**Discretion-as-politics in immigration processes and unaccompanied migrant children in the US**

**Abstract**

Trump administration’s anti-immigration measures affected dramatically the lives of unaccompanied migrant children (unaccompanied minors-UAMs) at the Southern border. This paper investigates how and the extent to which the ‘discretionary power’ of immigration officials served the political objective of obstructing UAMs’ prospects of immigration relief. By drawing on qualitative empirical data, this paper finds that border officials and the Attorney General employed ‘discretion-as-politics’ to block UAMs’ prospects of regularizing their immigration status in the US, which was consistent with the political agenda of the Trump administration.

**Word count: 7,997**

**Introduction[[1]](#endnote-1)**

The US immigration policy is notorious for its incoherent treatment of migrant children seeking asylum in the US. This treatment has been described as an ‘outlier in comparison to the treatment of children in other legal contexts’ (Thronson 2018). Moreover, Trump administration’s anti-immigration policies from 2017 onwards had a detrimental impact on the plight of immigrants crossing the Southern border and their prospects of getting asylum. This paper investigates how the use of ‘discretionary power’ or ‘discretion’, as exerted by key immigration officials during the Trump administration, served solely the political objective of obstructing unaccompanied migrant children’s (unaccompanied minors-UAMs) prospects of getting immigration relief in the US. More specifically, it will scrutinise *how and the extent to which discretionary* *modus operandi*, namely in the interpretation and implementation of immigration procedures and rules, served Trump administration's political agenda, and therefore, gave rise to *'discretion-as-politics'*, which overshadowed the previous usages of prosecutorial discretion in immigration, namely discretion-as-expedience or discretion-as-humanitarian. To illustrate this, the paper draws on the case of UAMs' prospects of being granted immigration relief under the Trump administration. While prosecutorial discretion, as a legal principle in US immigration, has been widely investigated (Kanstroom 1997; Wadhia 2010) this paper demonstrates that, during the Trump administration, the unprecedented deployment of 'discretionary power' by key civil servants at both the top and bottom ends of the immigration system was *politically motivated* and it exceeded the prosecutorial discretion - which is built-in the system - both in terms of its depth and extent. Analytically, the paper tests for the first time the explanatory power of ‘*discretion-as-politics’* frameworkto account for the treatment of UAMs in immigration proceedings in the US, while empirically, the qualitative data sheds new light on how the anti-immigration measures adopted by the Trump administration impacted on the situation of vulnerable child migrants. The key theoretical and empirical contribution made by this paper is the provision of evidence showcasing that the exercise of discretion by key immigration officials was politically subordinated to curbing of immigration, in this case of UAMs, as embraced by the Trump administration. Methodologically, the study draws on a sample of semi-structured interviews (30)[[2]](#endnote-2) conducted between February-April 2020 with immigration lawyers, social workers, children’s organisations, immigration officials and former UAMs in the state of Massachusetts, as well as with key stakeholders aiding UAMs across the US. The empirical data is triangulated with primary and secondary documents, as well as with official data on migration in the US.

The paper is organised as follows. The first section sets out the theoretical framework, while section two provides an overview of the US immigration policy as relevant to UAMs. The third section explores how discretionary power and leverage was deployed by immigration officers at the Southern border as well as by the Attorney General (AG) to bend legislation, rendering it more problematic for UAMs to get a form of immigration relief in the US. The fourth section examines the significance and consequences of deploying 'discretion-as-politics' for US immigration law and system.

**1.Discretion in decision-making and policy-implementation: theoretical approaches**

‘Discretion’, as a conceptual framework used to explain policy interpretation and implementation in practice, was popularised for the first time by Michael Lipsky (1980) in his book *‘Street-level Bureaucracy: Dilemmas of the Individual in Public Services’.* Lipsky’s book analyses the behaviour of frontline staff, i.e. street-level bureaucrats (SLBs) such as teachers, police officers, social workers, in policy implementing agencies. These public employees interact directly with citizens and have substantial discretion in the execution of their work (1980:3). These frontline workers have to respond to the specific needs of citizens in their respective policy sectors while following broad policy guidelines. To cope with the specific information shortages, SLBs have to adjust the policy to the specific needs of the beneficiary group, hence they have a certain degree of *discretion* – or autonomy – in their work (1980:14). Therefore, ‘discretion’ is understood as the perceived freedom of SLBs in making choices concerning the sort, quantity, and quality of sanctions and rewards on offer when implementing a policy measure or rule (Hill and Hupe 2009).

According to Lipsky, the discretion exerted by SLBs is a consequence of limited resources, hence there are no political motivations involved. Thus, SLBs need to draw on their own interpretation of the situation and the demands of their clients, and subsequently, they engage in routinizing procedures, modifying goals, rationing services, or asserting priorities. SLBs have been depicted as rule-followers and rule-benders (Heimer 2001). The discretion of SLBs is exercised as *rule-benders*, when they attach their own interpretation to formal rules when they encounter clients particularly 'deserving' or 'undeserving' of assistance (Zacka 2017). In essence, Lipsky’s argument is that the meaning of policy takes shape at the level of implementation, where SLBs shape its content via their discretionary actions involved in the interpretation and implementation of rules and policy measures.

