

I. Executive Summary

1. Heartland Alliance's National Immigrant Justice Center (NIJC) remains deeply concerned with U.S. immigration policy despite the U.S. government's support of Recommendation 80 in the last UPR review, which recommends that the U.S. "spare no efforts to constantly evaluate the enforcement of the immigration federal legislation, with a vision of promoting and protecting human rights."
2. This submission focuses on the U.S. Department of Homeland Security's (DHS) use of summary removal mechanisms to facilitate immigration enforcement. Summary removals facilitate the process of swiftly deporting record numbers of people, and expeditiously re-deporting those who return, even if the purpose of returning is family reunification. The process systematically denies individuals a hearing before an immigration judge and limits access to counsel, severely limiting their ability to pursue asylum and other legal protections. Therefore, summary removals pose a threat to basic values of fairness and due process rights enshrined in international and U.S. law, and can deny internationally-recognized rights to seek asylum and to family.
3. Recently, DHS has increasingly used summary removal processes to deny due process rights to women and children seeking safety in the United States. In response to increased numbers of arriving families, DHS significantly expanded detention of women and children by more than 1500 percent, from approximately 80 detention beds to more than 1,200 beds during the summer of 2014.¹ Women and children in family detention are subject to summary removal with expedited hearings and limited access to legal counsel, severely limiting their ability to pursue asylum and other legal protections.
4. DHS uses five mechanisms to summarily remove individuals from the United States: (1) expedited removal orders; (2) final administrative removal orders (FAROs); (3) stipulated removal orders; (4) removals pursuant to the Visa Waiver Program (VWP); and (5) reinstatements of prior removal orders. Section II of this submission addresses three international human rights implicated by summary removal mechanisms:
 - A. Right to a fair, public hearing
 - B. Right to seek asylum
 - C. Right to family

II. Human Rights Framework and Analysis

- A. **The U.S. government routinely denies individuals fair and public hearings in violation of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).**
5. The United States is obligated under international law to provide everyone with a fair and public hearing.² However, the U.S. government denies immigrants a right to a fair hearing and judicial review through summary removal processes. This contradicts the U.S. government's position in its last UPR review where they expressed support for Recommendation 185: "Ensure that

migrants in detention, subject to a process of expulsion are entitled to counsel, a fair trial and fully understand their rights, even in their own language.”³

6. While some summary removal mechanisms outright deny individuals in removal proceedings their right to a fair hearing, evidence exists that government agents also coerce or provide wrong information that results in individuals waiving their right to a hearing without fully understanding the consequences.⁴ In addition, summary removal processes often leave individuals without adequate time to obtain legal counsel, who could help them challenge the removal or identify and articulate claims to alternate forms of relief.
7. Under U.S. law, federal courts do not have the authority to review some summary removal mechanisms, such as expedited removal orders.⁵ Regardless of the lack of review, the removal becomes part of an individual’s permanent immigration record and negatively affects one’s ability to immigrate in the future.

i. Immigrants in family detention face challenges receiving fair hearings

8. From October 2013 through August 2014, 66,142 family units have been apprehended along the southwest border.⁶ The vast majority are women and children from El Salvador, Guatemala, and Honduras who are fleeing violence. Central America is one of the most violent regions in the world;⁷ violence against women and girls is of particular concern. In 2011, El Salvador had the highest rate of gender-motivated killing of women in the world, followed closely by Guatemala (third highest) and Honduras (sixth highest).⁸
9. The right to a fair hearing for women and children in family detention facilities is severely curtailed by their limited access to attorneys. Family detention facilities are frequently located in remote locations where legal service providers are few or non-existent. For instance, the family detention center in Artesia, New Mexico is located more than 200 miles from the closest city center. In some instances, deportation flights have left the U.S. before detained mothers and their children have even had a legal orientation program to understand their rights and the removal process. Limited phone access seriously complicates detainees’ ability to communicate with counsel to prepare their cases and gather necessary documentation in support of their applications for relief.
10. To proceed with the asylum process, families must pass a screening process known as the “credible fear interview” (CFI). During these interviews, attorneys are not guaranteed an opportunity to speak on behalf of their clients. Attorneys are also frequently not allowed to represent their clients at the hearing before an immigration judge to review negative credible fear findings. These hearings take place by video-teleconference (VTC), which limits the judges’ ability to assess the individual’s fear.

