PROSECUTORIAL DISCRETION IN REMOVAL PROCEEDINGS

Part 2: Navigating Unfavorable Exercises of Discretion in Removal Proceedings

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This is the second part of a two-part advisory. Part 1 explores the current state of prosecutorial discretion (PD) in removal proceedings, including the various factors advocates should consider when assessing whether a favorable exercise of prosecutorial discretion may help a case. Part 1 also offers guidance on advocating for PD and protecting your client's interests in the uncertain political climate of a presidential election year.[1]

Part 2 explores some of the unexpected consequences of PD policies adopted by the ICE Office of the Principal Legal Advisor (OPLA) that can prejudice noncitizens in removal proceedings. These include the practice of moving to dismiss proceedings over respondents' objections and failing to appear at master calendar and merits hearings. This advisory explores options to defend against or otherwise navigate these unfavorable exercises of discretion, protecting your client's interests and furthering their goals.

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I. Defending Against Unilateral Motions to Dismiss Proceedings

According to OPLA's central memorandum on prosecutorial discretion, known as the "Doyle Memo," dismissal of removal proceedings is OPLA's preferred method of exercising PD.[2] Neither the Doyle Memo nor OPLA's Frequently Asked Questions on PD[3] instruct OPLA attorneys to consider the strength of an underlying application or whether a respondent wishes to litigate the case before moving to dismiss; rather, OPLA attorneys are instructed to move to dismiss as early as possible in proceedings, irrespective of the respondent's position on dismissal.[4]

Particularly since the Supreme Court's decision in *US v. Texas* in June 2023,[5] OPLA has carried out this directive by moving to dismiss proceedings in many cases, often just weeks before the merits hearing or at the start of the merits hearing itself. Although some local OPLA offices have indicated that their attorneys should consider the strength of any claims for relief before moving to dismiss, in practice OPLA moves to dismiss indiscriminately and often presses for dismissal even after the respondent has indicated their desire to litigate the merits.

A. Opposing dismissal

If OPLA moves to dismiss proceedings and the respondent wishes to proceed to merits, advocates should strenuously oppose the motion as soon as possible. See Part 1 of this advisory for a review of factors advocates should consider when determining whether to accept dismissal of removal proceedings in different types of cases. Depending on the case, there are various arguments advocates can make to demonstrate that dismissal is not appropriate given the circumstances.

Failure to Show Changed Circumstances Under 8 CFR § 239.2. OPLA asserts its purported dismissal authority under 8 CFR § 239.2(a)(7), which allows OPLA to "cancel" an NTA "prior to jurisdiction vesting with the immigration judge" in certain scenarios, including where "[c]ircumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government." But the regulation differentiates between this authority to cancel an NTA prior to commencement of proceedings, and the agency's more limited privilege to request dismissal once proceedings are underway.[6]

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[2] Kerry E. Doyle, ICE OPLA, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022) at 10, https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.
[3] ICE OPLA, *Doyle Memorandum: Frequently Asked Questions and Additional Instructions* (last updated May 15, 2024), https://www.ice.gov/about-ice/opla/prosecutorial-discretion ("OPLA FAQs").
[4] Doyle Memo at 11.
[5] *United States v. Texas*, 599 U.S. 670, 143 S. Ct. 1964 (2023).
[6] *See Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998) ("This language marks a clear boundary between the time prior to commencement of proceedings … and the time following commencement … the regulation presumably contemplates not just the automatic grant of a motion to terminate, but an informed adjudication by the Immigration Judge or this Board based on an evaluation of the factors underlying the Service's motion."); *see also Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 45 (BIA 2012) (discussing dismissal regulations).

EOIR recently underscored this distinction in the Preamble to its Final Rule on *Efficient Case and Docket Management in Immigration Proceedings*, making clear that only the IJ may dismiss removal proceedings once they have commenced, upon consideration of arguments from both parties.[7] Advocates should argue that merely falling outside of DHS's enforcement priorities, without more individualized facts, is not a "changed circumstance since the notice to appear was issued." Across other areas of immigration law, "changed circumstances" involves an assessment of the facts of the specific case, not a general change in government priorities or resource allocation, yet OPLA rarely provides further explanation or evidence to demonstrate that circumstances have actually changed. Advocates should therefore argue that dismissal based on "changed circumstances" is unsupported by the regulatory standard or the record, particularly where the respondent wishes to continue the proceedings.

