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Relaxing Federal Rules: Political Determinants of Targeted Leniency

A dissertation submitted in partial satisfaction of the
requirements for the degree
Doctor of Philosophy

in

Political Science

by

Sara Maria Kerosky

Committee in charge:

Professor Thad Kousser, Chair
Professor Seth Hill
Professor Mark Jacobsen
Professor Nolan McCarty
Professor Christina Schneider
Professor David Victor

2018

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The dissertation of Sara Maria Kerosky is approved, and it is acceptable in quality and form for publication on microfilm and electronically:

Chair

University of California San Diego

2018

DEDICATION

This dissertation is dedicated to whales,
for warming me up to the challenge of studying humans.

EPIGRAPH

If the Endangered Species Act were implemented to the letter of the law, there would be no ESA.

—Ya-Wei Li, former senior director at Defenders of Wildlife

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ABSTRACT OF THE DISSERTATION

Relaxing Federal Rules: Political Determinants of Targeted Leniency

by

Sara Maria Kerosky

Doctor of Philosophy in Political Science

University of California San Diego, 2018

Professor Thad Kousser, Chair

Federal regulations exist to universally protect the public interest, including civil rights, public health, and the environment, sometimes explicitly at the expense of narrow interests. Yet federal officials often demonstrate leniency when it comes to enforcing these regulations. What prompts the federal government to selectively reverse course and relax federal rules at the expense of the public good? This dissertation examines the political incentives driving the timing and allocation of regulatory leniency. I argue the emergence and use of regulatory leniency in the executive branch is a response to the likelihood of policy reform in Congress. Importantly, my theory demonstrates that both presidents who seek to reform existing policies and presidents who seek to preserve existing policies are incentivized under different circumstances to use

leniency to achieve their policy goals. I test my theory by examining strategic decisions in revision and implementation of the Endangered Species Act (ESA) between 1973 and 2017. I trace parameters of interest through interviews with policy experts and close examination of party platforms, congressional hearing transcripts, and political reporting, as a preliminary test. I then construct a dataset of four leniency mechanisms available to the executive under the ESA and predict their patterns of use. I find that presidents who oppose a policy are more likely to use leniency to relax the policy in periods of congressional gridlock, and tend to rely on narrower exemptions and stalling tactics. I find that the narrower forms of exemption follow a pattern of presidential partisan particularism. Presidents who support a policy do not stall implementation; however, they issue more policy exemptions (both narrow and broad) when the policy is threatened with revision in Congress. These results hold when controlling for administrative capacity, economic variables, and time trends.

Chapter 1

Introduction

Within the first few months of his presidency, Barack Obama overturned a rule issued by the Bush administration just weeks before George W. Bush left office. Bush's midnight rule allowed federal agencies to bypass the consultation process mandated by the Endangered Species Act (ESA), typically requiring agencies to consult with scientists at the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) to ensure government activities and projects did not harm species at risk of extinction (See 73 Fed. Reg. 76272 for the Bush rule). The Bush regulation was intended to reduce the regulatory burden of the ESA in favor of industry, growth, and public works projects, but environmentalists saw it as an attempt to undermine the law – a sentiment echoed by President Obama himself:

Today I've signed a memorandum that will help restore the scientific process to its rightful place at the heart of the Endangered Species Act, a process undermined by past administrations. The work of scientists and experts in my administration, including right here in the Interior Department, will be respected. For more than three decades, the Endangered Species Act has successfully protected our nation's most threatened wildlife, and we should be looking for ways to improve it, not weaken it. (*Public Papers of the President*, 2009: 179)

Reactions from environmentalists were positive. "It's refreshing to hear good news for endangered species coming from the White House...President Obama has begun the process of returning oversight and accountability under the Endangered Species Act" said Jamie Rappaport

Clark, executive vice president for Defenders of Wildlife at the time and former FWS director in the Clinton administration.

By the end of his administration, however, Obama seemingly disappointed the environmental groups that initially praised him. First, the administration chose not to revoke another Bush era special rule limiting protections for the polar bear. Then, the administration proposed delisting the gray wolf in spite of scientific evidence suggesting the population had not yet recovered (Bergstrom et al., 2009). The Obama administration set records for issuing more “special rules” limiting protections for threatened species and for delisting far more species than any other administration before, nearly a third of all species delisted in the history of the act.

Why would a president who ostensibly supports a policy take unprecedented measures to relax that policy in its implementation? This dissertation tackles two related substantive questions: when do presidents relax federal rules, and who benefits from regulatory leniency? I argue that both presidents who oppose existing policy and presidents who support existing policy are incentivized to relax the policy, but under different circumstances. Specifically, I argue that the interaction of the president’s position on a given policy and the level of congressional momentum to revise that policy drives executive decisions to relax federal rules. In the next chapter, I introduce a theory that predicts Policy Opponents will relax federal rules administratively when congressional reform appears unlikely, while Policy Custodians – those who support and seek to protect a policy from congressional rollback – will relax federal rules administratively when members of Congress threaten to revise key provisions of the policy.

I test these theoretical predictions through an in-depth exploration of U.S. endangered species policy. Cognizant of the depth versus breadth trade-off, I explicitly focus on a single policy area. Obviously, focusing on one policy issue limits the scope and relevance of my findings. An important advantage of the single-policy approach, however, is that I am able to catalog, and include in my analysis, several types of administrative tools offering leniency under the Endangered Species Act. Furthermore, I am able to trace the emergence of these mechanisms

through a careful examination of this policy's implementation from first passage to present day. While I sacrifice breadth across policy areas, I am able to observe variation in use across different within-policy tools, which provides critical insight and opportunities for theory expansion.

To understand who benefits from federal leniency, I test a series of hypotheses derived from different theories. The particularistic president hypotheses suggest that the president is motivated by partisan and/or electoral interests. As such, the president uses particularistic benefits, such as federal grants, disaster relief, or military base closures, to reward co-partisan states or to appeal to swing states in election years (Hudak, 2014; Kriner and Reeves, 2015). My work is the first to my knowledge to empirically extend and quantitatively test theory to federal rule exemptions.¹ The policy president hypotheses suggest that the president is motivated by his policy goals. Finally, the capacity and cost hypotheses suggest that the administration is motivated to reduce compliance costs based on either state administrative resource constraints or the cost of policy implementation to state GDP.

In the following sections of this chapter, I offer a brief summary of my main argument and findings, a description of my contribution to the literature, and a roadmap to the dissertation.

1.1 Main Argument

The concept at the core of this dissertation is regulatory leniency. Regulatory leniency is the selective relaxation of federal rules. Leniency is offered by the president's administration through a series of executive and administrative tools. I argue that regulatory leniency is used to either bypass or appease members of Congress who stymie the president's agenda. Presidents are elected to office based on a policy agenda relative to existing law. Depending on their agenda, presidents may want to revise some policies and protect other policies from reform. The president's lawmaking agenda is constrained by Congress. Congress may fail to pass reform

¹The concept that regulatory flexibility can be a potential benefit extended to states by the federal government has been proposed in literature on state interests and the governors' lobby (Jensen, 2016: 27).

bills the president supports, and may threaten to pass reform bills the president opposes.

When a president opposes an existing policy, he will look for ways to either reduce the impact of the policy or revise the policy. There are a variety of avenues for reducing the regulatory burden of a policy. The most visible and costly avenue involves persuading Congress to pass a policy revision. If this option is unavailable or too costly, the president will attempt to bypass Congress. Leniency offers the president a less costly avenue for rolling back policy he opposes. Leniency can involve issuing broad exemptions, narrow exemptions, or simply delaying or reducing the extent of the policy's implementation.

When a president supports an existing policy, he will look for ways to protect the policy when it is under threat of revision. Members of Congress propose revisions to the policy and if these revisions pass, the consequences could be costly to the president's policy agenda. If the president perceives a policy he supports to be under threat of revision or reversion in Congress, he will look for ways to appease the policy's critics. Leniency offers the president a means to keep revision control in the executive branch and avoid any amendments from Congress that might be costly to his agenda. The president may rely on multiple leniency mechanisms in order to reach the various interests advocating for policy reform.

This dissertation has four main findings. First, I find that *when* presidents choose to relax federal rules depends on 1) their position on existing policy, and 2) likelihood of congressional action on the policy. Second, a Policy Opponent is more likely to relax federal rules when Congress unlikely to reform the policy. Importantly, Policy Opponents rely more on narrow forms of regulatory exemption (e.g., individual permits) and stalling tactics in policy implementation (e.g., reduced rates of listing endangered species). Third, Policy Custodians, those presidents who seek to preserve the policy status quo, are more likely to relax federal rules when Congress threatens to reform the policy the Custodian supports. Interestingly, Policy Custodians tend to rely on broader forms of regulatory exemption (e.g., special rules and delisting/downlisting endangered species). Finally, an analysis of the spatial allocation of narrower,

or individual-level, regulatory exemptions suggests these exemptions benefit the president's co-partisans and states with low administrative capacity.

1.2 Contributions to the Literature

The theoretical contributions of this dissertation are at the nexus of existing theories of presidential unilateral action (Howell, 2003) and executive federalism (Gais and Fossett, 2005). The theory of regulatory leniency presented here extends existing presidential theories in at least two important ways. First, I extend the logic of presidential unilateral action to apply to policy implementation, with the necessary assumption that the president has sufficient control of the bureaucracy through the appointment of department secretaries. Second, my theory expands on theories of executive federalism that predict policy flexibility from presidents seeking innovation and reform; in particular, my theory predicts that presidents who seek to preserve the policy status quo use leniency to appease critics and avoid policy rollback.

Most studies of presidential influence in policy-making outside of Congress focus on presidential unilateral action at the national level. Political scientists are only recently beginning to study presidential subnational strategies for influencing policy. In other words, while most of the presidential power literature focuses on the president's interaction with horizontal checks and balances, i.e., Congress and the courts, only a few recent studies have explored the president's interaction with vertical checks and balances, i.e., state governors.

A notable exception is Elizabeth Mann's (2016) recent work. Mann argues that presidents use waivers to bypass Congress to revise national-level policy, but their use of waivers is constrained by subnational executives. Mann's empirical work demonstrates that the president pursues a waiver strategy when his policy preference is ideologically far from Congress and "contingent on the share of governors in his party" (2016: 114). She tests her theory on waivers submitted and approved in welfare, Medicaid, and education policy.

This dissertation builds on Mann's theoretical and empirical work in three ways. First, I refine the concept of interest. Mann's work focuses on the president's use of waivers. Waivers allow for either underperformance or over-performance relative to federal standards, and they are generally intended to encourage policy experimentation and innovation; therefore, it makes sense that a president seeking to reform or revise a policy might pursue a waiver strategy, and only when he can count on a critical mass of cooperative governors. The concept of interest in this dissertation is leniency. Leniency isolates the administration's allowance of underperformance, specifically. Federal leniency is particularly puzzling since federal laws protecting public goods or the public interest hinge on compliance. Theoretically, permitting noncompliance should lead to poorer outcomes.

Second, I refine Mann's theoretical contribution. The crux of Mann's theory is that the president circumvents Congress in policymaking, or the revision of existing policy. Mann situates her work in a budding literature on executive federalism (Gais and Fossett, 2005). The focus on presidential policymaking in the states largely ignores presidents whose policy goals are to protect existing policy, or limit significant revision. Mann's theory does not explain why a president who ostensibly *supports* an existing policy status quo would offer states the flexibility to not comply. In this dissertation, I build a theory that specifies the president's position relative to existing policy. I then demonstrate that both a president who opposes the status quo, and one who supports the status quo, can each be motivated to offer exemptions to federal policy under different conditions.

Finally, I expand the empirical scope of Mann's inquiry by focusing on endangered species policy, an issue area beyond welfare, Medicaid, and education. While Mann examines the same policy mechanism – waivers – across policy areas, I look at multiple policy mechanisms within a single policy area. This approach offers a more comprehensive understanding of presidential behavior; in fact, I do find evidence that presidents opt for issuing narrower or broader exemptions depending on their position on the policy and the likelihood of congressional

action on the policy.

This dissertation also makes important contributions to the literature on presidential particularism by extending the empirical scope of presidential particularistic behavior. Whereas the most prominent studies of presidential particularism focus on federal grants, disaster relief, and military closures (Hudak, 2014; Kriner and Reeves, 2015), I test the applicability of the theoretical predictions to a new type of particularistic benefit: regulatory exemptions. Indeed, I find evidence that the use of regulatory exemptions, specifically the allocation of federal permits under the Endangered Species Act, follow a pattern of partisan particularism.

1.3 Plan of Dissertation

The dissertation proceeds as follows. In Chapter 2, I develop a theory predicting the emergence and use of regulatory leniency in the executive branch. The theory demonstrates that both presidents who seek to reform existing policies, and presidents who seek to protect existing policies, use leniency to achieve their policy goals. I predict that presidents who oppose an existing policy will use leniency to minimize the policy footprint, particularly when pursuing policy reform in Congress is unrealistic. Presidents who support the policy status quo will use leniency strategically to protect it when Congress is moving toward reform.

In Chapter 3, I introduce the case study I use to assess the validity of these predictions: the Endangered Species Act (ESA). I trace parameters of interest identified in the theory, which are the president's policy position, congressional gridlock, congressional deregulatory pressure, and measures of leniency. I use presidential party to code the president's position, and track references to endangered species policy in party platforms over time as evidence of position stability. Through interviews with policy experts and careful examination of congressional hearing transcripts and political reporting of the time, I construct a detailed timeline of interactions between Congress and the executive branch over the ESA since its initial passage, with specific

attention to the likelihood of ESA reauthorization and the emergence of leniency mechanisms in ESA implementation. I code periods of gridlock, pressure, and neither, and identify four leniency mechanisms available to the executive within the framework of the ESA. I use these data to produce difference-in-means tests as a preliminary quantitative assessment of the propositions introduced in Chapter 2.

