

HQBOR 170/6



**U.S. Customs and  
Border Protection**

**MAR 19 2021**

MEMORANDUM FOR: Troy A. Miller  
Senior Official Performing the Duties of the Commissioner  
U.S. Customs and Border Protection

FROM: Rodney S. Scott (b) (6)  
Chief  
U.S. Border Patrol

SUBJECT: Prosecutorial Discretion

The U.S. Border Patrol (USBP) is experiencing a high-volume of encounters of persons illegally entering the United States along the southwest border. Due the prolonged detention of specific populations, like unaccompanied alien children (UAC), the USBP will exercise its discretionary authority to release subjects without placing them in removal proceedings, to prioritize our limited assets to national security events. Pursuant to 8 C.F.R. § 287.3, agents retain discretion to place a removable alien in proceedings. We will exercise prosecutorial discretion (PD) to release persons illegally in the U.S when at least one of the following triggers are met:

- When a USBP Sector reaches 100% of total permanent detention capacity;
- When a USBP Sector reaches 75% total permanent detention capacity and the number of subjects arriving in custody exceeds the discharge of persons out of custody;
- When the average time-in-custody (TIC) of unprocessed persons exceeds 24 hours in USBP custody and the number of subjects arriving in custody is projected to exceed the discharge of persons out of custody;
- When mandatory detention populations (e.g., UACs) meet 50% of total permanent detention capacity and placement into Health and Human Service / Office of Refugee Resettlement (HHS/ORR) exceeds 48 hours from the time of referral;
- When a USBP Sector notifies Immigration and Customs Enforcement Removal Operations (ICE/ERO) and referral was denied or when no response is received within 1 hours of notification;
- When the loss of Title 42 authorities is nationwide and any previous trigger is met; or
- When a Sector Chief Patrol Agent, in coordination with USBP HQ, determines the circumstances dictate the need to exercise prosecutorial discretion.

Agents already retain the discretion to not place a removable alien into proceedings. As a general rule, agents do not exercise this option. Due to the challenges set on by COVID-19, UAC encounters, custody challenges and finite resources, agents must consider the release of non-UACs. Agents will consider whether the subject poses a threat to National Security, Border Security, or heightened Public Safety risk, as outlined in the interim enforcement priorities, prior to making this decision. Custody decisions will be documented in the I-213 narrative. Under no

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circumstances will an alien who claims to be, is suspected to be, or is determined to be a UAC as defined by 6 U.S.C. § 279(g)(2), be processed for release.

Processing an alien for release without entering them into proceedings is not taken lightly. Only under circumstances outlined above will agents categorically use their discretionary authority to release family units or single adults. All subjects processed for release will be searched and enrolled into the biometric system. Records checks will be run to insure no prior criminal or immigration history that would categorize them as a heightened security or safety risk prior to release. Subjects will have their biographic, family, entry, arrest, and release information documented on a narrative (I-213). The custody redetermination for subjects released will fall under "Prosecutorial Discretion" and any current removal proceedings in which the subject is enrolled in will be documented.

Once PD is exercised, persons will be released in accordance with local Sector protocols to the fullest extent possible.