The concept of ‘discretion’ has received wide attention in the policy implementation literature (Hill and Hupe 2009; Sandfort 2000). Scholars deployed the concept to explain the bottom-up dimension of implementation. Indeed, as Hill (2013:203) rightly puts it, the literature on ‘discretion’ as an analytical framework is ‘about the various degrees of discretion accorded to those close to, or actually at, the delivery point for policy’. The concept of ‘discretion’ has been operationalised in various ways in practice. For instance, a distinction was made between ‘discretionary space’ and ‘discretionary reasoning’ (Molander *et al.* 2012). Discretionary space refers to the issues SLBs make decisions about, and discretionary reasoning is about the justification of decisions. Both these operationalisations of 'discretion' pertain to the conceptualisation of SLBs as 'rule-benders' when exerting discretionary power.

Within the US immigration literature, the SLBs and the discretionary framework were employed as an analytical framework to explain the judicial decision-making in US immigration courts (Asad 2019). It is widely contended that immigration judges reach decisions under significant structural and bureaucratic constraints (Asad 2019). These were further exacerbated by the political pressure exerted by the Trump administration requiring that judges cleared a minimum of 700 cases per year[[3]](#endnote-3) due to an increasing backlog of cases. Given these circumstances, scholars have explained the variation in removal outcomes by drawing on the discretion exercised by judges, described as 'SLBs', due to their personal attitudes, biases and motivations (Asad 2019). This scholarship sheds light on the judges' pro-active role in the decision-making process, where the employment of discretion can also be explained as an attempt to circumvent structural and bureaucratic factors perceived as constraints (Asad 2019). Indeed, immigration judges as rule-benders can exercise discretion when, by drawing on their own personal attitudes and motivations, they view certain immigrants as particularly 'deserving' of support (Zacka 2017). The variation in decision-making between immigration courts is explained via the role played by judges as SLBs who exert discretion in their interpretation and enforcement of the law, which has significant implications for the social control capacity of the federal immigration system (Asad 2019).

This article examines the politically-motivated discretion of key immigration officials during policy interpretation and implementation. The focus is on how the discretionary approach of these officials, who are enforcing immigration rules in the US, is distinct from prosecutorial discretion, i.e. discretion exerted on grounds of expedience or humanitarianism, and thus, it is solely subordinated to Trump administration's political agenda. The employment of the ‘SLBs’ concept in this paper is broader: it entails both those professionals at the level of policy and law enforcement, as well as those engaged in policy interpretation, and hence policy change. This paper will discuss in particular two key factors that allow for the successful pursuit of discretionary decisions and actions. First, the controversial and politically charged character of the policy area; second, the expert knowledge or lack thereof of SLBs in relation to the policy sector under scrutiny. These factors can facilitate the exercise of *discretion-as-politics* by shaping how and the extent to which various professionals take action vis-à-vis UAMs in ways that bend rules and serve political purposes.

The key analytical contribution of this paper is that the operationalisation of the ‘discretion’ analytical framework is linked to political aims, which is evidenced by the political context of the Trump administration. Therefore, the empirical case shows that discretion was exercised not with the intention of helping clients, as Lipsky's theory suggests, but rather to serve the crucial political objective of deterring immigration. While the anti-immigration strategy, as reflected by the Prevention through Deterrence (PTD) - see more below - had already been in place before Trump, the plight of UAMs during the Trump administration was compounded by the exacerbation of the structural problems of the US immigration system and, moreover, by the implementation of new rules, via discretionary power, justified by political motivations. In brief, it is claimed that key immigration officials exerted discretion to help materialise the political agenda of immigration deterrence, thus *discretion-as-politics*.

**2.Protection of UAMs in the US: context and key policies**

It is widely contended that US immigration policy is particularly unwelcoming of immigrants and asylum-seekers[[4]](#endnote-4) from Latin America. Coutin (2011) evidenced how the US government's treatment of Central Americans as generally undeserving of political asylum gave rise to political and legal advocacy, particularly on the part of human rights defenders, who contend that claiming asylum in the US is subject to abuse (Fassin 2005). Given that the burden of proof rests with the asylum claimant, the US asylum law is based on asylum exceptionality, which means that asylum claimants need to provide evidence of being singled out, subjected to a risk of violence higher than that experienced by the population at large, and forced to move (Coutin 2001). Among the category of immigrants seeking immigration relief in the US, there is the vast group of unaccompanied migrant children, which the Trump administration rebranded as unaccompanied alien children (UACs). UACs are defined in statute as children under age 18 who lack lawful immigration status in the US, and who are either without a parent or legal guardian in the US who is available to provide care and physical custody. The term UAMs in this paper is used to refer to UACs, given that they refer to the same category of migrant children. UAMs in the US can apply for various forms of immigration relief, the most common being asylum and special immigrant juvenile status (SIJ)[[5]](#endnote-5). There are three key pieces of legislation relevant to UAMs in the US: the *Flores Settlement Agreement* of 1997, the *Homeland Security Act* of 2002, and the *William Wilberforce Trafficking Victims Protection Reauthorization Act* (TVPRA) of 2008. These laws fit the broader US immigration and asylum law, which has been described as being plagued by inconsistencies due to, among others, restrictions on judicial review, the lack of legal representation, and asylum seekers' more limited due process rights (Coutin 2011). These three pieces of legislation relevant to UAMs are discussed below.