ii. Final administrative removal orders (FAROs) have no judicial oversight

11. Final administrative removal orders (FAROs) are issued to an individual who does not have permanent legal status and has been convicted of an aggravated felony, without consideration of family ties to the United States.⁹

12. The FARO process is problematic because DHS agents with little to no legal training – rather than specially trained immigration judges – are tasked with determining whether or not a crime is an “aggravated felony,” a complicated term in U.S. immigration law whose interpretation is rarely clear and decisive.¹⁰ Classification may also change depending on the state in which a person is detained. The time frame to challenge a FARO is only 10 to 13 days, and once an order is entered it is very difficult to reopen.
13. By law, the definition of “aggravated felony” can be applied retroactively to include acts that were not considered aggravated felonies at the time they were committed. This directly contradicts Article 15(1) of the ICCPR, which provides that “No one shall be held guilty of any criminal offence...which did not constitute a criminal offence...at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”¹¹ DHS maintains that they do not have jurisdiction to reopen cases where they have misclassified a conviction as an aggravated felony.

iii. Visa Waiver Program

14. Conditions placed on the Visa Waiver Program (VWP), which allows individuals from certain countries to enter the U.S. without a visa, greatly limit noncitizens’ ability to challenge removal from the United States. Participants in the VWP are subject to summary removal any time after entry, and can only challenge deportation by seeking asylum, withholding of removal, or protection under the Convention Against Torture (CAT) before an immigration judge.¹²
15. NIJC clients experience direct harm as a result of the limitations placed on participants in the VWP, whether they in fact were VWP participants or not. For example, in 2011 DHS came to Constanza’s (pseudonym) home searching for another individual. When they could not find him, they questioned and detained Constanza. DHS officers believed that Constanza had entered under the VWP and thus did not have a right to a hearing before a judge, issued a removal order and attempted to deport her. Constanza filed a lawsuit to challenge her deportation. After nearly a year of litigation, the government’s own files proved that Constanza had not entered under the VWP. Consequently, the government revoked the removal order against her and released her after nine months of detention.

iv. Stipulated removal orders

16. Stipulated removal orders require individuals to waive their right to a hearing before an immigration judge and agree to have a formal removal order entered against them, even if they may be eligible to remain in the United States.¹³ Some individuals may choose to waive their right to a hearing to avoid lengthy periods in immigration detention either to escape harsh detention conditions or because an individual does not believe they have any removal defense. An immigration judge is required by regulation to determine that the noncitizen’s waiver is voluntary, knowing, and intelligent,¹⁴ but immigration judges do not directly speak to individuals, making it difficult to determine whether the waiver was voluntary and the individual fully understood the consequences and their options.¹⁵
17. Frequently, immigration agents trick or coerce individuals into signing stipulated removal orders.¹⁶ Immigration agents, intentionally or unintentionally, pressure detainees and inaccurately describe the removal process, telling them that they will be deported regardless of

efforts to seek relief from removal or that the individual will be able to get out of detention more quickly if they sign the order. DHS agents may neglect to mention that detainees can seek release on bond while they challenge their removal. Some immigrants do not understand the stipulated removal order document, which is frequently not in their native language, and many do not understand the immigration consequences of agreeing to a stipulated removal order, such as bars to future reentry and increased criminal penalties due to the formal order of removal. Moreover, some—particularly those who have suffered past abuses—sign away their rights to judicial review in a desperate attempt to escape harsh detention conditions.