I present a fuller quantitative assessment of my theory-based predictions in Chapter 4. I restate my theoretical propositions as testable hypotheses using terms relevant to my case study. I introduce new quantitative measures for congressional gridlock and deregulatory pressure, informed by my qualitative work in Chapter 3. I then describe my estimation strategy and present results of the model, including an analysis of marginal effects.

In Chapter 5, I test several hypotheses predicting spatial patterns in the president's use of regulatory leniency. Presidents are known to pursue policy strategies that disproportionately benefit or prioritize a narrow portion of the population at the expense of the remaining population. I test whether regulatory exemptions follow a pattern of presidential partisan particularism, in which presidents favor core partisan or co-partisan states, or presidential electoral particularism, in which presidents favor swing states in election years. I also test whether presidential policy goals determine which states receive more exemptions, and whether administrative capacity and economic costs of regulation are important factors in the distribution of leniency.

I offer several concluding thoughts in Chapter 6. After summarizing the theoretical and empirical contributions of the dissertation, I discuss the implications of regulatory leniency for overall compliance and policy outcomes. Federal laws are often intended to safeguard the quality of public goods, including civil rights, free public education, health care, consumer protection, and biodiversity. Understanding how regulatory leniency affects the quality of these public goods is normatively important for a fair and healthy society. Uncovering the political dynamics underlying the use of regulatory leniency is a crucial first step since political factors will likely mediate positive or negative outcomes.

Chapter 2

Theory of Regulatory Leniency

One of the key questions motivating this dissertation is: why do presidents use regulatory leniency? Specifically, why do both presidents who oppose a policy *and* presidents who support a policy use regulatory leniency? Naively, we might expect presidents who oppose a given policy to pursue full repeal through Congress rather than expend administrative resources issuing policy exemptions. Furthermore, we might expect presidents who support a given policy to drastically limit the use of exemptions to encourage full compliance.

In this chapter, I build a political theory of regulatory leniency that explains why both presidents who oppose regulation and presidents who support regulation are driven to relax federal rules. The theory predicts that Policy Opponents, presidents who oppose an existing policy, use executive discretion to relax federal policy when Congress is unlikely to repeal the policy the president opposes. Policy Custodians – presidents who prefer the policy status quo – use executive discretion to relax federal policy as a response to congressional attempts to repeal the policy the president supports. While Policy Opponents use leniency as a path toward deregulation, Policy Custodians use leniency to stave off criticism of the law they seek to preserve in an attempt to insulate the law from further rollback in Congress.

2.1 Defining Leniency

Regulatory leniency is comprised of exemptions to prohibitive policy. Before proceeding, it is imperative to clarify these terms and their relationship. Yaffee (1982: 1) identifies three types of prohibitive policy. The first prohibits a certain action, such as murder or refusing to pay taxes. The second type of prohibitive policy prohibits an action by way of mandating another, for example: public buildings must be accessible to persons with physical or sensory disabilities. The third type of prohibitive policy prohibits actions beyond a set standard, such as the emission of carbon dioxide beyond some parts per million; these are also known as command and control regulations. Leniency discussed in this chapter is most closely associated with this third type of prohibitive policy.

Leniency mechanisms are policy instruments that relax federal rules associated with a prohibitive policy. Unlike flexibility, which implies the allowance of under- or over-performance with respect to the federal law (Mann, 2016), leniency refers to the allowance of underperformance exclusively. Leniency also differs from the concept of forbearance (Holland, 2015, 2016, 2017) because leniency incorporates situations in which the terms of leniency are negotiated on a spectrum of compliance, while forbearance refers to cases where the government makes a binary decision to ignore transgressions or enforce the law.

It is helpful to visualize regulatory leniency as movement in a single direction on a dimension (Figure 2.1). On one end of the dimension is prohibitive regulation, perhaps under the ideological banner of protecting the public interest. On the other end of the dimension is the absence of regulation, perhaps under the ideological banner of free market liberalism. Point and dashed line C is the location of a policy and boundary of executive discretion as described by congressional statute. Leniency moves the status quo to a new position, q , which is always to the right of C . q is always to the right of C because regulatory leniency, by definition, is the movement from prohibitive regulation towards deregulation on the dimension. While it is theo-

retically possible to move policy toward stricter regulation in the form of greater enforcement or implementation of more prohibitive administrative rules, the logic driving presidents to pursue a more prohibitive strategy is outside the scope of this analysis.

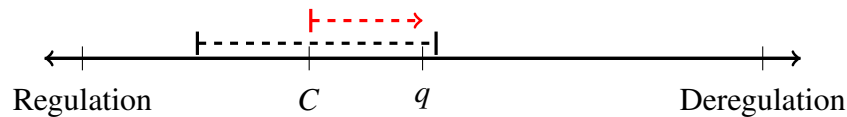


Figure 2.1: Regulatory dimension with spatial depiction of executive leniency strategy, the dashed red line. Leniency moves the status quo from Congress’s original intent for the policy as written in the statute, C , to a new policy implementation status quo at point q . The dashed black line represents executive latitude with respect to implementation; the amount of executive discretion available varies depending on the statute.

The president chooses how much leniency to grant, and therefore determines a position for q , but the president’s decisions are constrained by the congressional statute and influenced by his contemporary Congress. The logic of regulatory leniency is described in greater detail below. First, I introduce the primary actor and discuss conditions and assumptions.

2.2 The President

The strategic actor at the center of this dissertation is the president. How does the president influence policy? Early examination of presidential power characterized presidents as weak compared to legislators who wrote policy, or bureaucrats who implemented policy. Neustadt (1960), for example, attributed presidential power to the personal qualities, skills, and experiences each president brought to bear in strategic interactions with those around him. A president’s success in influencing policy, according to Neustadt, depended on the president’s ability to persuade legislators, bureaucrats, justices, journalists, and the public that his preferences were their own. Subsequent work has broadened the characterization of presidential power substantially.

One common argument is that Franklin D. Roosevelt’s New Deal set much higher expect-

tations for the office of the presidency:

From that point on, all presidents would be held responsible for addressing every conceivable social problem, and they would be expected, through legislative leadership and executive control, to take effective action. While these expectations far outstripped the president's means of meeting them, presidents responded as best they could by incrementally developing their institutional capacity for governance. The result has been a trajectory of change in which, over the decades, policymaking has become more centralized in the White House organization and the bureaucracy has become more politicized (or, more accurately, presidentialized) through appointments and top-down control. (Moe, 1993: 341)

As presidential capacity for policymaking rose, so has scholarly interest in mapping the growing extent of presidential power and influence. Political scientists have documented dynamics in presidential executive authority measured through executive agreements (Martin, 2005), executive orders (Mayer, 2001; Howell, 2003; Bolton and Thrower, 2016), memoranda (Lowande, 2014; Woolley and Peters, 2017), signing statements (Kelley and Marshall, 2008; Kelley, Marshall and Watts, 2013; Ostrander and Sievert, 2013), and procurement provisioning (Gitterman, 2013). Others have measured presidential influence on policy implementation through the power of appointment (Wood and Waterman, 1991; Lewis, 2012), agency formation (Howell and Lewis, 2002), oversight in the rule-making process (Bolton, Potter and Thrower, 2015), management of the budget (Moe, 1982), and distribution of federal spending (Berry, Burden and Howell, 2010; Kriner and Reeves, 2015).

The focus of this dissertation is presidential influence on policy, specifically on relaxing regulation. As discussed above, the president can influence policy in a myriad of ways. Previous studies have shown that presidents can and do specifically influence regulatory behavior (Wood and Waterman, 1991; Wood and Anderson, 1993; Bolton, Potter and Thrower, 2015), and that their influence extends even to independent commissions (Moe, 1982).

2.3 Conditions and Assumptions

2.3.1 Position-Taking

An important condition of the theory of regulatory leniency is that the president takes a position on existing policy. In other words, the theoretical president either wants to repeal an existing law or preserve an existing law. Unlike previous theoretical and empirical work that focuses broadly on presidential policymaking – i.e., attempts to pass a new law or implement a new program – this work focuses specifically on the presidential behavior relative to existing law.

2.3.2 Executive Discretion

A condition of regulatory leniency is that the executive has some latitude in interpretation of the law and discretion in decision-making regarding implementation of the law (Figure 2.1, red dashed line). Discretion can result from ambiguity in the law as written by Congress, or specific powers granted to the president by Congress (Epstein and O’Halloran, 1999; Howell, 2003).

The president and his administration may exploit executive discretion to move the status quo in the president’s preferred policy direction. This discretion can take many forms. For example, an administration can write or revise existing rules, even to the point of reinterpreting their original intent. After the Waxman-Markey cap-and-trade bill failed to advance in the Senate, the Obama administration moved to regulate carbon dioxide emissions under the existing Clean Air Act with a decision to characterize carbon dioxide as a pollutant. Essentially, the administration reinterpreted the Clean Air Act, a law regulating pollution, in order to address climate change, an emerging and much broader policy issue.

Executive discretion can also take the form of selective implementation, or implemen-

tation outside the scope of Congress's original intent. When President Ronald Reagan first took office, he was interested in reducing the regulatory burden on the economy to stimulate growth. Within a month of his administration, Reagan issued an executive order prohibiting federal agencies from taking any regulatory action without demonstrating that the benefits to society outweighed estimated costs to the economy.¹ This executive order, a unilateral action by the president, conflicted with the original intent of many public interest laws, including the Endangered Species Act which aimed to protect all species at risk of extinction. Then, the Fish and Wildlife Service under Reagan slowed the process of listing new Endangered and Threatened species to a near halt, choosing to implement the policy below the standard Congress had intended. Protecting species at risk of extinction often requires developers to make modifications to their development projects in order to accommodate endangered species and habitat, a process that costs time and money and could slow economic growth. In this example, President Reagan pushed the boundaries of executive discretion in the implementation of laws enacted by Congress, directly through executive order and indirectly through the actions of his bureaucracy.

A president can also use executive discretion strategically to influence a law's chances at longevity. For example, a president who supports a policy he has inherited may wish to relieve the build up of political pressure or controversy over the policy, leading him to moderate his administration's implementation and enforcement efforts. On the other hand, a president who opposes a policy he has inherited may wish to repeal the law, but does not have the congressional support for a repeal. This president might use discretion strategically to reduce the law's chances at longevity. The Trump administration, for example, wanted to repeal the Affordable Care Act (ACA) but did not have the votes in Congress to do so. Instead, the Administration relaxed the consumer protection rules in the ACA and cut federal enrollment efforts, destabilizing the insurance market exchanges. "ObamaCare is finished. It's dead. It's gone...There is no such thing as ObamaCare anymore...it's a concept that couldn't have worked," Trump said in

¹Ronald Reagan: "Executive Order 12291 – Federal Regulation," February 17, 1981. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=43424>.

a Cabinet meeting amid announcements of administrative changes to the law's implementation (Savransky, 2017). Presidents expect actions taken in their term to affect the popularity, durability, and longevity of the law in the future. With this in mind, presidents can also use discretion to influence long-term outcomes.

Executive discretion is not without checks, however, and a president attempting to move an existing policy closer to his preferred position must still take into account the positions of Congress and the courts. Congress can amend or revise statutes to limit discretion if the executive moves policy too far from Congress's preferred position. In response to Reagan's executive order and delayed endangered species listings, for example, Congress amended the Endangered Species Act to explicitly prohibit the Fish and Wildlife Service from considering economic costs in listing decisions, and shortened deadlines to force the administration to make listing decisions more efficiently.

Of course, if Congress is gridlocked on the policy issue, then the threat of statutory amendment is limited, but the courts may step in as a key player. The courts compare the administration's actions to their own interpretation of the statute and have the constitutional authority to reverse executive decisions or nudge the administration along. For example, in early 2018 a federal judge ruled the Trump administration broke the law by failing to implement an ozone pollution rule written by the Obama administration. The judge wrote, "There is no dispute as to liability: Defendants admit that the administrator violated his nondiscretionary duty under the Clean Air Act" (Cama, 2018). Thus, presidents must account for the other branches of government when using executive discretion, and checks on executive authority from these two branches of government determine the bounds on discretion depicted in Figure 2.1.

The latitude a president has to influence policy depends on the amount of executive discretion written in the statutes enacted by Congress and interpreted by the courts. The president's ability to act on his policy preferences is also constrained by public opinion and a variety of other political factors. Though I offer a description of the ways in which the bounds of executive

discretion are determined and the actors involved, the important condition is that some amount of executive discretion exists for a given policy, and an important assumption is that this amount of executive discretion stays constant across administrations.

2.3.3 Control of the Bureaucracy

As a strategy of the executive branch, leniency depends on an array of administrative actions characterized in growing literatures on bureaucratic dynamics (Wood and Waterman, 1994) and presidential unilateral power (Moe and Howell, 1999 a,b ; Howell, 2003, 2005). Howell theoretically defines presidential unilateral power as influence over policymaking outside of implementation (2003: xiv), and many scholars of the American presidency have focused on understanding the dynamics of *direct* presidential actions, such as executive orders, signing statements, or memoranda (Mayer, 2001; Howell and Lewis, 2002; Ostrander and Sievert, 2013; Cooper, 2014; Lowande, 2014; Bolton and Thrower, 2016; Thrower, 2017). However, many other scholars have also demonstrated presidential influence in policy implementation and outcomes through *indirect* means, such as appointments, oversight in rule-making, and management of the budget (Moe, 1982; Wood and Waterman, 1991; Wood and Anderson, 1993; Lewis, 2012; Bolton, Potter and Thrower, 2015).² I theoretically construct regulatory leniency as a policy strategy of the president. Thus, an important theoretical assumption is that the bureaucracy is responsive to the president. Empirically, in Chapters 4 and 5, I rely primarily on federal agency behavior to test predictions derived from theory.

