. *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).

10. Nor may the government justify Respondent’s unreasonably prolonged detention based merely on his/her decision to prosecute his/her removal case. As the Court held in *Leslie v. Attorney General*, “[a]lthough an alien may be responsible for seeking relief, he is not responsible for the amount of time that such determinations may take.” *Leslie*, 678 F.3d at 271 (quoting *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003)). Indeed, “[t]o conclude that [a detainee’s] voluntary pursuit of such challenges renders the corresponding increase in time of detention reasonable, would ‘effectively punish [him] for pursuing applicable legal remedies’”—a result the Court squarely rejected. *Id.* (quoting *Oyedeki v. Ashcroft*, 332 F. Supp. 2d 747, 753 (M.D. Pa. 2004) (Vanaskie, J.)).

9. Although *Diop* instructs 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,” it in no way holds that prolonged detention without a bond hearing is justified merely where a detainee has reasonably challenged his removal. *Diop*, 656 F.3d at 234. Indeed, in order for detention to be prolonged, a detainee will always have chosen to prosecute his case. Instead, properly read, *Diop* at most requires the lower courts to account for whether, based on the “exigencies of [his] case,” *id.*, 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. *See, e.g., Ly*, 351 F.3d at 272. In contrast, the government may not justify prolonged mandatory detention based on a detainee’s reasonable efforts to litigate good faith challenges to removal.

CONCLUSION

For the foregoing reasons, this Court should grant Respondent’s request for a determination that **he/she** is not properly included under the mandatory detention statute and order an immediate bond hearing where the government bears the burden of showing that **his/her** continued detention is necessary.

Respectfully submitted,

Date: _____

DETAINED

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY], [STATE]**

In the Matter of:	)	
	)	
[Name]	)	File No. A
	)	
Respondent	)	In Removal Proceedings
	)	

ORDER OF THE IMMIGRATION JUDGE

Upon due consideration of the respondent's Motion for Bond Hearing, it is HEREBY ORDERED that the motion be ☐ **GRANTED** ☐ **DENIED** because:

- ☐ DHS does not oppose the motion.
- ☐ The respondent does not oppose the motion.
- ☐ A response to the motion has not been filed with the court.
- ☐ Good cause has been established for the motion.
- ☐ The court agrees with the reasons stated in the opposition to the motion.
- ☐ The motion is untimely per _____.
- ☐ Other:

Deadlines:

- ☐ The application(s) for relief must be filed by _____.
- ☐ The respondent must comply with DHS biometrics instructions by _____.

Date

Immigration Judge

Certificate of Service

This document was served by: ☐ Mail ☐ Personal Service

To: ☐ Alien ☐ Alien c/o Custodial Officer ☐ Alien's Atty/Rep ☐ DHS

Date: _____

By: Court Staff _____

DETAINED

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[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