The *Flores Settlement Agreement*(FSA) was a result of lawsuits against Immigration and Customs Enforcement (ICE) regarding the treatment of unaccompanied migrant children in detention in the 1980s. This law recognizes the vulnerability of unaccompanied children and provides guidelines for their detention, treatment, including provisions of food and water, conditions of shelter (such as temperature control, access to facilities, etc.), and guidelines for supervision and protection. In brief, the FSA requires that all detention centres meet minimum child welfare standards and that UAMs should be held in the ‘least restrictive’ facilities possible.

The *Homeland Security Act of 2002* removes agency responsibility for unaccompanied migrant children from Immigration and Naturalization Service (INS) to divide tasks across two agencies with different missions. The tasks of capturing, transferring, and repatriating UAMs moves to the Department of Homeland Security (DHS), i.e. US Customs and Border Protection (CBP), while the tasks of coordination and implementation of care for children moved to the Department of Health and Human Services (HHS), namely to ORR. To ORR, the law assigned responsibility for coordinating and implementing the care and placement of UAMs in appropriate custody, reunifying UAMs with their parents abroad if appropriate and maintaining and publishing a list of legal services available to UAMs. The Homeland Security Act also established the statutory definition of UAMs as unauthorized minors not accompanied by a parent or legal guardian. To CBP, the law assigned responsibility for the apprehension, transfer, and repatriation of UAMs, and this role of the gate-keeper agency became crucial during the Trump administration.

The third piece of legislation is the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA). Under TVPRA, unaccompanied children from Mexico and Canada (contiguous countries) can be returned to their home country without penalty, while children from other countries (non-contiguous) are transferred to HHS (ORR) for care and custody during the removal process. TVPRA expands ORR’s statutory responsibilities such that children have to be promptly placed in the ‘least restrictive setting that is in the best interest of the child’[[6]](#endnote-6). These are the main pieces of immigration legislation at the federal level that guide how UAMs should be treated in the US. These laws had to be enforced particularly during and in the aftermath of the 2014 migrant surge, when the CBP apprehended 68,541 UAMs[[7]](#endnote-7), a record at that time.

Apart from these laws, the broader US immigration system has been underpinned by deterrence - the so called PTD - since 1994, when the US saw a build-up of enforcement in the Southwest, including surveillance towers and checkpoints along the US-Mexico border. The PTD strategy forces migrants to cross the US-Mexico borderlands via an arduous terrain which exposes migrants to extreme dangers (Dunn 2010). De León shows how PTD involves the effective use of non-human elements, such as the desert and extreme temperatures, as 'the best and most lethal weapon the Border Patrol has' (2015: 158). Indeed, by pushing migration into a hostile terrain, it was expected that immigrants wishing to cross the border would be deterred due to finding themselves in a dangerous terrain when attempting to enter the US illegally. The aim of the PTD is to deter immigrants from considering the journey, with the overall goal of preventing migration from Central America. Nevertheless, the goal proved to be unattainable for the US administration as PTD caused a significant number of deaths and countless more disappearances. In essence, PTD failed to deter the mass movement of undocumented migrants into the US.

Before Trump, President Obama's actions vis-a-vis immigrants earned him the moniker 'deporter-in-chief' (Coutin *et al*. 2017) for the record number of deportations that occurred under his watch. Moreover, during the Obama administration, the policy of 'metering' began to be enforced at the Southern border. In brief, 'metering' entails limiting the number of asylum seekers who can be processed per day at a port of entry. The policy was applied when thousands of Haitians arrived in Tijuana and Mexicali, but it became institutionalized during the Trump presidency. Indeed, since 2018 onwards, CBP had been specifically tasked with stopping asylum seekers from stepping into US territory and asking them to wait in Mexico instead (Leutert 2019). This practice led to significant hardship among immigrants from Central America, many of whom travelled for weeks or months to get to the border, and while there, having to wait for several months in Mexico before being processed (Leutert *et al.* 2018). The plight of immigrants in the US was deplorable also before Trump, nevertheless, the measures adopted by the Trump administration aggravated substantially the plight of immigrants in general, and that of UAMs in particular.