2.4 The Logic of Regulatory Leniency

Thus far, I have justified that presidents exert influence over policy and stipulated that presidential position-taking, executive discretion, and control of the bureaucracy are three con-

²The Office of the President can also issue rules, recorded in the *Federal Register*, and scholars of presidential unilateral power distinguish this direct action from the indirect influence presidents have in agency rule-making.

ditions preceding a presidential strategy of regulatory leniency. When does leniency emerge? Leniency is the president's response to congressional action or inaction relative to his goals for existing policy. It is constraint from Congress – in the form of policy gridlock, or in the threat of policy rollback – that motivates the president to pursue a strategy of regulatory leniency.³

This logic is an extension of Howell (2003). Howell offers a formal model for understanding *when* a president is likely to use presidential power to influence policy. “Presidents do not blindly pronounce any sort of policy initiative – come what may!” writes Howell, “They monitor politics, anticipating the likely reception that their actions will receive in Congress and the courts” (25). Howell’s model predicts two scenarios motivating a president’s unilateral action; I extend his predictions for unilateral action to encompass bureaucratic action under the direction of presidential appointees responsive to the president’s preferences. The model predicts executive action when 1) the president wants to move the policy status quo, but Congress remains gridlocked on the issue, and 2) the president prefers the status quo, but Congress is prepared to enact sweeping policy changes, prompting the president to preempt congressional action by moderating policy implementation (Howell, 2003: 53). These predictions provide a solid foundation for understanding the executive’s use of leniency with respect to policy.

The logic of regulatory leniency differs depending on whether a president opposes an inherited policy and seeks to repeal or destabilize it, or agrees with an inherited policy and seeks to protect it. I refer to these two types of presidents as Policy Opponents and Policy Custodians. A new president who enters office inherits a number of federal mandates passed by Congress offering varying degrees of executive discretion. The president may or may not agree with these statutes.⁴ When Congress passes a statute mandating certain regulations, such as the Clean

³Note that this reference to congressional constraint is conceptually distinct from congressional limits on discretion. Here, Congress is either gridlocked and cannot support the president’s policy goals or Congress seeks to repeal statutory language the president supports. Congressional limits on executive discretion are either written *ex-ante* in the law or written *ex-post* in an amendment in response to or as a check on the president’s interpretation.

⁴The president also inherits regulations written by previous administrations he may or may not agree with, but for clarity I will focus on the president’s position vis a vis congressional intent. Rules written by previous administrations are arguably easier to reverse through executive action, as noted in the opening anecdote. Amendments to congressional statutes require congressional consensus.

Air Act, the Clean Water Act, or the Endangered Species Act, future presidents who inherit these statutes have preferences that fall somewhere along the regulatory dimension relative to Congress's original intent (Figure 2.1). If a president's preference for regulation lies near or to the left of Congress's intent for the law, he is a Policy Custodian and will aim to protect against the law's reversion. If a president's preference for regulation lies far to the right of Congress's intent for the law, he is an Policy Opponent and will aim for deregulation.

2.5 General Propositions

Here I present three propositions drawn from the preceding logic. The first proposition is not conditional on Congress. If a president supports a given policy, I expect him to implement and enforce the law in accordance with the statutory status quo; if a president opposes a policy, I expect him to slow or stall implementation and enforcement within the bounds of executive discretion. This effect of president type on implementation is not conditional on Congress because delaying implementation is a form of leniency that does not require a direct action. Delaying or slowing implementation requires inaction. While a Policy Opponent would generally look to Congress first for proactive policy change, he does not need Congress to pursue a simple strategy of inaction. Inaction is the least costly form of leniency.

***Implementation Proposition:** A president who opposes an existing policy will use executive discretion to slow policy implementation relative to presidents who support the policy.*

When inaction does not suffice, a Policy Opponent may look to Congress for policy reform. If Congress is unable to pass the reforms the president seeks, a Policy Opponent finds other ways to shape policy (Gais and Fossett, 2005; Mann, 2016). I argue that a president opposed to an inherited policy will use regulatory leniency to move the status quo further toward deregulation when he does not expect Congress to repeal the law. Inherent to the president's type, the president prefers a regulatory status quo to the right of congressional intent for the

policy as written in the law. In fact, the president might prefer a full overhaul or repeal of the law, which would require congressional action.

Of course, sometimes Congress is unwilling or unable to overhaul the law, and as Sarah Binder (1999) points out, interbranch conflict is not the only culprit. Even when the same party controls the presidency and majorities in each chamber of Congress, partisan polarization and heterogeneity of preferences can still stand in the way of consensus and legislative productivity. Binder demonstrates that change from unified to divided party control actually has the smallest effect on the probability of gridlock. Her results suggest that greater ideological heterogeneity (measured using standard deviations of W-Nominate scores), fewer moderate legislators, and greater ideological distance between the two chambers each have higher impacts than divided party control on the probability of legislative gridlock and policy stalemate. This is to say that a president seeking policy reform may be disappointed by Congress even when his co-partisans are in the majority.

The key conditions driving the Policy Opponent toward an active strategy of regulatory leniency is that his preferred policy position is to the right of the statutory status quo, and Congress is unwilling or unable to repeal the law the president opposes. Either the congressional agenda is controlled by the president's opposing party, or the pivotal voters in Congress prefer a status quo to the left of the president's preferred status quo, or the issue is so polarizing that consensus on a single plan to amend the law cannot be reached. In such cases, the Policy Opponent will rely on executive discretion to actively relax regulation in accordance with his preference for deregulation. Unlike inaction in implementation, relaxing regulation requires administrative effort and bureaucratic resources. It is an administrative attempt to change policy toward deregulation.

Policy Opponent Proposition: *When Congress is unlikely to repeal a policy the president opposes, the president will rely on leniency mechanisms in policy implementation to move the status quo toward deregulation.*

A president who supports an inherited policy will use regulatory leniency to move the

status quo toward deregulation in order to prevent a congressional overhaul of the law. Inherent to the president's type, the president prefers a regulatory status quo near or to the left of congressional intent for the policy. Though a Policy Custodian will prefer policy implementation that is either true to or more prohibitive than Congress's original intent for the law, he will offer regulatory leniency if pressured to do so.

Pressure builds from changing conditions, e.g., changing economy, changing feedback from pivotal interest groups, or changing public opinion. Sometimes the emergence of new policy or political problems threatens the longevity of the law the president supports. Inherited laws may no longer be sufficient to address emerging and widespread issues like climate change, immigration, or rising inequality. Emerging issues cause friction between the letter of the law and the conditions on the ground. Grievances accumulate and aggrieved constituents – either a growing circle of the electorate, or strong albeit narrow political forces – seek recourse from the law. Members of Congress air grievances, call for reform, and introduce proposals to amend the law.

The Policy Custodian can use Congress as a barometer to gauge these pressures. When more members of Congress apply pressure to roll back the law, it is a signal to the Custodian president that broader public opinion may be shifting. But recall that what is at stake is a prohibitive federal program that the Policy Custodian supports. If the Policy Custodian does not act to address or relieve this pressure and underlying tensions persist, then criticism of the law is may amplify, or spread to more moderate members of Congress, and put the law at risk of repeal. The rational strategy for the Policy Custodian is to moderate implementation of the policy in an attempt to relieve this pressure and stave off criticism of the law. The Policy Custodian is willing to move the status quo away from his preference in order to minimize the risk of congressional overhaul.

The key conditions driving the Policy Custodian toward a strategy of regulatory leniency is that he prefers the policy status quo over any position to the right, but Congress is threatening

to roll back the policy and move the status quo toward deregulation. Unlike the Policy Opponent who responds to gridlock in Congress by pursuing an active leniency strategy, a Policy Custodian uses leniency in response to congressional attempts at policy reform.

Regulatory leniency is not costless to a Policy Custodian, therefore the threat to the policy must be credible. Assuming that the president is elected based on his ideology and policy positions, moving policy away from those positions may alienate his supporters. While the Policy Opponent's threshold for offering leniency is relatively low since he may please his supporters for moving the status quo closer to his preferred policy position during congressional gridlock, the Policy Custodian's threshold for granting leniency is relatively high since he risks alienating his supporters. The magnitude of the pressure to deregulate is the driver.

***Policy Custodian Proposition:** An increase in deregulatory pressure from Congress will correspond to an increase in the use of leniency mechanisms by the executive in an attempt to moderate the policy and prevent rollback.*

2.6 Conclusion

In this chapter I define regulatory leniency relative to prohibitive policy and draw a spatial depiction of leniency on a single dimension to demonstrate key features (Figure 2.1). Regulation and Deregulation lie on opposite ends of the dimension. Key features include the location of the existing statute as defined by Congress, the boundaries of executive discretion, and the location of a new implementation status quo to the right of Congress's original intent and within the boundaries of discretion. I identify the president as the key strategic actor.

The logic driving my theory is borrowed from Howell (2003), but applied beyond presidential unilateral action. I identify three conditions for the logic of regulatory leniency to hold. First, the president must take a position relative to an existing policy. I refer to presidents who oppose an existing policy, Policy Opponents, and presidents who support an existing policy, Policy Custodians. Second, some amount of executive discretion must exist for the president to

offer leniency administratively, and the bounds of discretion may be constant across administrations. Finally, the president must have reasonable control over the bureaucracy; otherwise, I risk misattributing leniency to the president when bureaucrats act independently, or risk null results if the president opts for a leniency strategy but principal-agent problems obscure the president's response to Congress.

My central claim is that the president will rely on regulatory leniency to achieve his policy goal when Congress is either unable to repeal a policy he opposes, or threatening to repeal a policy he supports. Additionally, I predict that regardless of the likelihood of congressional action, a president who opposes a policy he inherited will attempt to stall the implementation of that policy. Importantly, the theory I introduce in this chapter offers an explanation for why both presidents who ostensibly oppose and presidents who ostensibly support a given policy are each driven toward a strategy of regulatory leniency.

Chapter 3

Introduction of Case Study

This chapter has three objectives: 1) to introduce the primary case study referred to throughout this dissertation, 2) to detail the emergence and use of leniency tools relevant to the case, and 3) to qualitatively assess the validity of the three propositions derived from the theory in Chapter 2. Here I provide important context for the remaining chapters, including details regarding statutory history related to the case, implementation, and the positions of key political parties and players. I also track time trends across multiple measures of leniency.

The chapter proceeds as follows. I first describe the principles guiding my selection of the Endangered Species Act (ESA) as a case study. Next, I provide a summary of the case including background information about the law's reauthorization in Congress and the existing mechanisms for granting leniency within the framework of the law. Then, after describing my methods of data collection, I trace variation in my parameters of interest over time. I conclude with bivariate tests of the propositions using qualitative coding of explanatory variables and quantitative measures of leniency.

3.1 Research Design

The political theory of regulatory leniency applies to policies that prohibit actions beyond a certain set standard. Leniency mechanisms offer exemptions from such prohibitive policies for the regulated and the opportunity for regulators to selectively lower standards. The theory presented in the previous chapter generates three propositions that explain the timing and extent of use of leniency mechanisms. In this chapter I examine the emergence and use of leniency with respect to the Endangered Species Act (ESA). Focusing on one policy offers two analytical advantages. First, I am able to hold constant any issue-varying factors, such as issue complexity, while time-varying factors are allowed to vary. Second, this approach allows me to explore multiple leniency mechanisms relevant to a single policy, as opposed to just one mechanism across policy areas. This particular advantage may offer insights into whether some presidents prefer one type of mechanism over another.

3.1.1 Case Selection

The ESA is an ideal case for examining the dynamics in use of regulatory leniency across time for several reasons. First, it is a prohibitive policy that sets a strict universal standard applicable to federal agencies, state and local government, industry, and private individuals. The standard prohibits actions that harm protected species or their habitat. The survival of the species and the benefit of the species to society is valued above individual projects, according to a strict interpretation of, and adherence to, the law. This means that the policy status quo is positioned to the left on the regulatory dimension, the prohibitive side, and that administrations have ample space to move the status quo to the right by offering leniency.

Second, the policy has been enacted for decades, providing the opportunity to measure variation across time. The timeseries includes seven presidential administrations, four Republican and three Democrat, as well as periods of congressional interest in reforming the ESA and

congressional stalemate. Third, there are several types of leniency mechanisms applicable to the ESA that are measurable across time. This provides an opportunity to track the evolution of leniency mechanisms within a single policy as a response to specific political drivers.

Leniency mechanisms are a means for Policy Opponents to move the status quo toward deregulation in response to inaction in Congress. Conversely, leniency mechanisms are a way for Policy Custodians to moderate the policy status quo in order to appease policy critics in Congress and avoid a rollback of the policy. This suggests that new leniency mechanisms emerge through executive action either when Congress refuses to rollback contentious provisions of the ESA in the case of Policy Opponents, or when Congress is threatening to weaken the ESA in the case of Policy Custodians.

3.1.2 Case Summary

ESA and ESA Reauthorization

The ESA was passed in 1973 at the urging of President Nixon in his State of the Union and with the near-unanimous consent of Congress. The law strengthened the existing federal endangered species protection program by: 1) empowering the US Fish and Wildlife Service (USFWS) to list species at risk of extinction as either Endangered, offering more protection, or Threatened, offering slightly less protection, based on best available scientific data, 2) allowing private citizens to petition species for listing, and the ability to sue to enforce the law, 3) prohibiting federal agencies, or any project aided by federal money, to harm listed species or their habitat, and 4) making the act of harming a listed species or their critical habitat a federal offense.

There are two types of authorization related to congressional bills. A bill can authorize an agency or program to carry out an action, or a bill can authorize appropriations to an agency or program, usually in the form of setting non-binding funding limits. It is common for appro-

priations authorization to expire, forcing a debate over a bill’s reauthorization and presenting an opportunity to make amendments. Statutory authority to carry out certain actions can also be set to expire through what is known as a “sunset clause,” though these are less common.