Failure to Show Required Prejudice Under 8 CFR § 1239.2. In addition, EOIR's corresponding regulation mandates that such dismissal must be "without prejudice to the [noncitizen] or the Department of Homeland Security."[8] Being denied an opportunity to seek relief in immigration court, particularly asylum, is a harm to the respondent,[9] as is "unreasonable delay in the resolution of the proceedings."[10] EOIR's own guidance also instructs IJs that the court's resources should be devoted to cases in which the respondent is an enforcement priority *or* "desires a full adjudication of a claim for immigration relief."[11] IJs are also instructed to consider any objection to dismissal by the respondent.[12] Thus, the regulation and BIA precedent interpreting the regulation make clear that the Department does not have independent dismissal authority during removal proceedings, and the IJ is required to consider the respondent's position, including any potential prejudice to the respondent, before dismissing proceedings.[13]

Advocates should articulate in detail the prejudice their client will suffer if deprived of the opportunity to proceed on their application in court. Many nonpriority cases have already been pending for years, often through no fault of the respondents. These long delays can result in prolonged family separation; instability in other areas of the applicant's life, such as housing, employment, or education; and lack of access to public benefits or necessary medical care. Some respondents will already have prepared for their merits hearing, a process that can be

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[7] *See* 89 Fed. Reg. 46,742, 46,756 (May 29, 2024).
[8] 8 CFR § 1239.2(c).
[9] *Matter of W-Y-U-*, 27 I&N Dec. 17, 19 (BIA 2017) ("If his application is successful, [the respondent] may be eligible for lawful status in the United States, while administrative closure provides him no legal status."). Of course, if the applicant chooses to proceed before the Asylum Office and is not granted asylum, they will still have an opportunity to have their case heard before the IJ anew. But under current processing times, this process is likely to cause years, if not a decade of delay, so advocates should argue that the dismissal amounts to a deprivation. *See* Part 1 for more information on the USCIS Asylum Office's affirmative case backlog.
[10] *Id.* at 20.
[11] EOIR, *Guidance to EOIR adjudicators on Department of Homeland Security enforcement priorities and prosecutorial discretion initiatives* (Sep. 28, 2023) at 3-4, https://www.justice.gov/d9/2023-10/dm-23-04_0.pdf (hereinafter "EOIR PD Memo").
[12] *Id.* at 4.
[13] In *W-Y-U-*, the BIA also noted that IJs should not consider whether a noncitizen falls within DHS's enforcement priorities when adjudicating a request for administrative closure.

onerous and retraumatizing particularly for asylum seekers. If your office is handling the case pro bono, you might also highlight how dismissal will harm your office and waste pro bono resources.[14]

Failure to Comply with Procedural Rules & Deadlines. Advocates should review OPLA's motion for violations of procedural rules and policies that, while not binding, may persuade IJs not to dismiss proceedings. For example, the Immigration Court Practice Manual requires that any motion in non-detained proceedings be filed at least 15 days prior to the individual hearing and must be served on the opposing party.[15] Technically, a motion to dismiss raised orally at the merits hearing is therefore untimely under the Practice Manual and the IJ is permitted to deny the motion on that basis alone, although IJs rarely do so.[16] In addition, the moving party "should make a good faith effort to ascertain the opposing party's position" and describe such efforts in the motion.[17] If an OPLA motion to dismiss is filed untimely or without an attempt to meet and confer with the respondent, highlight these failures to conform to the Practice Manual as a potential basis to deny.

Similarly, both OPLA and EOIR guidance counsel that PD decisions should be made at the earliest stage of proceedings practicable, to preserve resources and promote efficient docket management.[18] Thus, if OPLA moves to dismiss at the individual hearing itself, or later than the filing deadline for that hearing, advocates should urge the IJ to deny the motion because dismissal at such a late stage of proceedings will not serve the purpose of preserving judicial or prosecutorial resources. Although these rules are all procedural in nature and not technically legally binding, it is worth highlighting them to underscore one party's inattention to court rules and procedures.

Due Process Violations. It is also a good idea to incorporate due process arguments into an opposition, when appropriate. Unfortunately, IJs generally do not engage with these arguments, particularly where the alleged due process violation concerns a discretionary form of relief, but it is important to raise and preserve these arguments for appeal.