B. The summary removal process denies asylum seekers meaningful opportunities to express fear of return to their home country in violation of the UDHR, the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

18. Both international and domestic law provide for protection against return for refugees and victims of torture.¹⁷ Summary removal processes, however, can deny asylum seekers the opportunity to present their cases before an immigration judge or trained asylum officer, and potentially result in their being returned to countries where they face persecution or torture, in violation of international treaty obligations and domestic law.

i. Expedited removal

19. Expedited removal orders are issued by DHS who has the authority to deport nearly any person who does not have a valid visa or entry document, and who was caught within 100 miles of the border or was previously deported.¹⁸ DHS can send the individual back to their country of origin immediately unless immigration agents decide to prosecute them in federal court instead. Two-thirds of Americans live in this border zone where DHS has the power to deport people without any oversight.¹⁹ Between fiscal years 2010 and 2012 DHS removed 395,685 individuals through the expedited removal process, accounting for 33 percent of all removals.²⁰

20. Although the expedited removal process is supposed to initiate a screening to establish whether individuals have a fear of persecution upon return to their home countries, DHS's screening process is not conducive to obtaining this information. Moreover, expressions of fear are often overlooked or disregarded. Subsequently, asylum seekers are frequently deported back to places where they faced persecution in clear violation of U.S. commitments under the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol, and the CAT.

21. NIJC's client, Jazmin, (pseudonym) is one of many immigrants who was deported despite having a strong asylum case. When Jazmin was 14, she was forced into marriage to "cure" her homosexuality in El Salvador. Her husband raped her on numerous occasions. She was also persecuted by several women in her hometown who beat her for being a lesbian and left her unconscious on the side of the road. Despite this harm, DHS refused to recognize her as eligible for protection. In 2010, she received an expedited removal order and was not allowed to present her case for asylum. She re-entered the United States again in a second attempt to seek protection in 2011, and was successful after intervention from NIJC and more than a year in detention.

ii. Women and children in family detention denied meaningful opportunities to seek asylum

22. Mothers detained with their children are subject to accelerated hearings through expedited removal procedures that prioritize speed over due process. Although everyone in expedited removal has a right to seek relief from removal, the expedited process at Artesia undermines this right and subjects mothers and children to higher standards to prove eligibility for asylum.
23. To proceed with the asylum process, DHS uses Credible Fear Interviews (CFIs) to gather information to evaluate whether individuals have a fear of return that could qualify them for asylum in the United States. Interview conditions can discourage mothers from sharing painful details of their experiences. Often the mothers' children are present and the mother does not want to reveal her story of persecution before her children. Mothers have also reported that asylum officers rushed their interview, requested short answers, and asked questions in legal terminology that the women could not understand (e.g. asking women if they were a part of a "particular social group").²¹

C. Summary removal policies tear families apart in violation of the right to family in the UDHR and ICCPR

24. The international community has long viewed the family as the natural and fundamental group unit of society, and as such, it is entitled to protection by society and the State.²² However, restricted due process rights under summary removal proceedings frequently leads to family separation, in violation of the right to family. In fiscal year 2012 alone, at least 152,000 U.S. citizen children were in foster care because of the detention or deportation of a parent.²³ Although immigration judges have historically been able to consider one's individual circumstances, increases in summary removal proceedings means that many individual's ties to the United States will never be considered in removal proceedings.
25. Individuals who did not receive meaningful hearings for their first deportation order frequently re-enter to reunite with U.S. citizen spouses and children—a factor that should have been considered at the outset of the first deportation order. When individuals return, they find out that their prior removal order subjects them to automatic deportation despite underlying problems with the original removal order. In many cases, individuals are charged with illegal reentry.

i. Reinstatement

26. Reinstatement of a prior removal order is issued when a previously deported noncitizen is apprehended after re-entering the United States without authorization. When placed in reinstatement proceedings, individuals are denied an opportunity to a hearing before an immigration judge to reopen or review the prior removal order.²⁴ The entire process, including the removal, can occur within a 24-hour period, and usually happens too quickly for an individual to consult with an attorney.²⁵ During fiscal years 2010 through 2012, reinstatement orders accounted for 398,666 or 33 percent of removals.²⁶
27. Frequently, individuals re-enter the United States after deportation to reunify with family. For example, NIJC's client, Miguel (pseudonym), was deported under an erroneous FARO in 2009.^a

^a Since age 14, Miguel has cared for and supported his younger siblings and his single mother, a long-time green card holder. In 2009, ICE gave him a FARO after an ICE officer mistakenly classified his offense – resisting arrest – as an aggravated

At the time of his removal, he had a pending family petition through his ailing mother who is a long-time lawful permanent resident (LPR). In addition, Miguel was his mother's sole caretaker. Given his mother's declining health, Miguel returned to care for her. He now faces reinstatement of removal as he fights to stay and care for his sick mother.