The ESA included provisions granting authority to the USFWS to implement and enforce the ESA; these provisions do not expire. It also includes a provision authorizing appropriations, which were set to expire at the end of fiscal year 1978 (Corn and Wyatt, 2016). The reauthorization of the appropriations process set the ESA on a schedule for consideration and possible amendment by Congress. Reauthorizations of the ESA were passed in 1978, 1982, and 1988, each including amendments to the law. Each of these reauthorization periods that culminated in ESA amendment offer clear examples of congressional interest in revising the ESA, some deregulatory pressure, and the absence of gridlock. In 1992, authorization of appropriation expired and has yet to be reauthorized as of this writing.¹ Coding congressional gridlock and deregulatory pressure in the period after 1992 invites a thorough exploration of the context surrounding failed attempts to reauthorize and amend the ESA.

ESA Implementation

The ESA is implemented by the Fish and Wildlife Service (FWS) in the Department of Interior and the National Marine Fisheries Service (NMFS) in the Department of Commerce. These two agencies jointly manage lists of species endangered and threatened with extinction; FWS manages terrestrial and freshwater species, while NMFS manages marine species. Their tasks include making listing and delisting decisions, consulting with agencies to evaluate the impact of federal agency activity on listed species, issuing permits for incidental “take” of listed

¹Note that Congress still annually appropriates funding for ESA-related programs in spite of the fact that authorization of appropriation is expired. This is due to the fact that administrative action is required, and must be funded, in order to carry out ESA mandates, including consultations and processing of permits. In the absence of this administrative effort, development projects would stall or be subject to litigation, frustrating development interests and potentially harming the economy.

species, and monitoring and enforcing the law.² They are also mandated in Section 6 of the ESA to cooperate with state governments to develop state programs for species management. In terms of bureaucratic organization, the Director of FWS reports to the Assistant Secretary of Fish, Wildlife, and Parks, who reports to the Secretary of Interior. The Assistant Administrator for Fisheries reports to the Administrator of the National Oceanic and Atmospheric Administration (NOAA) who reports to the Secretary of Commerce. The President nominates the Director of FWS directly, who is confirmed by the Senate. The Assistant Administrator for Fisheries is appointed by the NOAA Administrator.

There are several ways administrators can introduce regulatory leniency within the legal framework of the ESA. First, administrators may choose to stall listing new species as Endangered or Threatened. This comes with some risk of intervention by other branches of government, however. Congress can nudge the administration to make listing decisions if the perception is that the administration is stalling by incorporating deadlines in the statute. Furthermore, the citizen suit provision of the ESA allows private citizens and non-governmental organizations to sue the administration for failing to implement the ESA. If sufficient evidence is presented, the courts could rule against the administration. Such a ruling costs taxpayer money for litigation fees, takes administrative resources away from other priorities, and could result in court-ordered listings.

A second way the administration can offer leniency under the ESA is through the issuance of federal permits. Congress granted the Secretaries of Interior and Commerce the authority to permit takings of listed species as an exemption to the ESA in the reauthorization amendments of 1982. There are two types of federal permits issued by the FWS or NMFS, Incidental Take permits and Enhancement of Survival permits. Both types of permits offer ESA exemptions, typically to non-federal landowners, for otherwise lawful activities, such as timber harvest, ranching, housing development, or utilities development. Incidental Take permits are

²The ESA defines “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct,” Section 3(18).

issued upon the completion of a Habitat Conservation Plan, which details the landowner's plan to mitigate any adverse impacts on listed species or habitat. Mitigation activities may include purchase of a conservation credit or payment to a conservation fund, restoration of degraded habitat, establishment of buffer areas, modifications of land use practices, or access restriction (*HCP Fact Sheet*, 2017). Enhancement of Survival permits are issued upon the signing of a Safe Harbor or Candidate Conservation with Assurances Agreement, which details the landowner's plan to support the recovery of listed species or their habitat. Recovery efforts can include reducing habitat fragmentation or increasing habitat connectivity, maintenance or restoration of existing habitat, establishing buffers for protected areas, or testing and experimenting with new habitat management techniques (*SHA Fact Sheet*, 2017). Enhancement of Survival permits are intended to protect landowners who are willing to help with species recovery on their property but disincentivized due to ESA restrictions on property use. Permits are rarely if ever challenged in court.

A third way the administration can introduce leniency is through the establishment of special rules. Specifically, section 4(d) of the ESA authorizes FWS and NMFS to designate special rules "deemed necessary and advisable" for Threatened species. Without a special 4(d) rule a species listed as Threatened is afforded the same protections as a species listed as Endangered. These protections prohibit import to or export from the US, takings (defined above), possession, sale, delivery, transport, or any commercial activity, interstate or foreign. Generally, the protections related to takings are the most controversial. A 4(d) rule gives the administration the discretion to offer leniency with respect to certain species under certain circumstances. For example, in 2002 the FWS issued a 4(d) rule for Preble's Meadow Jumping Mouse allowing landowners to continue to engage in rodent control and weed control activities (*Special Rules Fact Sheet*, 2017). Even though these activities would have adverse affects on individuals of the Threatened species and therefore qualify as "taking" under the ESA, the FWS concluded these limited activities would not impede conservation of the species. While federal permits

(generally) offer individual-level exemptions per project, 4(d) rules offer blanket exemptions per activity. In fact, one of the justifications for special rules is to reduce the administrative costs of processing many similar permits.

A fourth way the administration can offer leniency in the implementation of the ESA is by delisting species. Delisting offers the broadest scope of leniency and as such it is also vulnerable to litigation. In order to delist a species, FWS or NMFS must determine that the threats to extinction have been removed or controlled. The agency must evaluate recovery achievements and assesses population sizes and trends, and habitat quality and stability. The agency published proposals to delist along with post-delisting management plans in the *Federal Register* for public comment.³ The threshold for species recovery has been left open to interpretation, and delistings are often challenged in court.⁴

3.1.3 Data Collection

To investigate the emergence of these leniency mechanisms over time, I collected qualitative data from several sources. I obtained text of Republican and Democratic Party Platforms between 1976 to 2016 from *The American Presidency Project* (Peters, 2018) and flagged all references to endangered species, conservation, and environmental policy after ESA enactment in 1973. I conducted interviews with professionals working on endangered species policy for decades, either within the Department of Interior and FWS, or as lobbyists, lawyers, or consultants. I watched and read transcripts of congressional committee and subcommittee hearings on ESA reauthorizations. I combed the *CQ Press Library*, *The New York Times*, *The Washington Post*, and *Greenwire* – a subscription of *E&E News* for energy and environment professionals – for references to the ESA. To complement the qualitative data, I obtained data on legislative

³Proposals to list species as Threatened or Endangered are also published in the *Federal Register* and open to public comment.

⁴An administration can also selectively list or delist *populations*, as opposed to listing or delisting the entire species wherever it is found. This strategy is particularly useful for controversial species, such as the gray wolf. For now, population listings are outside the scope of this leniency analysis.

attempts to weaken the ESA between 1996 and 2017 from the Center for Biological Diversity, a non-governmental organization at the forefront of litigation efforts to strengthen species protection under the ESA.

I collected quantitative data on the use of four leniency mechanisms over time. Federal permit data were downloaded on Feb 6, 2018 from the USFWS Tracking and Integrated Logging System (TAILS), a field office activity tracking system within the broader ECOS database.⁵ Data on special 4(d) rules issued by FWS and NMFS were procured from Ya-Wei Li at Defenders of Wildlife (Li et al., 2017). Names and dates of species listings and delistings were taken directly from the Environmental Conservation Online System (ECOS) maintained by FWS and accessible online.⁶

3.2 Emergence of Leniency Mechanisms

The first parameter of interest guiding my theoretical predictions is *president type*. Policy Opponents and Policy Custodians are driven toward a leniency strategy by different political circumstances. Recall from the theory that regulatory leniency emerges as a strategy when a president opposes a policy but Congress cannot act to repeal it, or when a president supports a policy but Congress is poised to repeal it. Therefore, the second parameter of interest is conditional on president type. A Policy Opponent will respond to *congressional gridlock* with a leniency strategy as a path toward deregulation. A Policy Custodian will respond to *deregulatory pressure* in Congress with a leniency strategy as means to appease critics of the policy.

Congressional gridlock and deregulatory pressure are not necessarily opposite sides of the same coin. Congressional gridlock can occur even when deregulatory pressure in Congress

⁵Some entries in the database are amendments or renewals to existing permits. Amendments are treated as 0.5 count.

⁶<https://ecos.fws.gov/ecp0/reports/species-listings-count-by-year-report> and <https://ecos.fws.gov/ecp0/reports/delisting-report>

is relatively high, encompassing up to two-thirds of the Senate.⁷ In this case, a Policy Opponent will still be compelled to use a leniency strategy in the absence of congressional action. Furthermore, a Policy Opponent will be driven toward a leniency strategy even when deregulatory pressure is absent in Congress simply because the Policy Opponent is guided by a preference to deregulate. The lack of congressional action is the primary driver. On the other hand, the passage of policy reform bills – i.e., the absence of gridlock – may be too blunt a measure to capture the relationship between deregulatory pressure and a Policy Custodian strategy to deescalate conflicts. The very logic of regulatory leniency suggests that the Policy Custodian is able to prevent the passage of policy overhaul bills in Congress by relaxing implementation of the policy.

I code these three parameters of interest using careful examination of party platforms and trace congressional action with respect to the ESA, beginning with the first reauthorization. To measure my outcome variable, I focus on the four most prominent forms of leniency associated with the ESA: stalling listing decisions, issuing federal permits, issuing special rules, and delisting decisions. These leniency mechanisms vary by effort and scope. For example, stalling listing decisions is a form of passive leniency, while issuing exemptions and delisting species requires administrative action. Federal permits are issued at the individual project level while delisting species removes protections for an entire species. The following sections describe my parameters of interest in detail. I then present the patterns of use of leniency mechanisms across time, and conclude with an analysis determining whether or not the observable evidence supports the propositions derived from the theory of regulatory leniency.

3.2.1 President Type

Before I assess the validity of the propositions, I first code president types – Policy Opponent or Policy Custodian – based on preferences toward the ESA. The most salient declaration

⁷If the Senate filibuster pivot also prefers deregulation, then the filibuster is no longer an obstacle to legislative reform and gridlock is not an issue.

of the president's policy agenda is the annual State of the Union; however, endangered species policy is rarely addressed directly by the president in these speeches.⁸ There are at least three explanations for this. First, endangered species policy might simply be a lower priority issue compared to the economy, health care, civil rights, education, or even other environmental issues such as clean air and water. Second, the Endangered Species Act passed nearly unanimously in Congress and was signed immediately by Republican president Richard Nixon. Divergent preferences did not emerge until after ESA enactment. After enactment, there is little reason for a president who supports the ESA to make an appeal to Congress to reform the ESA. On the other hand, we might expect a president who opposes the ESA to make such an appeal, yet they are still absent from State of the Union addresses. Thus, the third possible explanation for the absence of endangered species policy in presidential State of the Union addresses is that preferences regarding the ESA, including opposition, may be subsumed by declarations of preferences regarding environmental policy or even federal regulation more generally.

The next best prospective data source for president type and policy preference is the president's party membership, and that party's declaration of beliefs in the party platform. I code president type based on the president's party membership, and use the party's stance relative to endangered species policy to infer the president's position on the ESA. A party platform is a statement of the party's beliefs and principles that coincides with presidential elections. The platform is adopted at the party national convention held every four years at the same time the party's nominee for president is announced. Thus, there is an intrinsic link between the development of the party platform and the announcement of the party leader. There is also evidence of an extrinsic link between party platforms and the presidential agenda in that issue areas emphasized in party platforms are shown to correlate with federal spending and governance outcomes (McDonald, Budge and Hofferbert, 1999).

Though party platforms provide a useful heuristic for the president's position on the ESA,

⁸State of the Union text was retrieved from *The American Presidency Project* hosted online by Gerhard Peters and John T. Woolley and the University of California, Santa Barbara at <http://www.presidency.ucsb.edu/sou.php>

there are limitations to relying on party platforms alone. Some platforms fail to mention the ESA or offer only broad platitudes referring to the value of biodiversity and a call to stewardship. I emphasize here that my coding of president type is based on the president's party membership and that party's general attitude toward the ESA across time. Using the president's actions to interpret his position on the ESA in order to then predict his administration's actions would be problematic and is therefore avoided. Where appropriate, I interpret the absence of ESA mentions in the party platform as strategic.

I characterize Republican presidents as Policy Opponents and Democratic presidents as Policy Custodians, and I rely on party platforms to support this coding. The Republican Party refers to endangered species in every party platform since 1984. In the 1980 Republican Party Platform, the terms "endangered species" appear only in reference to "the small entrepreneur." That said, the platform does make a strong commitment to protect "the cherished human right of property ownership" and denounces the previous Democratic administration for its "severe land use controls." At this time, the property rights movement and the wise use movement were gaining momentum in opposition to the environmental movement. The Republican Party's message regarding the protection of private property reflects an appeal to these interests and a clear effort to distinguish the Republican Party from the Democratic Party on this issue.

The 1984 and 1988 Republican Party Platforms include short generic statements supporting endangered species protection, in addition to strong statements reiterating Republican commitment to private property, "the cornerstone of liberty." The 1984 platform commits Republicans "to the protection of endangered or threatened species of plants and wildlife," and the 1988 platform is modestly updated to read, "We will fight to protect endangered species and to sustain biological diversity worldwide [*sic*]."

By 1992, however, there is a notable shift in tone with respect to endangered species policy. The generic statement, "We value our Nation's real wetlands habitat and the diversity of our native animal and plant life," is followed by the caustic, "We oppose, however, bureaucratic

harassment of farm, ranch, and timber families under statutes regarding endangered species.” Republicans go so far as to invite congressional action: “Accordingly, prior to the implementation of a recovery plan for a species declared to be endangered, we will require the Congress to affirm the priority of the species on the endangered list and the specific measures to be taken in any recovery plan. These acts should not rest with the rubber stamp of a bureaucrat.” In other words, 1992 marks a shift in Republican messaging to their base on the endangered species issue.