To establish a due process claim in immigration court, the respondent must prove that there was a violation *and* that the violation caused prejudice.[19] Respondents in removal proceedings must be given an "opportunity to be heard at a meaningful time and in a meaningful manner."[20] Thus, in raising a due process argument, the respondent must show that the dismissal of proceedings caused prejudice, which can be challenging particularly where the respondent may pursue the relief outside of court. For example, in asylum cases, USCIS's policy for accepting re-filed asylum applications purports to provide an alternative means for

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[14] *See* EOIR, *Encouraging and Facilitating Pro Bono Legal Services* (Nov. 5, 2021), https://www.justice.gov/eoir/book/file/1446651/dl?inline.
[15] *Id.* Ch. 3.1(b), Ch. 3.2.
[16] *Id.*
[17] ICPM Ch. 5.2(i).
[18] Doyle Memo at 9; EOIR, *Guidance to EOIR adjudicators on Department of Homeland Security enforcement priorities and prosecutorial discretion initiatives* (Sep. 28, 2023) at 5, https://www.justice.gov/d9/2023-10/dm-23-04_0.pdf (hereinafter "EOIR PD Memo").
[19] *See, e.g.*, *Matter of R-C-R-*, 28 &N Dec. 74, 77 (BIA 2020).
[20] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted).

adjudication.[21] Therefore, as discussed above, advocates should think creatively about how the dismissal prejudices this specific respondent, including arguments regarding long processing times, prolonged family separation, lack of access to public benefits while an application is pending, and the client's mental health and other vulnerabilities. In many cases, dismissal of proceedings will create a functional bar to adjudication of benefits for which the respondent is eligible.[22] These are all potential examples of prejudice that advocates might cite to show a due process violation.

Particularly where the respondent is seeking a discretionary form of relief, advocates must also distinguish cases in which the BIA and circuit courts have found that due process was not violated. For example, in *Matters of Jaso and Ayala*, 27 I&N Dec. 557 (BIA 2019), the BIA affirmed dismissal of proceedings where the respondents had filed meritless asylum applications in order to pursue cancellation of removal in immigration court.[23] The BIA found that the respondents did not have a substantive due process interest in the commencement of removal proceedings in order to pursue cancellation of removal.[24] Advocates should distinguish *Jaso & Ayala* when making due process arguments: *Jaso & Ayala* dealt with the unique situation in which the respondents affirmatively applied for asylum because they wanted to be placed in removal proceedings to pursue other relief, with no intention of pursuing asylum. In contrast, most respondents find themselves in immigration court after a border encounter, state criminal process, or street arrest, not as the result of an affirmative attempt to be placed in proceedings. Moreover, while a respondent may not have a substantive interest in the *commencement* of proceedings, the BIA has held that the Due Process Clause requires the right to a "full and fair hearing" in removal proceedings once they have started.[25]

B. Seeking reconsideration after a dismissal order

Advocates report that IJs frequently grant OPLA's motions to dismiss without allowing the respondent time to respond or even when the respondent has opposed dismissal. In this situation, the respondent and advocate must determine whether it is in the respondent's best interest to try to reverse the dismissal and reopen proceedings, or to simply accept dismissal. Where the respondent has applied for asylum, this assessment involves determining whether the respondent prefers to proceed in court immediately, or re-file their application at the asylum office and face potentially years of additional delay. For some asylum applicants—for example, those whose priority is to maintain employment authorization but for whom resolution is not necessarily urgent—re-filing at USCIS might be the better option. For more considerations in

[21] *See* USCIS, *How USCIS Processes a Form I-589 Filed After Removal Proceedings are Dismissed or Terminated* (last updated Feb. 12, 2024), https://www.uscis.gov/humanitarian/refugees-and-asylum/how-uscis-processes-a-form-i-589-filed-after-removal-proceedings-are-dismissed-or-terminated.
[22] *See, e.g.*, DHS, Off. of Inspector General, *Final Report: USCIS Faces Challenges Meeting Statutory Timelines and Reducing its Backlog of Affirmative Asylum Claims* (Jul. 3, 2024), https://www.oig.dhs.gov/sites/default/files/assets/2024-07/OIG-24-36-Jul24.pdf.
[23] 27 I&N Dec. at 559.
[24] *Id.* (citing *Mendez-Garcia v. Lynch*, 840 F.3d 655, 666 (9th Cir. 2016) ("No statute or regulation requires the government to take action on [noncitizens'] applications within a set period, nor does cancellation of removal give rise to a substantive interest protected by the Due Process Clause.") (internal citation omitted).
[25] *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011).

deciding whether to accept dismissal in different types of relief cases, see Part 1 of this practice advisory.