In light of the strong anti-immigration rhetoric of Trump administration, there were widespread criticisms particularly linked to the poor implementation of the FSA. The implementation of the FSA provisions at the Southern border has to occur in conjunction with the TVPRA, as the CBP officers have to screen the apprehended UAMs for evidence of human trafficking or persecution. However, in August 2019 the Trump administration adopted a rule, later reversed, which tried to eliminate Flores altogether. The administration further enforced rules at the border, such as the controversial 'zero-tolerance' policy, or the Remain in Mexico (Migrant Protection Protocol-MPP), which all had detrimental effects on UAMs arriving or wishing to arrive in the US. For instance, the 'zero-tolerance' policy adopted in April 2018 led to the separation of children from parents, therefore rendering accompanied minors unaccompanied. Human rights advocates documented how CBP officers gave false information to asylum-seekers at the border and therefore, turned them away, or they resorted to using intimidation and coercive tactics toward a deeply vulnerable population of asylum seekers (see Leutert *et al*. 2018).  Along the same line, Flores - which states that children and adults cannot be detained together - was additionally used as a justification for separating immigrant families under the 'zero-tolerance' policy. The MPP requires asylum-seekers who have arrived at the US border to return to Mexico pending their formal removal proceedings. The 'metering' border measure applies to immigrants who have not yet been apprehended by CBP, whereas MPP applies to those who have already been inspected and placed in removal proceedings. The MPP was also, indirectly, conducive to the separation of families as children were removed from their parents at the border and sent to detention in the US while their parents waited in Mexico to apply for asylum (Roth *et al.* 2019*).* Arguably, these examples demonstrate that one of Trump administration's strategies was to use the well-being of child migrants to deter immigration.

Apart from these measures targeting immigration deterrence, the US immigration system is described as including 'prosecutorial discretion' to shape certain decisions linked to immigration. Prosecutorial discretion covers decisions about which offenses or populations to target; whom to stop, and interrogate; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order (Wadhia 2010). Prosecutorial discretion refers to the Department of Homeland Security’s (DHS) power to choose whether or not to take enforcement action against a person or group of people (Wadhia 2021). It has been argued that prosecutorial discretion linked to immigration decisions provides a useful tool for achieving cost-effective law enforcement (Wadhia 2010), i.e. *discretion-as-expedience,* and relief for individuals on humanitarian grounds, i.e. *discretion-as humanitarian*. For instance, during the Obama administration, prosecutorial discretion was widely used as a necessity (Kanstroom 2012:215). A key reason for the exercise of prosecutorial discretion is humanitarian, as it allows humanitarian concerns to be considered by immigration officials when rigid immigration laws are enforced (Zatz and Rodriguez 2014). This discretion is exercised when DHS chooses to not enforce the law against a mother legally eligible for immigration arrest or detention (Wadhia 2021). Therefore, beneficiaries of prosecutorial discretion avoid removal and in certain circumstances are eligible to apply for work authorization (Wadhia 2010). In the next sections we will examine how a different type of discretion, i.e. *discretion-as-politics*, became prominent during the Trump administration and it was exercised by key immigration professionals, via rule-bending, in the interpretation and implementation of immigration policy with the key political aim of deterring immigration.

**3. Exercise of politically motivated discretion**

This section will explore instances of rule interpretation and application which were underpinned by the discretion exerted by relevant officials and decision-makers. While the exercise of discretion occurred at the level of policy delivery and rule application, this was also primarily facilitated by the normative and legal framework for UAMs in removal proceedings which is based on an adult framework (Thronson 2018). Most significantly, it is shown that the ‘discretion’ exercised by immigration officials is an outcome of strong institutional incentives to adhere to particular political priorities, such as immigration deterrence, which in turn colours decision-making. The analysis will focus on *discretion-as-politics*, i.e. discretion serving political ends, exercised by officials in charge of apprehending, screening and detaining UAMs, i.e. CBP officials, namely in the first stage of UAMs' immigration process, as well as the discretion of the Attorney General (AG) in interpreting and amending legislation which impinges directly on UAMs’ prospects of being granted immigration relief. In brief, the focus is on the discretionary power exerted at the two main ends of the immigration system: the entry point and the immigration relief eligibility one. The discretionary use of authority, via rule-bending, by immigration officials had the main political purpose of deterring immigration at the Southern border.

*3.1. CBP officers and detention at the Southern border*

The broader treatment of immigrants at the Southern border is guided by deterrence. Indeed, the detention of immigrants, which peaked during the Obama administration, and became the *modus operandi* during the Trump administration, relies on the idea that detention can prevent immigrants from coming to the US. There is wide ranging evidence documenting the treatment of UAMs at the Southern border by CBP officials as well as the conditions of detention in CBP facilities (Rojas-Flores *et al.* 2017). In the case of UAMs, the use of discretion to implement immigration rules generates fundamental questions regarding the rules’ scope vis-à-vis children: whether they should block or support the protection of immigrant children arriving in the US.

Leading civil society stakeholders have documented UAMs’ treatment in detention by key immigration officials. How UAMs are treated in detention centres, either in CBP custody, when detained alone, or ICE, when detained along with adults, violates the detention conditions and standards stipulated in the FSA. The Flores Settlement requires that minors in the custody of the CBP must be housed in facilities that meet certain welfare standards, including state standards for housing and care of minors. As mentioned above, the FSA requires the relevant agencies to place minors in the least restrictive settings appropriate to the child’s age and special needs, provide notice of rights, safe and sanitary facilities, toilets and sinks, drinking water and food, medical assistance, temperature control, supervision, and contact with family members, among other requirements. Upon detaining a minor, CBP officers must make and record a prompt and continuous effort toward family reunification and release, as well as maintain up-to-date records of minors held for longer than 72 hours, including biographical information and hearing dates. The detention of minors and their treatment in these facilities have to meet child welfare standards. The Trump administration tried to amend the FSA requlations on detention by expanding the government’s ability to detain migrant children with their parents for indefinite periods of time. However, in September 2019 US District Judge Dolly M. Gee issued a permanent injunction blocking the Government from implementing new rules that would expand UAMs’ detention for indefinite periods of time.