The 1996 Republican Party Platform devotes a paragraph to the endangered species issue:

Republicans have always advocated conserving our animal and plant resources, but we recognize the current Endangered Species Act is seriously flawed and, indeed, is often counterproductive because of its reliance on Federal command-and-control measures. The adherence of Clinton Democrats to these discredited ESA provisions has devastated the environment they pretend to protect by virtually encouraging landowners to remove habitat for marginal species to avoid government seizure of their property. We will improve the ESA by implementing an incentive-based program in cooperation with State, local, and tribal governments and private individuals to recognize the critical relationship between a healthy environment and a healthy economy founded on private property rights and responsibilities.

Note again the contrasting statement referencing the “Clinton Democrats.” The implication is that Republicans promote market-based incentives – or deregulation – while Democrats promote a command-and-control – or prohibitive policy – approach. In fact, Clinton’s appointee to the position of Secretary of Interior, Bruce Babbitt, took proactive measures as soon as he took office to incorporate market-based incentives and leniency measures in order to moderate the implementation of the ESA.⁹

In 2000, the Republican Party Platform reiterates its dissatisfaction with the ESA and the party’s commitment to market-based incentives, though removes the reference to the Clinton administration:

The Endangered Species Act (ESA)...is sometimes counter-productive toward its truly important goal of protecting rare species, 75 percent of which are located on

⁹I address the political reasons for this policy moderation in the following section. Recall that the theory would predict threats of policy rollback in Congress.

private land. Its punitive approach actually encourages landowners to remove habitat to avoid federal intervention. This serves as a disincentive for private landowners to do more to restore habitat and become private stewards of wildlife. The legislation needs incentive-based cooperation among federal, state, local, and tribal governments, and private citizens. The result will be a more effective ESA that better protects wildlife diversity.

By 2004, the Republican Party has updated its platform's endangered species paragraph with the heading: "Modernizing the Endangered Species Act." Republicans acknowledge "Americans overwhelmingly support" the ESA, and renew a commitment to "the goal of protecting species to enhance their chances for survival." The party proposes reforms to the Act, including an expansion of voluntary agreements with private property owners (i.e., opportunities for take permits) and cooperative conservation programs – primarily means of encouraging private stewardship as opposed to federal intervention. Perhaps because the incumbent president is a Republican, the platform focuses less on executive decisions regarding implementation and more on congressional action to reform and "modernize" the ESA.

The 2008 Republican Party Platform scales back the call for ESA reform. Instead, Republicans refer to their "continued stewardship" over the environment, and attribute successful protection of endangered species to a diverse economy and "balancing environmental goals with economic growth and job creation." The 2012 party platform does not mention the ESA by name, but does generalize the party's commitment to conservation and frames the commitment as a moral obligation. Several paragraphs in the 2012 party platform cover the following themes: balancing economic development and property rights with conservation goals, restoring scientific integrity by removing political incentives from publicly funded research, encouraging private stewardship, and local and state management of environmental issues "instead of a national rule based on the ideological concerns of politicized central planning." The Republican Party closes the section on conservation with this statement on political appointees:

The Republican Party supports appointing public officials to federal agencies who will properly and correctly apply environmental laws and regulations, always in

support of economic development, job creation, and American prosperity and leadership. Federal agencies charged with enforcing environmental laws must stop regulating beyond their authority. There is no place in regulatory agencies for activist regulators.”

This statement clearly communicates the Republican Party’s position relative to the implementation status quo and prioritization of economic growth over environmental protection. The reference to local management vs “national rule” is a commitment to deregulation.

The 2016 Republican Party Platform begins its section on the environment by reaffirming a moral obligation to environmental stewardship. Republicans assert that “private ownership has been the best guarantee of conscientious stewardship” and “steady economic growth brings the technological advances which make environmental progress possible.” Several subsequent strong statements situate the Republican Party squarely in opposition to Democrats and the environmentalist movement. One paragraph is particularly unflattering to Republican opponents:

The environment is too important to be left to radical environmentalists. They are using yesterday’s tools to control a future they do not comprehend. The environmental establishment has become a self-serving elite, stuck in the mindset of the 1970s, subordinating the public’s consensus to the goals of the Democratic Party. Their approach is based on shoddy science, scare tactics, and centralized command-and-control regulation. Over the last eight years, the Administration has triggered an avalanche of regulation that wreaks havoc across our economy and yields minimal environmental benefits.

This paragraph is followed by the assertion that environmental “successes become a challenge for Democratic Party environmental extremists, who must reach farther and demand more to sustain the illusion of an environmental crisis.” Republicans accuse environmental extremists in the Democratic Party of “routinely ignore costs, exaggerate benefits, and advocate the breaching of constitutional boundaries by federal agencies to impose environmental regulation.” The Republican Party reiterates a proposal to decentralize environmental responsibilities away from the federal bureaucracy to state and local governments.

The 2016 Republican Party Platform also devotes a paragraph specifically to the ESA. Republicans claim that in the last few decades “the ESA has stunted economic development,

halted the construction of projects, burdened landowners, and has been used to pursue policy goals inconsistent with the ESA – all with little to no success in the actual recovery of species.” In contrast, the party affirms its prioritization of economic growth and property rights: “To upset the economic viability of an area with an unneeded designation costs jobs and hurts local communities. We must ensure that [species] protection is done effectively, reasonably, and without unnecessarily impeding the development of lands and natural resources. The ESA should...balance the protection of endangered species with the costs of compliance and the rights of property owners.” Finally, Republicans also state opposition to the listing of specific controversial species, including gray wolf, lesser prairie chicken, and sage grouse. These species are controversial because, according to the Republican Party Platform, “[n]either [of these] species has been shown to be in actual danger and the listings threaten to devastate farmers, ranchers, and oil and gas production.”

This careful review of the Republican Party Platform demonstrates the Republican commitment to deregulation in favor of private stewardship and state management, and a prioritization of economic growth and job creation in policy implementation. These themes remain constant in the party platforms from the 1980s until 2016. The Republican commitment to deregulation and economic growth provides substantial evidence for the Republican Party’s position toward the right on the regulatory dimension.

The Democratic Party rarely refers to the Endangered Species Act outright in its party platforms between 1976 and 2016. In 1976, the Democratic Party Platform makes a strong commitment to environmental quality and includes the protection of endangered species in a list of several “irreplaceable natural and aesthetic resources.” Elsewhere in this platform, Democrats also reference endangered species in a commitment to participate in global efforts to protect the environment.¹⁰

¹⁰The ESA is the federal implementation tool of the Convention on International Trade in Endangered Species (CITES), an international agreement spearheaded by the United States in 1973 with the aim of regulating international trade of species so as not to threaten species survival.

The next reference to endangered species appears in the 1984 Democratic Party Platform, which simply includes a general statement demonstrating an alignment with the primary aims of the ESA: “The Democratic Party supports protection of endangered species, land management to maintain healthy populations of wildlife, and full United States participation to implement international wildlife treaties.” In 2000, however, a Democratic Party with Al Gore at the helm makes a more impassioned statement in support of endangered species policy by strongly attacking the Republican Party on a range of environmental issues: “The Republicans have tried to sell off national parks; gut air, water, and endangered species protections; let polluters off the hook; and put the special interests ahead of the people’s interest. They are wrong. Our natural environment is too precious and too important to waste.” Finally, in 2016, the Democratic Party uses the party platform to respond to increased calls from some members of Congress to reform the ESA: “Democrats oppose efforts to undermine the effectiveness of the Endangered Species Act to protect threatened and endangered species.”¹¹

The Democratic Party rarely acknowledges a commitment to endangered species protection because reforming endangered species policy is not part of the party’s agenda; the Democratic Party generally prefers the status quo, that is a relatively prohibitive policy protecting endangered species against actions that might harm their chances at survival. Given this policy preference, the Democratic Party has little to gain in renewing a commitment to uphold a law that is already enacted precisely because such a commitment would tie the party’s leader’s hands against moderating implementation as needed, to avert rollback. A public commitment to uphold the ESA could draw unnecessary attention to inconsistencies in Democratic governance when juxtaposed with a Democratic president who offers considerable exemptions from the law. It isn’t until 2016, in response to a rise in threats to the ESA in Congress, that the Democratic Party gains utility from clarifying a commitment to protect the status quo. The fact that the Republican Party Platform refers to the ESA much more often than the Democratic Party Platform

¹¹Broad commitments to “protect the planet’s biodiversity” appeared in the 1992, 1996, and 2008 Democratic Party Platforms.

is evidence that Republicans seek to move policy away from the present status quo, while the Democratic Party prefers to protect the policy status quo.

It is worth noting that this partisan divide extends to the mass public as well. Of the two major parties in American politics, the Democratic Party is more closely associated with environmental protection, including safeguarding biodiversity and protecting species at risk of extinction. Results from a 1997 national survey fielded by Czech and Borkhataria (2001) show that Democrats value species conservation more than Republicans and are more strongly supportive of the Endangered Species Act (ESA) than Republicans.

The scope of my analysis is limited to presidential administrations after ESA enactment. I count Ronald Reagan, George H. W. Bush, and George W. Bush as Policy Opponents, and Jimmy Carter, Bill Clinton, and Barack Obama as Policy Custodians. I expect Republican administrations to use leniency mechanisms more when Congress is unable or unwilling to roll back the ESA, and I expect Democratic administrations to use leniency mechanisms more when there is pressure to roll back the ESA in Congress.

3.2.2 Congressional Gridlock

The theory predicts that Policy Opponents are more likely to use regulatory leniency in periods of congressional gridlock. I code Republican administrations as periods governed by Policy Opponents. Within the temporal scope of this study, the Policy Opponents are Ronald Reagan, George H. W. Bush, and George W. Bush. The following sections describe the political circumstances surrounding congressional attempts at reforming the ESA. I reference notable conflicts and each administration's position on the ESA, but my descriptions focus on legislative attempts at ESA reauthorization or reform, their sponsors, why some attempts succeeded, and where other attempts failed. There were two successful ESA reforms during the Reagan administration that established new exemptions and avenues for leniency. On the other hand, Congress failed to make any concerted effort to roll back the ESA during the first Bush administration.

Republican efforts to roll back the ESA intensified in the second Bush administration only to stall in the Senate.

Reagan and the 1982 Amendments

In 1982, the ESA was due for reauthorization. It was an opportunity for Congress to put pressure on the new Reagan Administration, which had taken significant actions to favor industry in policy implementation. First, President Reagan, a Policy Opponent, issued an executive order requiring all federal agencies to estimate the economic costs of their actions.¹² Furthermore, the Administration slowed the process of listing new species as endangered or threatened to a near halt.

Congress, led by a Democratic majority in the House and a Republican majority in the Senate, responded to the Administration by shortening deadlines for USFWS, forcing the agency to respond to petitions for listing species more quickly, and explicitly prohibiting USFWS from considering economic costs in listing decisions.¹³ Though the Senate majority was Republican at the time, it is important to note that the Senate Committee on Environment and Public Works was chaired by John Chafee, R-RI, who often sided with conservationists in spite of his party.

Interestingly, the Reagan Administration asked Congress to make minimal changes to the act and reauthorize appropriations for just one year, possibly to spare Republican members of Congress running for re-election. The New York Times reported: “Interior Secretary James G. Watt has sent a letter to both Congressional committees involved, saying he would like to see the present act reauthorized with only minor revisions for one year instead of the normal three-year period...since this is an election year, when pressures on candidates to keep a strong act might be greater, he feels he would have a better chance to revamp and perhaps weaken the act next year” (Webster, 1982). While the House version of the reauthorization bill acquiesced to

¹²Ronald Reagan: “Executive Order 12291 – Federal Regulation,” February 17, 1981. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=43424>.

¹³USFWS is allowed to account for economic costs in the process of designating critical habitat after a species is listed.

the one-year reauthorization, the Senate version – and ultimately the final version – authorized appropriations for three years. No attempts to weaken the act through Congress were made on part of the Reagan Administration in the next reauthorization deliberation period, however, which began in 1985 but did not culminate with a successful bill until late 1988.

Congress added a few important amendments to the ESA in the 1982 reauthorization. These amendments offered new opportunities for exemption from the law. One exemption granted the Secretary of Interior the authority to classify “experimental populations” within an endangered species and relax restrictions associated with those populations. Prior to this exemption, USFWS was empowered to reintroduce endangered species to areas of that species’ historic range in order to establish a new population of that endangered species as part of recovery efforts. Reintroduction proposals often elicited strong local opposition based on concerns that ESA property use restrictions would be introduced to an area as well, affecting activities on both federal and non-federal land. The exemption for experimental populations was added to the ESA to foster cooperation from local communities and increase the likelihood of successful reintroduction efforts (Bean and Rowland, 1997: 232-3).¹⁴

Another type of exemption introduced in the 1982 amendments permitted incidental “taking” of endangered species. Taking is defined as harming an individual of an endangered species or habitat necessary for its survival. As Michael Bean and Melanie Rowland note in their book on the evolution of national wildlife law, one reason why the ESA is considered so powerful is that “neither direct physical injury nor intent to cause injury to a listed species is required by the Act’s broad definition of ‘take.’” (1997: 234). Therefore a variety of common and otherwise lawful activities, such as timber harvest, land clearing, hydropower operation, commercial fishing, and more, could be prosecuted if these activities impacted the survival of an endangered species. Bean and Rowland astutely point out that:

“[The Endangered Species Act’s] potential for influencing activities that result in

¹⁴Note that I do not include experimental populations as a leniency mechanism, though it is an exemption from the law.

incidental taking depends to a large extent on the public perception of the likelihood of prosecution. Not surprisingly, the government rarely prosecuted, and the Act's theoretically absolute prohibition against any form of taking was seriously undermined by nonenforcement...On its face, this exemption (found in section 10 of the Act) seems to ease the Act's restrictions because it permits what was previously prohibited. In fact, however, this provision likely increased the Secretary's leverage over activities that incidentally take endangered species because it substituted a flexible regulatory authority for a threat of prosecution that few found credible." (1997: 234)

Each application for an incidental take permit was to be accompanied by a Habitat Conservation Plan (HCP), which would outline measures taken by the applicant to reduce or mitigate any harm to the species covered in the plan. Counterintuitively, both exemptions in the 1982 amendments to the ESA were aimed at generating more compliance. The CQ Almanac called the 1982 ESA reauthorization "one of the year's more significant accomplishments" (Davis, 1983).