But in other cases, the respondent may prefer to try to reverse the IJ's decision. In these cases, the respondent can file a motion to reconsider within 30 days of the IJ's dismissal order.[26] Motions to reconsider must state the "errors of fact or law in the Immigration Judge's prior decision and shall be supported by pertinent authority."[27] A motion to reconsider should be accompanied by a copy of the IJ's decision.[28] Although technically reconsideration is based on the record as of the original IJ decision, you may attach additional evidence if necessary to show how the IJ's original decision was based on a factual or legal error (particularly if you were not served the original motion or if the IJ ruled before receiving your opposition). A motion to reconsider, as opposed to an appeal directly to the BIA, is recommended if you can identify a clear legal or factual error in the IJ's decision; if the record on the dismissal issue is underdeveloped; or if you believe the IJ may otherwise be open to changing their mind.

In addition to the legal arguments in opposition described above, advocates should look for procedural errors in both OPLA's motion to dismiss and the IJ's decision that might warrant reconsideration. For example, OPLA is required to properly serve any filing on the respondent and attach a valid proof of service to that filing.[29] The regulations further state that the IJ "will not consider any documents or applications that do not contain a certificate of service unless service is made on the record during a hearing."[30] Carefully review the proof of service for any defects, such as an incorrect name or mailing address. Any service defects in OPLA's motion to dismiss present a strong argument for reconsideration.

The Practice Manual further provides that the opposing party should generally have 10 days to file a response to the motion, unless the IJ sets a different deadline.[31] If the IJ's order granting dismissal is dated sooner than 10 days after OPLA's filing, the motion to reconsider should highlight this as a failure to allow the respondent to respond and have their opposition considered.[32] Although this 10-day response period is not enshrined in statute or regulation, advocates can argue that, by failing to allow adequate time for a response, the IJ failed to consider any potential prejudice to respondent, as required under 8 CFR § 1239.2(c).

If the IJ issues a template dismissal order without fully engaging with the respondent's arguments in opposition, this may also constitute a legal error. The regulations and BIA precedent require the IJ to consider the arguments of both parties and any prejudice to the respondent, and to articulate a basis for their decision.[33] For example, in *Matter of M-P-*, the IJ's order merely stated that the motion had been "duly considered" and that "no substantial grounds [had] been advanced to warrant its grant," with no further explanation of the IJ's

[26] 8 CFR § 1003.23(b)(2).
[27] *Id.*
[28] Immig. Ct. Prac. Man. Ch. 5.2(d).
[29] 8 CFR § 1292.5.
[30] 8 CFR §1003.32(c).
[31] Immig. Ct. Prac. Man. Ch. 3.2(b).
[32] *See also G-N-C-*, 22 I&N Dec. at 284-85 (finding that the IJ erred where "proceedings were terminated without considering arguments from both sides ….").
[33] *Id.*; 8 CFR § 1239.2(c).

reasoning or consideration of evidence.[34] The BIA found that this insufficient reasoning "deprived [the noncitizen] of a fair opportunity to contest that determination on appeal."[35] Thus, if the IJ's decision granting dismissal did not meaningfully engage with the respondent's arguments in opposition, this may be a basis for reconsideration.

Motions to Reopen Following Dismissal. In some cases, it may be too late to file a motion to reconsider, or reconsideration may not be appropriate because you cannot identify a clear error of fact or law in the IJ's original decision. In these situations, advocates should assess whether a motion to reopen may be appropriate. Motions to reopen must generally be filed within 90 days of the IJ's decision, and can be based on new, material evidence that was not previously available and could not be discovered at the time of dismissal.[36] Depending on the new facts or circumstances underlying a motion to reopen, OPLA may be willing to join in or non-oppose reopening.