The poor treatment of UAMs in CBP facilities, during the Trump administration, points to the breach of FSA standards. Indeed, civil society organisations monitoring the situation of UAMs in detention centres contend that both the children’s treatment as well as the conditions in these facilities were very poor. As an interviewee put: ‘the problem is not in the law content, but its implementation’ (author's interview with a legal expert 2020). The conditions in CBP facilities were poor: children often lacked basic sanitation conditions, the rooms were not heated, and the overall living conditions were precarious. Moreover, they lacked access to healthcare and mental health services while detained in these facilities. A report[[8]](#endnote-8) by the Office of Inspector General, DHS’s independent watchdog, evidenced the overcrowding and squalid conditions at migrant centres at the Southern border. The report also described the standing-room-only cells, children without showers and hot meals, and how child detainees clamoured desperately for release. This shows that CPB officers' discretionary actions were consistent with the employment of childhood trauma to deter immigration.

How can we explain the failure of CBP officers to enforce the provisions in the FSA? One of the reasons for the poor implementation of FSA standards and the inadequate screening of UAMs at the border by CBP officers is their lack of training in child welfare (author's interview with a refugee NGO, 2020). This lack of training is particularly evident in their treatment of UAMs from contiguous countries, such as Mexico. For instance, according to the TVPRA, children from non-contiguous countries are placed in removal proceedings and are referred to the ORR within 72 hours for screening and placement in the least restrictive setting possible[[9]](#endnote-9).On the other hand, UAMs from contiguous countries, like Mexico, must be screened within 48 hours of apprehension to determine whether they were trafficked, whether the child has a credible fear of returning to their home country and, finally, whether the child is able to make an independent decision to withdraw an application for admission into the US, also known as voluntary departure[[10]](#endnote-10). However, according to stakeholders, Mexican UAMs were often put in harm’s way due to the lack or poor screening by CBP officers. Moreover, Mexican UAMs were not screened by CBP officers to check whether they are victims of trafficking or persecution, or indeed were at risk of persecution. Therefore, there was a significant disparity between the treatment of UAMs from contiguous and non-contiguous countries: the former were not screened and their capacity to make independent decisions to travel to their home country, i.e. Mexico, was not taken into account (author's interview with a refugee NGO, 2020).

The evidence above shows that the treatment of migrant children at the Southern border significantly worsened during the Trump administration. This is another factor that explains why the poor treatment of UAMs by CBP officers, which violates the FSA[[11]](#endnote-11) provisions, could be seen politically legitimate: namely UAMs' treatment was in line with the anti-immigration rhetoric advanced by the Trump administration. Indeed, as an interviewee - who had been documenting the situation of children at the border – put it ‘this population [UAMs] is extremely vulnerable and the Trump administration has targeted them in particular: a population that is vulnerable and, in some ways, visible’ (author's interview with a child refugee NGO, 2020). The Trump administration took targeted action to weaken the FSA, as the various attempts at weakening both the letter and the spirit of the FSA demonstrate it. Against this backdrop, the CBP officers’ discretionary interpretation and implementation of FSA standards vis-à-vis UAMs complied with the political objective of deterring immigration by all means. Thus, they deliberately misinterpreted the FSA provisions, as a stakeholder put it: ‘the FSA is deliberately not enforced in practice at the border’ (author's interview with a refugee NGO, 2020), as this is aligned with the political priorities of the Trump administration. How CBP officers treat UAMs and how they could justify their actions is consistent with the concepts of discretionary space and discretionary reasoning (Molander *et al.* 2012). In other words, the discretionary space is reflected by the CBP’s handling of a controversial and politically charged issue, such as immigration, while the discretionary reasoning is determined by how they can justify their actions: in this case, their actions were legitimate as they were consistent with the Trump administration’s political agenda. Rather than making strictly arbitrary decisions in line with their personal preferences, CBP officers had strong institutional incentives to pursue actions conforming with immigration deterrence. In brief, the treatment of UAMs by CBP officers in detention could be described as ‘FUBAR’[[12]](#endnote-12), as an interviewee put it. This is further aggravated by the widespread misinformation faced by UAMs at the border regarding their rights and how they should be treated: this is rooted in the fundamental scepticism shared by immigration officers about children’s claims for protection (author's interview with a child refugee charity, 2020).