In this period, Congress – aided by Democrats in the House and a liberal Republican committee chair – used the reauthorization process to check a Policy Opponent in the White House who relied on delayed listing of new species as Endangered or Threatened to minimize the impact of the ESA. However, Congress also authorized important administrative avenues for regulatory leniency in this round of amendments, including the issuance of Incidental Take permits.

Reagan and the 1988 Amendments

In 1985, authorization for appropriations had again expired. As Congress was preparing to draft and debate ESA reauthorization, water interests in the west were coordinating a lobbying campaign (Reid, 1985). The ESA had provided grounds to block a few water projects in Colorado. The USFWS blocked proposals for hydroelectric and irrigation projects on the Colorado River to protect the squawfish and the humpback chub, and water development projects on the South Platte River in Colorado to protect whooping cranes downstream in Nebraska. Though these water interest groups drafted amendments to exempt their projects from the ESA

and lobbied members of Congress to sponsor them during the reauthorization process, they were simultaneously meeting regularly with federal agencies to resolve their conflicts. An aide to Sen. William L. Armstrong (R-Colo) was quoted at the time urging water interests to work for change “through regulatory or administrative channels,” admitting, “this is going to be an awfully tough fight if it comes up in Congress” (Ann Vance, quoted in Reid, 1985).

The Democratic House passed a reauthorization bill that year, but the Senate failed to take action on it. Sen. John Chafee (R-RI) reported the Senate version of the reauthorization out of committee, but this time a few senators – Howell Heflin (D-Ala), Steven D. Symms (R-Idaho), and Alan K. Simpson (R-Wyo), the Majority Whip at the time – vocally opposed it and sought major revisions. Sen. Bob Dole (R-KS) refused to bring the bill to the floor in order “to keep the Senate running smoothly” (Rheem, 1986). The senators obstructing consideration of the bill were concerned about implementation of the ESA in their respective states. In Alabama, the listing of the flattened musk turtle threatened to affect the coal mining industry. Senators from Wyoming and Idaho were concerned about the USFWS program to reintroduce gray wolves and grizzly bears into Yellowstone National Park. Migration of these predators outside park boundaries threatened livestock in these states. A Minnesota court decision reiterated that hunting threatened species, like wolves and grizzly bears, was illegal except “in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved” (Davis, 1988). The “extraordinary case” exception already applied to grizzly bears and USFWS allowed state wildlife agencies to manage limited public grizzly bear hunts. However, it was unclear whether the Minnesota court ruling would jeopardize this hunting program, or whether the “extraordinary case” exception would apply to the gray wolf population the USFWS was proposing to reintroduce into Yellowstone.¹⁵ The confusion was enough for Sen. Simpson to stall the reauthorization process in pursuit of an amendment allowing ranchers to legally kill predators to

¹⁵Since the gray wolf population would be categorized as an “experimental population” the 1982 amendments would give the Secretary of Interior the flexibility to relax certain restrictions, including allowing state-managed culling programs. Recall that the intent of the amendment was to minimize local opposition to reintroduction proposals.

protect their livestock (*Endangered Species Cleared*, 1989).

Notably, this time the Reagan Administration requested Congress maintain the status-quo with a four-year reauthorization at the same appropriation levels without substantive amendments (Davis, 1985). USFWS Director Robert A. Jantzen noted that the 1982 amendments contributed to a program that was now “running effectively and efficiently” and that USFWS had picked up the pace with listings (Davis, 1985), likely due to the new congressionally-imposed deadlines.

The Democratic House tried again in 1987 and passed a version of ESA reauthorization with a vote of 399-16. Wolf and grizzly bear reintroduction remained a key obstacle in the Senate, in spite of the fact that control had now shifted to the Democrats. Additionally, the House and Senate could not agree about whether to delay a new regulation affecting shrimp fishermen in the South, requiring shrimpers to use turtle excluder devices (TEDs) in their nets, allowing protected sea turtles to escape if caught. But in the end, the House accepted the Senate’s amendment delaying TED regulations, and Sen. Simpson agreed to pursue the species reintroduction issue in a parks or appropriations bill. Additional amendments accepted included two amendments from James A. McClure (R-Idaho) requiring USFWS to include local concerns in their development of species recovery plans, and requiring the Secretary of Interior to annually report to Congress how much money was spent on each species. Though the appropriation authorization lapsed for three years in between its expiration in 1985 and reauthorization in 1988, Congress continued to appropriate funds to USFWS programs through appropriations bills. (*Endangered Species Cleared*, 1989) Short-term authorizations opened the act up for amendment and regulatory reversion more frequently. This motivated members of Congress to authorize appropriations for five year this time.

In 1985, a few Republican senators from the West and South, including Republican leadership in the Senate, obstructed passage of a bill reauthorizing the ESA without major revision. By 1987, Democrats gained control of the Senate and offered some particularistic compromises

to Western and Southern senators in order to pass reauthorization without a major overhaul.

H. W. Bush and Congress on Standby

Five years later, a heated controversy over the northern spotted owl in the Pacific Northwest put the ESA at risk again as Congress prepared to debate appropriation authorization. The controversy pitted the timber industry against environmentalists who wanted to preserve the last old growth forest in the nation. The 1990 listing of the northern spotted owl as Threatened provided the legal framework for environmentalists to use the ESA to protect the old growth forest, the owl's preferred habitat. From the environmentalists' perspective, the ESA protected not just the threatened owl, but also the entire old growth ecosystem. From the critics' perspective, the ESA offered no flexibility for economic growth or compensation for economic loss, including tens of thousands of jobs in the spotted owl case. Whereas the snail darter controversy in Tennessee demonstrated that federal public works projects could be threatened under the ESA, the northern spotted owl controversy demonstrated that logging on public land and even logging on privately owned land was also subject to restriction under the ESA.

President George H.W. Bush's Interior Secretary appointee, Manuel Lujan, Jr., famously said, "When the president asked me to be Secretary of Interior, I told him that Interior was like a sack full of cats and I would be in the middle."¹⁶ The northern spotted owl conflict was considered the most controversial aspect of his administration. When asked directly about the issue in an interview a decade after leaving office, Lujan quipped, "Well, first of all, I have to tell you that we're lucky we're in front of a big audience because I vowed when I left that I was going to kill anybody who ever mentioned the spotted owl"¹⁷

Sure enough, tempers ran high both on the ground, in communities in the Pacific Northwest, and in the halls of Congress. After the northern spotted owl was listed, Rep. Jolene Un-

¹⁶Cabinet Address at the National Press Club, June 28, 1990, Accessed Online at <https://www.c-span.org/video/?12939-1/cabinet-address>

¹⁷Interview with Sec. Manuel Lujan at the Center of the American West at University of Colorado at Boulder, March 17, 2004. Transcript obtained online at: <https://www.centerwest.org/wp-content/uploads/2011/01/lujan.pdf>

Unsoeld (D-WA) was nearly mobbed by a “sea of angry people” at a rally in her district (*Un-Sold*, 2018). In a joint hearing of three House subcommittees held on May 10, 1990, several representatives from Oregon and Washington expressed their frustration at the political stalemate.¹⁸ Rep. Unsoeld tried to put the economic crisis in perspective, “If the entire Olympic Peninsula were to slide into the Pacific Ocean the economic impact wouldn’t be any greater than this enormous problem with which we are now grappling.” Unsoeld went on to blame political rhetoric for distracting from long-term planning, problem-solving, and compromise: “When emotions are high they are easily manipulated and exploited. Demagoguery, inflammatory slogans and cries to pick up a club and slug it out may bring some perception of short term political gain but will not help us find solutions.” Rep. Robert Smith (R-OR) blamed Congress itself:

People are asking well if the Congress can’t satisfy this problem, what confidence can we have in the greatest deliberative body in the world? So I - this is a sad time for me to serve my state in Congress...I know you’re torn with protecting something you’ve never seen...but we do see clearly the people, the tragedy, that we’re going to cause here by putting people out of work and destroying the Pacific Northwest doing it.

Rep. Peter DeFazio’s (D-OR), whose district was among the most embroiled in the spotted owl conflict, detailed his grievances against Administration:

I’m tired of Congress being blamed for the spotted owl crisis. We rely on the Administration to set direction for the management agencies. We have trusted the information they have provided to us. Two years ago we were told the agencies had legally sufficient spotted owl plans. A year ago the [Forest Service] Chief came up to the hill and defended the spotted owl DEIS [Draft Environmental Impact Statement]. Instead when the agencies were sued they concealed crucial biological information, they concealed the fact a year ago that no one in the Forest Service would testify in favor of the DEIS, no biologist, they provoked a crisis in the Northwest, and they played a very deceptive stall game in the courts. I would call this an abdication of management except that it’s worse. It’s blatant political maneuver to use timber workers and communities in the Pacific Northwest as pawns in a calculated strategy

¹⁸House Agriculture Subcommittee on Forests, Family Farms, and Energy, House Interior and Insular Affairs Subcommittee on National Parks and Public Lands, and House Merchant Marine and Fisheries Subcommittee on Fisheries and Wildlife Conservation and the Environment. Hearing viewed online at: <https://www.c-span.org/video/?12214-1/timber-harvesting-growth-forests>

to provoke a revolt against this nation's environmental laws. By deliberately making the timber crisis as bad as it can possibly be, the Administration clearly wants to light a prairie fire of rebellion against balanced natural resource management...The Administration has abandoned its responsibility. Congress clearly has to act knowing full well we're being set up to take a fall. We can't trust the Administration's numbers, we can't trust their legal advice, and we certainly can't trust them to give a damn about the Northwest workers or the Northwest forest.

It is difficult to adjudicate to what extent the Bush administration was intentionally mismanaging implementation of the ESA; however, just days after Rep. DeFazio's statement, major newspapers quoted Secretary Lujan expressing considerable frustration with the ESA and publicly suggesting Congress weaken certain provisions: "Do we have to save every subspecies? The red squirrel is the best example. Nobody's told me the difference between a red squirrel, a black one or a brown one" (Lancaster, 1990; Leary, 1990). *The New York Times* reported Sec. Lujan "repeatedly questioned the value of saving different endangered species" (Egan, 1992). Environmentalists compared Sec. Lujan's tactics to those of Sec. Watt during the Reagan administration, noting, "Congress and the American public rejected Mr. Watt's efforts to weaken the Endangered Species Act and we expect them to reject Secretary Lujan's proposals as well" (Leary, 1990).

The northern spotted owl crisis exacerbated partisan and regional divisions in Congress, limiting any chance at consensus for reauthorization.¹⁹ Meanwhile, the administration either stalled or mismanaged implementation of the ESA, most notably in the case of the spotted owl. In 1989 and 1991 federal judge William Dwyer twice ordered logging in the Pacific Northwest to stop on the grounds that federal agencies were not doing enough to protect the northern spotted owl under the ESA. These court orders triggered the Bureau of Land Management to file for an exemption with the God Squad, and Sec. Lujan agreed to convene the committee. The Secretary's decision to convene the God Squad over the northern spotted owl issue delayed

¹⁹The House was building consensus on a bill, but efforts were abandoned when it was clear the Senate was stalled on the issue.

congressional deliberation.²⁰ The committee eventually voted 5-2 to exempt logging on 13 of the 44 tracts from restrictions under the ESA, though this decision was later overturned in court (*No Consensus Reached on Forest Protection*, 1993).

Sec. Lujan further complicated matters after the God Squad ruling by introducing two different management plans simultaneously – one official plan of the administration based on the existing legal mandates, and an alternative plan that would allow the owl to go extinct in some areas and require congressional action to relax the ESA. The Pacific Northwest congressional delegation “remained tied in knots by plans to save the northern spotted owl that could hurt the region’s economy” (*No Consensus Reached on Forest Protection*, 1993). Without clear leadership or consensus, the issue was left unresolved and both sides left dissatisfied. Environmentalists were vocal about their theories that Sec. Lujan’s intention was for the God Squad exemption to be overturned in court (a blow to the timber industry) in order to demonstrate the ESA’s inflexibility and mobilize support for its repeal (Kenworthy, 1992).

As the 1992 presidential election approached, and ESA appropriation authorization was set to expire, congressional party leaders were reluctant to bring up the divisive issue and risk alienating interest groups by coming down on one side or the other – or worse, alienating both sides. The presidential candidates campaigned hard on the issue. President H. W. Bush vowed not to sign any reauthorization of the ESA that did not take into account economic costs of protecting wildlife. Even *The Washington Post* noted a shift in tenor on the environment: “Campaigning in Oregon and Washington four years ago, Bush promoted himself as the environmental president. Today...he presented himself as the environmental president with a healthy dose of economic realism, in contrast to the Democratic ticket” (Marcus, 1992). Meanwhile, Clinton is quoted as saying at a backyard gathering in Eugene: “If I win this race in 50-odd days, I am determined to break this logjam. You’re entitled at least to have all these federal agencies on

²⁰The God Squad included the Secretary of Interior (Lujan), Secretary of Agriculture, the Environmental Protection Agency administrator, Army Secretary, Council of Economic Advisors Chairman, Undersecretary of Commerce for Oceans and Atmosphere, and a state representative from Oregon.

the same side and to have a coherent policy and to have a commitment to the region and to the people that resolves this in a fair and balanced way” (Marcus, 1992).

The likelihood of congressional reform to the ESA was low in the period between 1988 and 1992. Authorization of appropriation was set to expire in 1992, so there was little reason to take up a contentious issue until the year before. When the northern spotted owl was listed in 1990, the Policy Opponent president and his appointed Secretary of Interior failed to produce a clear management plan. The lack of direction perpetuated uncertainty and fueled anxiety about the ESA, which coincided in timing with debate over reauthorization. Though both chambers of Congress were controlled by Democrats and committee hearings were held on the topic, the ESA exacerbated partisan and regional divides. Republicans in Congress tended to support the Administration, either in good faith or perhaps with eyes on the horizon for repeal. Democrats in Congress, particularly those representing districts most affected by the ESA, lambasted the Republican Administration for not doing more to broker a compromise. Party leaders felt compromise was unlikely and were unwilling to take up the issue. The next Policy Custodian would be under significant pressure to prove the ESA could work.