> **Example:** Reina comes to your office for a consultation. She tells you that she was previously in removal proceedings, unrepresented, and had applied for non-LPR cancellation of removal. At her master calendar hearing last month, OPLA moved to dismiss proceedings as a matter of prosecutorial discretion, and the IJ dismissed the case. Reina tells you that, although the IJ explained what dismissal would mean, he did not explain that she would eventually become ineligible for work authorization, which she needs to support her family. You file a motion to reopen, accompanied by a declaration from your client explaining that she did not fully understand the consequences of dismissal. Before filing the motion to reopen, however, you discuss with Reina the risks of reopening her case, including the possibility of ultimately being denied relief, as well as the possibility (but not guarantee) of administrative closure.

C. Appealing dismissal

If the IJ declines to reconsider their dismissal decision, or if you determined that filing a motion to reconsider is not likely to succeed, another option is to appeal the IJ's decision to the BIA. While many of the appeal arguments will be similar to arguments you would make in a motion to reconsider, an appeal will be subject to a different burden of proof and standard of review.

The BIA reviews IJ findings of fact under the "clearly erroneous" standard, meaning it will only reverse the IJ's factual findings if they are "clearly erroneous."[37] The BIA reviews questions of law, discretion, and all other appeal issues *de novo*, meaning it reviews the issue on its own, giving no deference to the IJ.[38] Thus, whether you file a motion to reconsider with the IJ or a direct appeal to the BIA will depend in part on the completeness of the record: if the IJ's errors are clear from the existing record, and you do not believe that the IJ will be open to reconsidering their decision, then an appeal may be the appropriate route. But if the IJ did not have an opportunity to consider certain facts or evidence that are essential to identifying the errors in dismissal, then a motion to reconsider (or, in some cases, a motion to reopen), may

[34] *Matter of M-P-*, 20 I&N Dec. 786, 787 (BIA 1994).
[35] *Id.* at 787-88.
[36] 8 CFR § 1003.23(b)(3).
[37] 8 CFR § 1003.1(d)(3)(i).
[38] *Id.* § 1003.2(d)(3)(ii).

be a better option. If you do not have experience with post-order motions and appeals, speak to a supervisor or find a mentor attorney to help strategize.

NOTE: Work permits. If a case is dismissed and the respondent previously had employment authorization based on an application pending before the IJ, such as asylum or non-LPR cancellation of removal, the respondent should still be able to renew their work permit while the appeal is pending.[39] Advocates should argue that the IJ's dismissal of proceedings is not administratively final until the BIA rules on the appeal, and therefore the application for relief remains pending for purposes of employment authorization. Given the unique posture of such appeals, however, USCIS may deny a renewal application if it determines that the application is not the subject of the appeal, but rather the dismissal itself. This may be an important factor to consider particularly for asylum applicants, who have the alternate option of re-filing at the Asylum Office, thereby maintaining employment authorization eligibility.

WARNING! EOIR's Off-Docket Initiative. In 2022, EOIR announced its own docket-management initiative, the "Off-Docket Initiative," under which EOIR Headquarters removes certain non-priority cases from the IJ's docket. The Off-Docket Initiative is unrelated to DHS's PD policies and is initiated by EOIR Headquarters, not the local IJ assigned to the case.[40] EOIR Headquarters identifies a case for the off-docket initiative, the parties receive a notice that the case will be taken off calendar unless either party timely objects. Cases that are removed from the court's calendar pursuant to the Off-Docket Initiative will have no scheduled hearing unless on party requests that the court put it back on calendar.

Practitioners report that EOIR Headquarters has initiated Off-Docket notices in the cases of individual respondents, even when their cases are consolidated with family members' cases, causing confusion about which respondent(s) remain on calendar. EOIR Headquarters has also reportedly used the Off-Docket Initiative to remove some time-sensitive cases from the docket, including where the respondent has applied for Non-LPR Cancellation of Removal, even where there is a risk that the qualifying relative necessary for this relief may age out. Practitioners who receive an Off-Docket notice should review the notice carefully to understand exactly whose case is being removed from the court's calendar, and whether that action will actually benefit the respondent. If not, practitioners should timely respond to the notice and request that the case remain on calendar.

[39] According to the USCIS Policy Manual, "If an applicant appeals an unfavorable decision from an application for relief from removal from the immigration judge (IJ) to the Board of Immigration Appeals (BIA), the application for relief from removal is considered pending" until the BIA either sustains or denies the appeal." 10 USCIS-PM A.4.H. *See also* 8 CFR § 274a.12(c) ("USCIS, in its discretion, may establish a specific validity period for an employment authorization document, which may include any period when an administrative appeal or judicial review of an application or petition is pending.")