The bureaucratic discretion exerted by CBP staff can be explained via Downs’ (1967) account of ‘zealot’ bureaucrats, namely those bureaucrats who are loyal to specific policies or politics. Indeed, this description is based on the division of public servants into those who care about public policy *per se*, and others who do not (Downs 1967). This is in line with the Gailmard and Patty’s (2007) discussion about the heterogeneity of public service motivation among SLBs: the CBP officers implementing Trump’s anti-immigration political objective can be described as policy motivated or ‘zealots’, who are radically distinct from policy indifferent ‘slackers’. Arguably, the zealots’ commitment to deliver Trump administration’s anti-immigration strategy is facilitated by their discretionary interpretation and implementation of the policy. In brief, CBP staff’s discretionary violation of FSA child welfare standards can only be justified in terms of conforming with the political objective of immigration deterrence: in this case, bureaucratic discretion served the political agenda of the government of the day.

*3.2. Attorney General' s discretionary power and decisions*

The exercise of discretionary power to deter immigration applies both to policy implementation, as shown above, and policy content and interpretation, as shown in this section. The decisions adopted by the Attorney General (AG) further curtailed the rights and prospects of UAMs to regularize their status in the US. Being politically appointed by President Trump, the AG had the discretionary power of reinterpreting, and hence changing, the content and application of immigration law, which in practice changed the type of hurdles and challenges that UAMs had to face in their attempts to regularize their immigration status in the US.

As head of the Department of Justice and chief legal counsel to the president, the duties of the AG are obviously important for immigration policy. The AG prosecutes cases that involve the government and, being politically appointed by the President, endeavours to put into practice the anti-immigration political objective. The AG took some crucial legally binding decisions which made it more difficult for UAMs to get a form of immigration relief, such as asylum. These are discussed below and it is shown that compelling discretion was exerted by the AG in order to pursue the political objective of the President, i.e. immigration deterrence. It is not only the content of the rules that were being reinterpreted, and hence changed, but also the number of rules that the AG amended in a short space of time, as an interviewee rightly put it ‘that’s the big challenge: he [AG] keeps reinterpreting and changing the rules all the time’ (author's interview with a lawyer, 2020).

The immigration lawyers working with UAMs and usually representing them in court agree that the AG employed his power in a discretionary manner to adopt decisions that drastically diminished the prospects of asylum-seekers, including children, to be granted asylum. These legislative changes were facilitated by the way in which the American immigration court system works and the AG’s power in relation to it. The immigration court is an administrative agency and the AG can decide cases that get appealed – at the Board of Immigration Appeals (BIA) – or refer cases to himself, which he can decide upon differently. Over two years the AG took a couple of crucial decisions that affect the UAMs’ asylum application process. For instance, in October 2018, BIA published *Matter of M-A-C-O-*[[13]](#endnote-13), a decision concerning initial jurisdiction over asylum applications filed by UAMs after their eighteenth birthday. In *Matter of M-A-C-O-*, the AG decided that immigration judges could determine the initial jurisdiction over asylum applications filed by UAMs. The decision further stipulated that if an UAM filled an asylum claim and turned 18, then the immigration judge had jurisdiction over his/her asylum application rather than US Citizenship and Immigration Services (USCIS), namely the Asylum Office. In May 2019, USCIS adopted a memorandum concerning its position in relation to AG’s decision. According to this policy memorandum, asylum officers were required to independently determine whether an applicant met the unaccompanied minor definition at the time of filing[[14]](#endnote-14).

Other two important decisions reached by the AG further narrowed down the criteria under which UAMs could make an asylum claim. These are *Matter of A-B-[[15]](#endnote-15)* and *Matter of L-E-A[[16]](#endnote-16).* In *Matter of A-B-* the AG overruled the *Matter of A-R-C-G-* landmark decision by the Board of Immigration Appeals, which had recognized that domestic violence survivors may be eligible for asylum. This decision threatened the viability of asylum claims by domestic violence survivors, including UAMs, and others who faced persecution by private actors, such as criminal gangs. Arguably, the AG's decision eliminated domestic violence linked to harm and persecution as a basis for asylum claim and above all, ruled out gang violence as a basis for asylum. UAMs arriving to the US often flee domestic violence and gang violence, which the decision describes as examples of ‘private violence’ against groups, and which do not qualify as a valid basis for asylum. The AG’s decision entailed, in practice, that all asylum claims from applicants fearing gang violence should generally not be approved. As most stakeholders acknowledged it, this decision already had its intended effects: it generated fear and dismay among immigrant communities, including UAMs, and further created confusion among practitioners on how best to navigate the new legal landscape. In the *Matter of L-E-A*-, the AG issued another decision with the intention of limiting the ability of asylum seekers to obtain protection.  In this decision, the restrictions were intended for individuals who had been persecuted or feared persecution in connection with their family membership.  These decisions by the AG and BIA illustrated how adjudicators became increasingly resistant to ensuring due process for asylum-seekers under the Trump administration. Legal experts acknowledge that, for instance, the *Matter of A-B-* decision was quite effective in achieving the objectives of the AG, namely preventing many asylum-seekers from getting asylum. These decisions closed the door on many meritorious asylums claims by UAMs who were survivors of domestic violence, gang brutality, and other harms inflicted by non-state actors.