28. The U.S. government also bars individuals issued reinstatement orders from accessing asylum protections.²⁷ This is particularly problematic in cases where the individual was first deported through streamlined processes which deprived them of a fair hearing,²⁸ but it is always problematic to deprive individuals of opportunities to access protections. Individuals deprived of the right to seek asylum must meet a higher burden to obtain protection from removal, and face months of mandatory detention in order to access those protections.²⁹
29. Without judicial review, access to qualified counsel, and fair, meaningful hearings, legal errors are made which are burdensome, if not impossible, to correct. When the person deported is the primary wage earner or caretaker, the well-being of the entire family suffers. The suffering among children is particularly acute, with studies finding poorer health and education outcomes among children who have lost a parent to deportation.³⁰ Further, the formal removal order makes it nearly impossible for an individual to legally rejoin their family. Miguel has attempted to revisit the erroneous FARO with ICE, but the agency argued that they do not have jurisdiction to reopen summary removal orders.

III. Recommendations

The summary removal process systematically denies immigrants due process, access to fair hearings, the right to pursue asylum, and the right to family. NIJC makes the following recommendations to ensure that U.S. policies conform to international human rights protections:

- 1) Eliminate the use of family detention.
- 2) Urge DHS to implement a more robust screening process, including recording meetings and providing certified interpreters.
- 3) Improve conditions at the border to ensure that detention conditions do not drive people to abandon relief claims.
- 4) Reform regulations to allow asylum eligibility notwithstanding prior removal orders.
- 5) Refrain from issuing reinstatement of deportation orders on a humanitarian basis, taking into account family ties and other equities.
- 6) Abolish administrative removal orders by immigration officers and allow immigration judges to review administrative removal orders.
- 7) Allow immigration judges to review reinstatement orders where the underlying removal orders are potentially problematic.
- 8) Ensure that the Visa Waiver Program does not prevent removal hearings for individuals alleged to have resided in the United States in excess of the time permitted.

felony. In addition to failing to challenge the wrongful FARO, Miguel's attorney also neglected to tell Miguel that he was eligible for relief from deportation. By the time Miguel found out the truth, the three-day period to challenge a FARO had passed.

Endnotes

¹ Democracy Now, *Two Detention Centers for Migrant Women And Children Open On 5th Anniv. of End to Family Detention*, Aug. 8, 2014, http://www.democracynow.org/blog/2014/8/8/two_detention_centers_for_migrant_women; see also Wilder, F., *Feds Planning Massive Family Detention Center in South Texas*, The Texas Observer, Sept. 5, 2014, <http://www.texasobserver.org/exclusive-feds-planning-massive-family-detention-center-south-texas/> (detailing plans for an additional 2,400 bed family detention facility).

² Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR], Art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR], Art. 14 (“everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”).

³ U.S. Department of State, *UPR Recommendations Supported by the U.S. Government*, June 2014, <http://www.state.gov/j/drl/upr/recommendations/index.htm>.

⁴ Lee, J. et al, *Deportation Without Due Process*, 10-12, Sept. 2011, http://web.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf.

⁵ 8 U.S.C. § 1252(a)(2)(A).

⁶ U.S. Customs and Border Protection, *Southwest Border Unaccompanied Alien Children*, 2014, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>.

⁷ Chavez, S. & Avalos, J., *The Northern Triangle: The Countries That Don't Cry for Their Dead*, InSight Crime – Organized Crime in the Americas, Apr. 24, 2014, <http://www.insightcrime.org/news-analysis/the-northern-triangle-the-countries-that-dont-cry-for-their-dead>.