[40] Tracy Short, EOIR, *Taking Cases Off Calendar Pursuant to 8 CFR § 1003.9(b)* (Apr. 26, 2022), AILA Doc. No. 22080202.

II. Dealing with OPLA Failures to Appear

The Doyle Memo also explicitly notes that OPLA may exercise PD by waiving its appearance at master calendar and individual hearings, or in other words, by not appearing at scheduled hearings.[41] The Doyle Memo cites an EOIR regulation that, in OPLA's interpretation, only requires OPLA to appear in certain types of hearings: (1) the noncitizen is unrepresented and is incompetent or an unaccompanied minor (8 CFR § 1240.2(b)); (2) the removal proceeding will result in a removal order and the noncitizen's nationality is at issue (8 CFR § 1240.2(b)); (3) DHS is moving to rescind adjustment of status (8 CFR § 1246.5(a)); or (4) the IJ cannot determine removability (8 CFR § 1240.10(c)).[42] The Doyle Memo thus asserts that OPLA has discretion not to assign counsel to any case falling outside of these categories.[43]

OPLA's implementation of this guidance has varied depending on jurisdiction, but in many courts OPLA has begun not appearing at certain master calendar and merits hearings.[44] Anecdotally, practitioners report that OPLA generally files a notice of non-appearance prior to merits hearings, in which it indicates OPLA's position on the case and whether OPLA will reserve appeal. But practitioners have reported that OPLA's notice sometimes does not state its position on the case or intent to appeal, or OPLA fails to file a "courtesy notice" at all. *Id.*

Where OPLA fails to appear at a merits hearing, practitioners should consider arguing that the non-appearance should be construed as non-opposition to the relief being sought, particularly where OPLA has not filed an advance notice or where the notice does not state OPLA's position on the case. While the Doyle Memo indicates that non-appearance does not waive OPLA's ability to present arguments, non-appearance does indicate, at minimum, that DHS has determined the respondent is not a priority for enforcement.[45]

When OPLA fails to appear, some IJs take on a more prosecutorial role to ensure that the respondent meets their burden of proof. Advocates should remind the IJ of their role as a neutral arbitrator, whose job is to "receive and consider," not to solicit or cross-examine the evidence,[46] and to "resolve disputes between the parties."[47] And while circuit courts have held that IJs have a duty to assist pro se respondents by explaining and exploring relief eligibility, this duty to "develop the record" does not entail adopting a prosecutorial role where the government, a represented party, voluntarily chooses not to appear to make arguments against the noncitizen.[48] Argue that by failing to appear, OPLA forfeits its ability to present and

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[41] Doyle Memo at 15-16.
[42] Doyle Memo at 16 n.35.
[43] *Id.*
[44] AILA, *Practice Pointer: Advocating in Immigration Court Where OPLA Does Not Appear or Does Not Respond* (June 20, 2024), AILA Doc. 24062100.
[45] Doyle Memo at 15-16
[46] 8 CFR §1240.1(c).
[47] EOIR Memo at 3 n.4.
[48] *See, e.g.*, *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002) (discussing IJs' duty to assist pro se respondents in developing claims, identifying relevant evidence, and articulating legal arguments); *cf. Quintero v. Garland*, 998 F.3d 612, 623 (4th Cir. 2021) (collecting cases discussing IJs' statutory duty to develop the record in all cases, but "especially in pro se cases," as a matter of due process for the respondent).

defend evidence, challenge the respondent's testimony, and otherwise raise disputes, and the IJ exceeds their authority by taking on that prosecutorial role.

If the IJ ultimately grants relief when OPLA has failed to appear, advocates should argue that OPLA is not able to reserve appeal if they do not appear for the merits hearing. The IJ is unlikely to foreclose appeal, but it is nevertheless important to preserve the argument. If OPLA fails to appear at a merits hearing and the IJ nevertheless denies relief, advocates should argue on appeal that OPLA has failed to raise arguments on appeal.

III. Conclusion

While the government's current prosecutorial discretion policy has benefitted many noncitizens wishing to avoid removal, some aspects of the policy have resulted in unintended consequences of preventing noncitizens from pursuing relief and depriving them of a fair day in court. When certain PD actions are weaponized against noncitizens, advocates should explore options for escalation, reconsideration, and appeal to preserve their client's rights and legal arguments.

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