Following the same pattern of blocking the asylum application for children, the AG made further changes to immigration proceedings that made it more difficult for UAMs to be granted asylum in the US. In the *Matter of Castro-Tum*, followed the same approach of rendering UAMs’ prospects of being granted asylum more difficult. The AG’s aim, in line with Trump administration immigration policy, was to dispense immigration cases in an orderly and expeditious way, requesting judges and the BIA to deal with cases in removal proceedings by acting swiftly to resolve the case. The AG’s decision expressly required immigration judges to promote the ‘timely ‘and ‘expeditious’ completion of removal proceedings. This is consistent with the views shared by interviewees: all key legal experts and stakeholders agree that there was a lot of pressure placed by these decisions on immigration judges to move cases along by reaching decisions on asylum in an expediate manner.

These decisions and legislative changes brought about by the AG demonstrate the discretionary use of power to shape the legal framework, which affected UAMs indirectly. In this case, discretion is employed at the policy interpretation stage, which subsequently, shapes the policy implementation process. Immigration experts highlighted both the structural problems of the US immigration system, as well as the decisions of the AG, which were politically driven. In terms of policy interpretation and content, the AG exceeded his legal mandate by overhauling at least twenty immigration rules over a couple few months (author's interview with a lawyer, 2020). As one of the interviewees put it, the BIA, as the appellant body, is subject to the AG and the AG’s *modus operandi* in relation to the BIA is that ‘once in a while, the AG would go [to the BIA] and say:” this is what we’re going to do next […] we need to change this and this…”’ (author's interview with a lawyer, 2020). This clearly demonstrates the discretionary manner in which the AG dealt with the BIA and the decisions he adopted. Indeed, as one of the interviewees put it, the Trump administration exacerbated the existing problems of the UAMs in the American immigration system, and, therefore, all the subsequent decisions and amendments to legislation carried out by the AG were justified by the narrative that these child migrants are not genuine asylum-seekers (author's interview with a lawyer, 2020). The politically motivated discretionary actions of the AG generated a ‘legally anomalous system, where policies change all the time’ (author's interview with a lawyer, 2020). All stakeholders concede that the AG exerted significant political discretionary influence over the content and, subsequently, application of immigration law.

The actions of the AG, despite demonstrating the discretionary use of power, are justifiable, and hence accountable, to the Trump administration. This is consistent with the depiction of ‘discretion’ as an ‘opportunity-concept’, reflecting the nexus discretion-accountability. For instance, Molander *et al*. (2012) distinguish between an understanding of discretion consistent with an *epistemic* dimension (discretion as a mode of reasoning) and another one consistent with the common *structural* understanding of discretion (an area of judgment and decision). The former describes the type of reasoning that results in conclusions about what to do under conditions of indeterminacy, while the latter refers to a space where an agent has the autonomy to judge, decide and act according to his own judgment, hence discretion as an ‘opportunity-concept’ (Molander *et al*. 2012:214-215). According to the opportunity dimension, agents have the choice of using discretion: when they are afforded discretionary powers, like the AG was, then they are expected to deploy that discretionary power in their judgements as long as these are justifiable, and hence the agents can be held to account. Similar to CBP officers’ discretion at the implementation stage, AG’s discretionary power vis-à-vis immigration law was an upshot of the need to adhere to the political agenda of the Trump administration. Rather than illustrating arbitrary decisions, the actions of the AG here reflect the political loyalty to the government of the day, including their anti-immigration agenda. In brief, AG’s actions are acceptable as long as they can be politically justified, namely he could provide political reasons to the administration to justify the taken course of action. As the empirical evidence in this section illustrates, the rule-bending actions pursued by both CBP officers and the AG were politically-justifiable by Trump's anti-immigration agenda.

**4. Discretion-as-politics and its implications**

The discretionary rule-bending exercised by key civil servants during the Trump administration highlights the importance of the political context and institutional incentives for facilitating the use of *discretion-as-politics*. While anti-immigration measures, such as PTD policy and 'metering', pre-dated Trump Presidency, immigration officials were under enormous political pressure to align their actions with Trump administration's agenda. The actions undertaken during the Trump Presidency led to what has been described as the 'reconstructing and dismantling of the US immigration system (Pierce and Bolter 2020). In essence, the measures adopted by the previous administration exacerbated the already existing anti-immigration hostility while creating new institutional incentives for the enforcement of more radical anti-immigration changes.

A key consequence of this hostile immigration environment was the role played be pro-bono lawyers in navigating the legal barriers and restrictions imposed by the Trump administration by using a creative interpretation of the available loopholes in the legislation. Indeed, as most of the legal stakeholders contend, they could aid UAMs by proffering arguments for a particular legal interpretation of statues and precedents in order to suit the specific circumstances of their clients. In this respect, their ‘creative lawyering’ was deployed as a counterweight to the anti-immigration exercise of discretion.