W. Bush and Gridlock in the Senate

Two bills were introduced and assigned to committee in the House to reauthorize the ESA at the start of the George W. Bush administration: one by Rep. Greg Walden (R-OR) and the other by Rep. Richard Pombo (R-CA). The House Resource Committee chair, James Hansen (R-UT), held field hearings on the ESA that environmentalists said merely provided a platform for amplifying ESA “horror stories” (Layzer, 2012: 311). By early 2004, the House Resources Committee approved two bills, one sponsored by Rep. Dennis Cardoza (D-CA) and the other by Walden, similar to his previous one. The bill proposed by Cardoza incorporated delays and extra bureaucratic hurdles for designating critical habitat upon listing a species Endangered or Threatened. The bill proposed by Walden required federal agencies to follow a well-defined

procedure for sourcing peer-reviewed scientific information to make listing decisions, while also requiring them to accept at face value data provided by property owners regarding species occurrence on private property. These efforts were part of a Republican strategy to “work at the margins of the law, proposing limited changes that will have bipartisan backing” as opposed to proposing significant changes to the ESA that were unlikely to pass in the Senate (Jalonick, 2004). Though similar bills were proposed by Gordon H. Smith (R-OR) in the Senate, the bills never made it out of committee. As reported by E & E News at the time, the Senate “has not made so much as a peep in the way of ESA reform this Congress” (Henry, 2002).

Bolstered by a successful election in 2004 in which the Republican Party gained seats in Congress, Rep. Richard Pombo (R-CA) introduced an ESA overhaul bill that would remove the critical habitat designation requirement, narrow the definition of “harm,” compensate property owners for economic losses due to the ESA, and restrict the scientific sources FWS could use to make listing decisions, among other constraints on regulatory action. In fact, according to Judith Layzer, Pombo dropped an unprecedented ten year sunset clause on the ESA in order to get the bill reported out of committee and passed on the House floor 2012: 313.²¹ Minutes before the House passed Pombo’s ESA overhaul bill (229-193), House representatives barely rejected (216-206) a more moderate substitute introduced by Reps. George Miller (D-CA) and Sherwood Boehlert (R-NY). Thirty-six Democrats, mostly from rural and western states, voted in favor of the Pombo bill, while thirty-four Republicans voted against it.

The Senate version of the bill, introduced by Sens. James Inhofe (R-OK) and Michael Crapo (R-ID), stalled due in large part to Lincoln Chafee (R-RI). Chafee “threatened to filibuster any Pombo-style endangered species bill” (Farquhar, 2005) and used his power as subcommittee chairman to delay action on the Inhofe-Crapo bill by convening a working group to investigate the impact of the proposed reforms. During this time, Chafee and Sen. Hillary Clinton (D-NY) began crafting a bipartisan ESA reauthorization. Once Clinton became the Democratic nominee

²¹Recall that a sunset clause is an expiration of the statute’s authorization, as opposed to expiration of appropriation authorization, which certainly did apply to the ESA.

for president in 2016, there was renewed interest in her tenure on the Senate Environment and Public Works Committee; reporting on the topic revealed that ESA supporters – Democrats like Hillary Clinton and moderate Republicans like Chafee – were again forced into a defensive strategy with respect to the ESA, choosing not to propose a reauthorization bill and risk conservative amendments. ““We didn’t want the bill to get ‘Pombo-ized’” in conference, recalled Chafee” (Cahlink and Koss, 2016).

In spite of a mostly unified government during the second Bush administration, the Senate was just moderate enough to stall any legislative attempts at ESA reform originating from the more conservative House. In particular, a combination of the filibuster rule and gatekeeping by the moderate Republican chairing the Senate Natural Resources Committee killed any hopes of a conservative overhaul of the ESA. Moderates and Democrats, on the other hand, dared not risk introducing a moderate reauthorization bill out of fear it would be hijacked by conservatives. “Despairing of legislative action,” writes Judith Layzer in her accounting endangered species policy at the time, “conservatives in the Bush administration tried to achieve many of the results advocated by Pombo and his allies through low-profile administrative means” (2012: 313).

3.2.3 Deregulatory Pressure in Congress

The theory predicts that Policy Custodians are more likely to use regulatory leniency in periods of high deregulatory pressure from Congress. I code Democratic administrations as periods governed by Policy Custodians, therefore including Jimmy Carter, Bill Clinton, and Barack Obama as Policy Custodians in this study. As before, I describe the political circumstances surrounding congressional attempts at ESA reform during each administration. Again, I focus on the success or failure of legislative initiatives to roll back the ESA, though I also reference the administration’s position as well as any notable actions. There was one successful ESA reform during the Carter administration, in which Congress offered the first ever ESA exemption. Both the Clinton and Obama administrations experienced periods of high deregulatory pressure when

Republicans gained control of Congress.

Carter and the 1978 Amendments

The power of the ESA as written became clear within just a few years of the law's enactment. A small fish, the snail darter, was listed as endangered and legally prevented the completion of dam in the Tennessee River Valley, a federal project that had begun before the ESA's passage. But the strict interpretation of the law to protect species regardless of economic loss was upheld by the Supreme Court in 1978. In retaliation, Rep. Robin Beard (R-Tenn) introduced 682 amendments to an appropriations bill in the House, one for each listed species at the time, prohibiting the use of federal funding to enforce the ESA (Sinclair, 1978*a*). A committee staff member is quoted as saying, "When they voted for the act, Congressmen thought they were voting to protect warm and cuddly animals, or bold and beautiful things like the bald eagle, and not little slimy, scaly things and invertebrates," (Mohr, 1978).

Though a majority of public works projects carried on just fine with modifications to accommodate endangered species, members of Congress worried that continued enforcement of the ESA would threaten "pet public-works projects in their districts" (Sinclair, 1978*b*). Rep. John Buchanan (R-Ala) warned his peers "There is not a district in this country that will be immune from the kind of problem we are facing unless the law is changed," (*Endangered Species Curbs*, 1979). The CQ Almanac offers insight as to the congressional climate at the time:

As complaints flooded in from developers and state and local officials about the application of the law, members came under increasing pressure to change it, if not abolish it altogether...The sentiment to soften the law was so strong in Congress that members allied with environmentalists quickly gave up fighting the concept of exemptions...Interior Committee Chairman Morris K. Udall, normally a friend of the environmentalists, remarked on the floor that conflicts between obscure species and projects 'get the whole act into trouble, into disrepute.' (*Endangered Species Curbs*, 1979)

The quote from Rep. Udall clearly communicates that the alternative to compromise was roll-back. At this point, the concern that the ESA was interfering with development had not yet

trickled down from Congress to the mass public. A public opinion survey conducted in July 1978 showed 67% of a national adult sample agreed that endangered species must be protected, even at the expense of commercial activity.²² Nevertheless, Congress made the first amendment to the ESA allowing exemptions by way of the “God Squad,” a Cabinet-level committee that could vote to permit projects even if they caused a species to go extinct.²³ The perceived threat to pork affected most members of Congress and brought the issue to the table. The threat of roll-back pressured those who supported the ESA to acquiesce to the amendment. It is noteworthy that even in this period of a unified government led by Democrats, the perceived threat to pork was strong enough to force an exemption amendment.

In his signing statement on November 1978, President Jimmy Carter voiced his opposition to the amendment, which was part of the ESA’s reauthorization: “In the past, the act has worked well without this exemption process, because all agencies have made efforts to resolve conflicts and, where necessary pursue alternate courses of action...Destruction of the life of an endangered or threatened species should never be undertaken lightly, no matter how insignificant the species may appear today.”²⁴ Carter went on to praise other amendments he considered improvements to the ESA, including strengthening of the consultation process wherein federal agencies consult with USFWS to make sure federal projects comply with the ESA. He noted “the most welcome provision” was the reauthorization of appropriations for the act, which at that point had already expired on September 30, 1978.

²²Resources for the Future. National Environmental Survey 1978, Jul, 1978 [survey question]. USB-SSR.78ENVR.R28. Bureau of Social Science Research [producer]. Cornell University, Ithaca, NY: Roper Center for Public Opinion Research, iPOLL [distributor], accessed Feb-17-2018.

²³Though the God Squad eventually voted against exempting the Tellico Dam in the Tennessee River Valley, Congress exempt the project from the ESA in a rider attached to the 1980 energy and water appropriations bill. Notably, President Jimmy Carter opposed exempting the Tellico dam project and considered vetoing the appropriations bill, but eventually signed it (*Endangered Species Curbs*, 1979). The God Squad can exempt a project, not a species, from the ESA. This exemption avenue is rarely used because the process is intentionally lengthy and complex, while the consultation process offers federal agencies sufficient opportunity to accommodate the ESA and still proceed with their project (Corn and Wyatt, 2016).

²⁴Jimmy Carter: “Endangered Species Act Amendments of 1978 Statement on Signing S. 2899 Into Law,” November 10, 1978. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=30147>.

The 1978 amendments to the ESA offered a form of regulatory leniency issued by Congress and signed by a reluctant president. Though Congress was controlled by Democrats at the time, these Democrats were constrained, not by public opinion, but by their moderate and conservative colleagues and the possible threat the ESA posed to the success of public works projects – a staple for credit claiming (Mayhew, 1974). The president, a clear Policy Custodian, expressed his dismay at the need for regulatory leniency, but signed the bill into law anyway in order to protect and reauthorize the remaining provisions. In this case, the Policy Custodian used his executive authority to moderate the policy by signing the bill as opposed to vetoing it. This fits with the broader theory of regulatory leniency, though stands in contrast to future Custodians who relied on administrative tools for regulatory leniency.

Clinton and the Republican Revolution

During the first two years of the Clinton Administration, great effort and attention was placed on brokering a deal between timber companies and environmentalists over the northern spotted owl and old growth forest management, including a conference led by the president himself. The administration submitted a plan to the court, which eventually lifted the injunctions on logging. But by this time, timber shortages drove lumber prices up and increased the cost of construction, mobilizing home builders to join forces with the timber industry to protect jobs (Hamilton, 1993). Meanwhile, conservative think tanks doubled their budgets and worked on dismantling the environmentalists' narrative on the severity of environmental problems, including questioning the credibility of scientists. "I refuse to let scientific elitism prevent me from asking commonsense questions that are skeptical of their 'findings,'" said conservative talk show host Rush Limbaugh (quoted in Layzer (2012: 194)).

The economic downturn did not help the chances of ESA reauthorization in Congress. Rep. Gerry Studds (D-MA), chair of the Merchant Marine and Fisheries Committee, held hearings on ESA reauthorization and proposed a bill that offered measured compromises – both in

1991 and in 1993. In 1991, with an election year looming and the northern spotted owl issue unresolved, the bill failed to advance. “I just wanted a vehicle to be there,” he was reported saying, “What I don’t know now is what climate we’ll see in the spring [1992]. The emotional climate may not be right. We have some large and highly emotional unknowns raging here – if the spotted owl is still raging, I’m not sure it would be the wisest time to bring a bill to the floor” (quoted in Davis (1992)). The *CQ Weekly* astutely reported that bringing ESA reauthorization up for a vote would force legislators to choose between the economy and the health of the environment, possibly alienating critical voters in the upcoming election (Davis, 1992).

In 1993, Rep. Studds reintroduced a similar bill. The Studds bill included concessions to property rights and states’ interests – such as incorporating incentives for property owners to comply with the ESA and strengthening cooperation between federal agencies and the states – and concessions to environmentalists – such as doubling the annual spending on ESA implementation, tightening deadlines on the development of recovery plans, and making it easier for citizens to file suit to protect species some cases (Layzer, 2012). Sens. Max Baucus (D-MT) and John Chafee (R-RI) co-sponsored a similar bill in the Senate. In her book on conservative opposition to environmental regulation, Judith Layzer quotes an environmental activist who attributes the failure of these bills at this time to a defensive strategy, “as soon as you tried to do anything, the development interests and mining interests and timber interests and drilling interests would come roaring in. Their allies would offer amendments that were very dangerous. John Chafee took the bill off the floor rather than see it weakened” (Layzer, 2012: 228-9).

The same year, Rep. Billy Tauzin (D-LA) – a property rights advocate – sponsored an ESA reauthorization bill that would require the federal government to compensate property owners who experience loss in property value due to the ESA. Critics of the bill feared that this type of provision would lead to abuse and would discourage the federal government from enforcing the ESA at all. Though his proposal failed to advance in the Democratically controlled House, Tauzin predicted “a real war in this chamber over what kind of balance we want to strike

between environmental protection and the protection of human beings on their property” (quoted in Stevens (1993)).

Sure enough, ESA reauthorization proposals shifted toward deregulation after the Republican Party gained control of the House and Senate in 1995. Judith Layzer describes the newly elected cohort:

The new class of Republican legislators was extraordinarily homogeneous on environmental issues: nearly half of the 73 members of the House freshman class received a zero rating from the League of Conservation Voters in 1995; the average LCV score for the class was 12. As a result of this infusion of conservative Republicans, in 1995, the number of zero LCV scores in both chambers reached a record high of 135, compared with only 2 in 1993. The disparity between the two parties was greater than ever before: House Republicans’ average score was 15, while Democrats averaged 76; in the Senate, Republicans’ average score was 11, while Democrats averaged 89. (2012: 201)

Chair positions of the major environmental committees went to western Republicans sympathetic to the property rights and wise use movements, and they were clear in their intention to rewrite the ESA and other environmental laws at the start of 1995 (Layzer, 2012: 201-2).