⁸ Geneva Declaration on Armed Violence and Development, *Global Burden of Armed Violence 2011*, Oct. 2011, http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2011_CH4_rev.pdf.

⁹ INA § 238(b); 8 U.S.C. § 1228(b).

¹⁰ See e.g., Zuniga, B., *Aggravated Felony Case Summary*, Nov. 15, 2010 (updated regularly), http://www.justice.gov/eoir/vll/benchbook/resources/Aggravated_Felony_Outline.pdf.

¹¹ ICCPR, Art. 15.

¹² INA § 217(b); 8 U.S.C. § 1187(b).

¹³ INA § 239(d); 8 U.S.C. § 1229a(d).

¹⁴ 8 C.F.R. § 1003.25(b).

¹⁵ See Operating Policies and Procedural Memorandum 10-01, Procedures for Handling Requests for a Stipulated Removal order (Sept. 15, 2010), <http://www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf>.

¹⁶ See Lee, J. et al, *Deportation Without Due Process*, Sept. 2011, http://web.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf.

¹⁷ UDHR, Art. 14 (“Everyone has the right to seek and to enjoy in other countries asylum from persecution”); Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention], Art. 33 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT], Art. 3 (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”); INA § 208(c)(1)(A), 8 U.S.C. § 1158(c)(1)(A); 8 C.F.R. § 208.17(a).

¹⁸ INA § 235(b); U.S.C. § 1225(b).

¹⁹ American Civil Liberties Union (ACLU), *Fact Sheet on U.S. “Constitution Free Zone.”* Oct. 22, 2008, <https://www.aclu.org/technology-and-liberty/fact-sheet-us-constitution-free-zone>.

²⁰ Department of Homeland Security, *Immigration Enforcement Actions: 2012*, 5, Dec. 2013, http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf (in FY 2010, expedited removals accounted for 109,867 of 383,031 total removals; in FY 2011, expedited removals accounted for 122,320 of 388,409 total removals; in FY 2012, expedited removals accounted for 163,498 of 419,384 total removals); see also, U.S. Immigration and Customs Enforcement, *ERO Annual Report: FY 2013 ICE Immigration Removals*, 4, December 2013, <https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf> (in FY 2013, ICE conducted 101,000 expedited removals of 368, 644 total removals).

²¹ *M.S.P.C. v. Johnson*, District of Columbia, 22 Aug. 2014,

https://www.aclu.org/sites/default/files/assets/filed_complaint_1.pdf.

²² See UDHR, Art. 16; ICCPR, Art. 23.

²³ Human Impact Partners, *Family Unity, Family Health: How Family-Focused Immigration Reform will mean Better Health for Children and Families*, June 2013,

<http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>.

²⁴ INA § 241(a)(5); 8 U.S.C. § 1231(a)(5).

²⁵ Immigration Policy Center, *Removal Without Recourse: The Growth of Summary Deportations from the United States*, Apr. 2014, <http://www.immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>.

²⁶ Department of Homeland Security, *Immigration Enforcement Actions: 2012*, 5, Dec. 2013,

http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf; see also, U.S. Immigration and Customs Enforcement, *ERO Annual Report: FY 2013 ICE Immigration Removals*, 4, December 2013,

<https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf> (in FY 2013, ICE issued 159,624 reinstatements out of 368, 644 total removals).

²⁷ 8 C.F.R. § 241.8(e).

²⁸ See, e.g., supra at para. 21.

²⁹ See 8 C.F.R. § 1208.16(b)(2) (stating burden of proof for withholding of removal); INA § 241(a), 8 U.S.C. § 1231(a) (generally requiring detention during a “removal period”). NIJC has filed a lawsuit regarding the extended delays faced by such individuals. See *Garcia v. Johnson*, 4:14-cv-01775-YGR (N.D.Cal.);

http://www.immigrantjustice.org/press_releases/detained-asylum-seekers-sue-obama-administration-end-long-waits-initial-interviews.

³⁰ Human Impact Partners, *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families*, June 2013,

<http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>.