Another important consequence of the excessive deployment of discretionary power subordinated to political ends is the emergence of path-dependent actions that may be difficult to reverse. Ways of doing things, for instance the treatment of immigrants at the Southern border, became institutionalised due to locked-in effects, which make it costly, from an institutional standpoint, to roll back those courses of action. Indeed, as some recent evidence regarding the treatment of child migrants at the Southern border shows, the situation of UAMs has not improved radically under the Biden administration. For instance, data obtained by the Associated Press showed the number of migrant children in government custody more than doubled in the spring of 2021, while the shelters where they are housed still endanger children's health and safety[[17]](#endnote-17). While the Biden administration took action to roll back the Trump policies, the plight of migrant children at the US-Mexico border did not improve, a fact that was further compounded by an influx of unaccompanied children which overwhelmed the ORR. Due to this, UAMs were housed in overcrowded CBP facilities, some for far longer than the three-day limit stipulated in the TVPRA (Cheatham 2021). Despite the change in administration, the hostilities faced by UAMs within the US immigration system still persist, and some of those challenges will have been set in motion by the politically-driven discretion exerted by those officials serving the previous administration.

**Conclusion**

This paper examined how and the extent to which *discretion-as-politics* was employed by key civil servants in the interpretation and implementation of immigration rules in relation to UAMs coming from Central America. One of the key findings of this paper is that the *'discretion-as-politics'* exerted by key immigration officials, such as CBP officers and the AG, superseded prosecutorial discretion. The civil servants' discretionary actions - as exemplified by CBP officers and the AG - were driven by their institutional incentives to meet the anti-immigration political objectives of the Trump administration. In essence, the exercise of bureaucratic discretion in these cases served only political purposes, hence the novel dimension of 'discretion-as-politics', as this form of rule-bending was not pursued due to economic on humanitarian grounds, as the employment of prosecutorial discretion prescribes. This article shines a light on the often arbitrary practice of interpreting and implementing rules in relation to politically charged issue, i.e. immigration, which was specifically targeted by the Trump administration in an attempt to score political points. Moreover, the empirical findings of this paper demonstrate that often the violation of human or children’s rights is a consequence of politically-motivated discretionary interpretations and delivery of controversial immigration rules serving the political interests of the government of the day.

**Endnotes**

1. Many thanks to the two reviewers who provided useful comments on the paper, and heartfelt thanks to Jacqueline Bhabha (Harvard University) for providing feedback on earlier versions of the paper. [↑](#endnote-ref-1)
2. Data for this project was collected as part of a Fulbright-Schuman grant held at Harvard University (2019-20). The study used a snowballing sampling, and semi-structured interviews were conducted with key professionals working or helping UAMs in the immigration process. The study aimed to investigate, among others, how discretion was exerted by civil servants in relation to policy interpretation and implementation relevant to UAMs. Ethics Approval provided by Faculty of Social Sciences Ethics Committee (Southampton University) on 17 Dec. 2019, Ethics No: 53857. [↑](#endnote-ref-2)
3. # See 'New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations' (2018), *The Wall Street Journal,* April 2, available from https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158

   [↑](#endnote-ref-3)
4. ## It should be noted that there is a procedural difference between asylum-seekers and refugees in the US immigration system. A person who requests asylum is called an 'asylee', while a person who requests protection while still overseas, and then is given international protection and permission to enter US is knowns as a refugee.

   [↑](#endnote-ref-4)
5. SIJ applies to cases where one or both of the applicant's parents are guilty of abuse, neglect, or abandonment of the child, *and* it is not in the child's best interests to return to his or her home country. A state court decides SIJ cases.  [↑](#endnote-ref-5)
6. # *U.S. Code § 1232 - Enhancing efforts to combat the trafficking of children,* available from Legal Information Institute, <https://www.law.cornell.edu/uscode/text/8/1232>

   [↑](#endnote-ref-6)
7. According to official data for FY2014, available from <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014> [↑](#endnote-ref-7)
8. *Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley*, July 2019, available from <https://int.nyt.com/data/documenthelper/1358-ig-report-migrant-detention/2dd9d40be6a6b0cd3619/optimized/full.pdf#page=1> . [↑](#endnote-ref-8)
9. William Wilberforce Trafficking Victim Protection Act § 235(a)(5)(D), § 235 (c)(5) (2008). [↑](#endnote-ref-9)
10. Idem. [↑](#endnote-ref-10)
11. The Obama administration also violated Flores and tried to defend that in Court in 2015 (see Jenny L. Flores, et al. v. Jeh Johnson, et al). [↑](#endnote-ref-11)
12. FUBAR s a military acronym for "fucked up beyond all recognition". [↑](#endnote-ref-12)
13. Matter of M-A-C-O, 27 IandN Dec. 477 (BIA2018). [↑](#endnote-ref-13)
14. John Lafferty, Chief, USCIS Asylum Division, ‘Updated Procedures for Asylum Applications Filled by Unaccompanied Alien Children’ (May 31, 2019). [↑](#endnote-ref-14)
15. Matter of A-B-, 27 IandN Dec. 316 (A.G. 2018). [↑](#endnote-ref-15)
16. Matter of L-E-A-, 27 IandN Dec. 581 (A.G. 2019). [↑](#endnote-ref-16)
17. # See *The Guardian* (2021) 'Revealed: Biden administration holding tens of thousands of migrant children', 11 May.

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    689. [↑](#endnote-ref-17)