Sen. Slade Gorton (R-WA) and Sen. Dirk Kempthorne (R-ID) each introduced a reauthorization bill in the Senate, and Rep. Don Young (R-AK) and Rep. Richard Pombo (R-CA) co-sponsored a reauthorization bill in the House. All three bills proposed an overhaul to the ESA. The Gorton bill would require FWS to go to greater lengths to justify listing decisions, including taking economic and social factors into account. Another important amendment would redefine the word “harm” used in the text of the act to refer to physical harm to an individual of a species only, and not include harm to a species’ habitat.²⁵ The Kempthorne and Young-Pombo bills limited the federal government’s authority to restrict development on private property, shifting more responsibility to states and property owners.

The House Resources Committee considering the Young-Pombo bill was packed with

²⁵This latter interpretation – “harm” as both harm to an individual and harm to the habitat – was the predominant interpretation governing ESA implementation and upheld by the courts that same year in the case *Babbitt v. Sweet Home*.

newly elected conservative Republicans, and “[t]he presence of such conservative Democrats as Cal Dooley of California and Solomon P. Ortiz of Texas cancel[ed] out the moderating tendencies of the few environmentalist-leaning Republicans on the committee, such as Gilchrest and H. James Saxton of New Jersey” (Benenson, 1995). An attempt by Rep. Wayne Gilchrest (R-MD) to moderate the bill – adding an amendment to preserve the interpretation of “harm” to include habitat destruction – failed before the Young-Pombo ESA overhaul was reported out of committee. *CQ Weekly* called the committee vote “a sharp reversal for what had long been regarded as one of the nation’s most popular environmental laws” (Benenson, 1995). Though the Young-Pombo bill was reported out of committee, House Speaker Newt Gingrich (R-GA) decided against bringing the bill to the floor. The bill was supported by most Republicans and western representatives, but many Democrats and the Republican environmentalists opposed it.²⁶

The failure of ESA roll back frustrated many Republicans. In addition to ESA overhaul bills, Republicans used riders to chip away at ESA provisions they opposed. For example, Sen. Kay Bailey Hutchison (R-TX) added an amendment to a successful supplemental defense spending bill that placed a six month moratorium on the listing of new species as endangered or threatened, which was then extended by a series of continuing resolutions passed by Congress. Attempts to extend the moratorium on listing in FY1996 appropriations bills were vetoed by President Clinton.

Between 1997 and 1998, Sens. Dirk Kempthorne (R-ID) and John Chafee (R-RI), chairs of the Senate environmental committees, worked with Democratic senators Max Baucus (D-MT) and Harry Reid (D-NV) to introduce compromise legislation to reauthorize the ESA that had the backing of the Clinton administration and even a lukewarm reception from some environmental groups (Chilson, 1998). Notably, this bill provided statutory backing for many of the leniency

²⁶Republican leaders were increasingly pressured by a growing movement of evangelical environmentalists who referred to the ESA as “the Noah’s ark of our day” (Steinfels, 1996).

mechanisms already introduced by the Administration, including the “No Surprises” clause.²⁷ However, the bill stopped short of offering federal financial compensation for economic loss to property owners. Property rights advocates were dissatisfied with the lack of provisions providing financial compensation to property owners; some environmental groups and scientists were fearful that the No Surprises clause would negatively impact species recovery and lead to extinction. After the bipartisan bill was reported out of committee, opponents on both extremes blocked a vote on the Senate floor.

Congressional interest in ESA reauthorization in the period coinciding with the Clinton administration was high. Initially, proposals for reauthorization were introduced by Democrats under unified government with support from Republican John Chafee and included amendments intended to strengthen and streamline the law. Action on these proposals was stalled as a defensive strategy, recognizing the rising momentum of property rights advocates in Congress and their potential ability to weaken the ESA in the amendment process. After the Republican takeover of the House and Senate in 1995, the composition of the House changed substantially as did the substance of proposed legislation. ESA reauthorization proposals focused on limiting federal authority over states and private property owners and significantly weakening the Act. These attempts at reauthorization were stalled by environmentalist Republicans in the Senate and Newt Gingrich in the House, who refused to bring a conservative reauthorization bill reported out of committee to the House floor out of fear of alienating interests on both sides. At this point, the ESA issue was so polarizing that even a moderate and bipartisan reauthorization bill reported out of committee in 1997 did not satisfy a sufficient number of senators on either side of the issue to bring it to a vote.

²⁷The No Surprises clause was an administrative addition to Habitat Conservation Plans and Incidental Take permits which absolved property owners from additional obligations and restrictions to property use once an HCP and permit were approved by the FWS, even if conditions change.

Obama and Attempts at “Piecemeal” ESA Reform

Reauthorization of the ESA was not a big priority for Democrats during their period of unified government between 2009 and 2011, when the primary focus was health care reform. Beginning in 2011, however, when Republicans regained majority party status in the House, attempts to scale back the ESA resumed. The first line of attack came through the appropriations process; House Republicans added a rider to the Interior appropriations bill that would prohibit FWS from using federal funds towards listing new species or increasing protections for already listed species. “We’re sending a message,” said Rep. Mike Simpson (R-ID), chairman of the Interior and the Environment Appropriations Subcommittee, “Because we haven’t addressed [the ESA], and we ought to address it” (Taylor and Chemnick, 2011).

Obama threatened to veto the bill, and Democrats – with the help of 37 Republicans – were successful in removing the moratorium from the spending bill when it was brought to the floor. Speaking on the House floor, Rep. Norm Dicks (D-WA) challenged Republicans to take on ESA reauthorization rather than attempt to change policy through appropriation riders. “[N]obody’s stopping you,” Dicks said, “Hold your hearings, have your meetings. Call your witnesses. But don’t stop listing 260 candidate species until you get the job done” (Chemnick and Taylor, 2011).

Rep. Doc Hastings (R-WA), chair of the House Natural Resource Committee, committed to reforming the ESA between 2013 and 2014. Hastings led a group of 13 Republican legislators in an Endangered Species Act Congressional Working Group, which “received hundreds of comments and heard from nearly 70 different people during forums and Natural Resources Committee hearings” (Estepa, 2014). Natural Resource Committee ranking member Peter DeFazio (D-OR) criticized the working group as a partisan task force: “[W]e will likely spend time debating legislation that will be cast as ‘common sense’ reforms, but will actually gut a law that has prevented the extinction of iconic American animals such as the bald eagle” (Estepa, 2014).

The ESA Congressional Working Group contributed to the introduction of four bills to reform the ESA in the House. The Republican strategy initially was to sponsor policies based on the working group recommendations in a piecemeal fashion, as opposed to a single overhaul bill. “The bills are, by design, narrowly focused and something that both Republicans and Democrats can support,” said Hastings (Yehle, 2014a). But all four bills were reported out of committee on party line votes and passed in the House as a package reform under the title “Endangered Species Transparency and Reasonableness Act.” Eight Republicans, primarily from New York and New Jersey, voted against the Act; Fourteen Democrats, primarily from western and southern states, voted for the Act.

The Endangered Species Transparency and Reasonableness Act would require FWS to use data supplied by state and local governments during listing determinations, and to make publicly available all scientific and commercial data used in listing decisions. Critics said that while states often provided the FWS with useful data, a statutory requirement that the FWS use state data forces an inappropriate and unnecessary assumption that the state source offers the best available data. Another big issue in this period was increased litigation. The bill required FWS to report annually federal expenditures associated with ESA-related litigation across several federal agencies, and removed the standard for awarding court costs, including attorney’s fees, to the prevailing party. Obama “strongly opposed” and threatened to veto the bill stating it would “rigidly constrain science, public input and data in making Endangered Species Act determinations.”²⁸ Though the bill passed in the House, the Democrat-controlled Senate did not take up the bill.

A few months later, Rep. Hastings held a committee hearing to discuss six more bills addressing a mix of state-specific issues and general ESA reforms (Yehle, 2014b). A bill sponsored by Rep. Randy Neugebauer (R-TX) would require FWS to notify states and coordinate

²⁸Barack Obama: “Statement of Administration Policy: H.R. 4315 - 21st Century Endangered Species Transparency Act,” July 29, 2014. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=105487>.

“State Protection Plans” before making any new listing decisions. A bill sponsored by Rep. Markwayne Mullin (R-OK) would reverse the Threatened listing of the lesser prairie chicken – a species found in Oklahoma – and place a moratorium on any new listing. Rep. Chris Stewart (R-UT) sponsored a bill that would require a comprehensive population census before determining whether a species warrants listing. Rep. Bill Flores (R-TX) introduced a bill that would require states’ approval before FWS enters into any legal settlements that might affect those states. A bill sponsored by Rep. Jim Costa (D-CA) would exempt water projects in California from the ESA in order to divert more water to agriculture, at the risk of diminishing the Threatened delta smelt’s habitat. Finally, Rep. Rick Crawford (R-AR) sponsored a bill requiring FWS conduct a comprehensive economic analysis for each new listing and critical habitat designation. Foreseeing the “long odds” that the bills would gain enough support from Democrats to get through the Senate, Committee ranking member DeFazio apologized to those at the hearing for “wasting everyone’s time” on bills “that are going nowhere” (Yehle, 2014*b*).

The Republicans’ piecemeal strategy for ESA reform was not limited to ESA-specific legislation. Legislators also debated ESA-related amendments in the reauthorization of the farm bill in 2013, and in the water infrastructure bill in 2016, to name a few. In fact, the escalation of Republican attempts to limit federal endangered species protection prompted Democratic members of Congress to send letters to President Obama urging him to veto any authorizing or spending bills that included such provisions. “A record number of anti-environmental provisions undermining the Endangered Species Act have been included in the Senate and House versions of the FY 2016 Interior appropriations bill,” began a letter signed by 25 Democratic Senators. In a letter to Obama the following year, 92 House Democrats urged the president to “maintain steadfast opposition” to any attempts to undermine the ESA, referencing “damaging anti-wildlife provisions” in the Interior appropriations bill, the Defense reauthorization bill, and House-passed energy package.

3.2.4 Summary

Based on a careful review of Party Platforms across time, I find justification to code Republican administrations as Policy Opponents and Democratic administrations as Policy Custodians. The theory of regulatory leniency predicts Policy Opponents and Policy Custodians will respond to different drivers. Policy Opponents respond to congressional gridlock, while Policy Custodians respond to deregulatory pressure in Congress. Gridlock can result from several factors including but not limited to divided government; in fact, Sarah Binder (1999) demonstrates that divided government has the smallest effect on the probability of gridlock. Tracing ESA reauthorization attempts in Congress during Policy Opponent administrations confirms that gridlock can prevent ESA reauthorization, even in periods of unified government. During a period of unified government under the W. Bush administration, for example, the ideological distance between a Republican-sponsored conservative House bill and a moderate Republican committee chair's position was enough to stall ESA overhaul.

I code gridlock as periods when ESA authorization for appropriation is about to expire, but Congress is unable to move a reauthorization forward, regardless of party control. There are three periods of gridlock during Republican administrations. The first is during the Reagan administration, from 1985 when authorization expired until 1988 when amendments passed. In this case, the House passed a moderate bill, Sen. John Chafee reported the bill from committee in the Senate, but several conservative senators prolonged debate on the floor until their particularistic issues were addressed. The other two periods of gridlock during Republican administrations are 1991 through 1992, during the H. W. Bush administration, and 2001 through 2008, or the entire W. Bush administration. The last year of the H. W. Bush administration coincides with the expiration of authorization, the height of the northern spotted owl controversy, including a ruling by the God Squad, and an election year. The congressional strategy in this period was to wait and see how the administration managed the crisis, then delay consideration of a reautho-

rization bill until after elections. As mentioned above, the period of gridlock during the W. Bush administration coincides with attempts by conservative House Republicans to rollback the ESA which were met with resistance from moderate Republicans in the Senate.

I code deregulatory pressure as periods when ESA authorization for appropriation is about to expire, and Congress is poised to pass legislation intended to relax certain provisions of the ESA. There are three periods of deregulatory pressure in Congress during Policy Custodian administrations: 1977-1978, 1995-2000, and 2011-2016. Deregulatory pressure *does* generally coincide with periods of divided government, with the exception of 1977 through 1978 during the Carter administration. Though Congress was controlled by Democrats during the Carter administration, Carter was opposed to including any exemptions in the legal framework of the ESA; conservative and moderate members of Congress, however, felt that the ESA threatened public works projects and Carter eventually signed a reauthorization bill that introduced an option to convene a God Squad to exempt individual projects from the ESA.

The two remaining periods of deregulatory pressure during Policy Custodian administrations coincide with Republican control of Congress. Tracing ESA reauthorization attempts in Republican Congresses during the Carter, Clinton, and Obama administrations reveals that the substance of ESA reauthorization bills shifts from moderate proposals to more conservative proposals. During the Clinton and Obama administrations, Republican control of Congress is characterized by the introduction of appropriations riders and piecemeal legislation, as opposed to a single overhaul bill. Whereas a single overhaul bill was unlikely to galvanize enough support to pass, several narrow scope deregulatory riders on must-pass appropriations legislation were passed in Congress. Though many of these were vetoed by President Clinton or President Obama, a few must-pass bills signed by these presidents did include provisions to weaken implementation of the ESA, including a moratorium on listing new species in 1995.

3.3 Patterns in Leniency Use

I review patterns in use of four leniency mechanisms related to ESA implementation: listing decisions, federal permits, special rules, and delisting decisions. Listing new species as Endangered or Threatened under the ESA imposes restrictions on property use in order to protect those species and preserve their habitat. Therefore, I interpret a notable decrease in listings as an attempt to minimize the scope of the ESA and reduce regulatory burden under circumstances when it may be appropriate to regulate according to the letter of the law. Citizens may petition species to be listed under the ESA; though FWS has the authority to list species outside of the petition process, a backlog in petitions in recent years means that most listings are initiated by petition. Figure 3.1 depicts annual listing rates and outstanding petitions between 1974 and 2016. Outstanding petition rates are calculated using the difference between the number of petitions received and the number of findings, meaning petitions processed.

Notable drops in new species listings occur in 1981-1983, 1995, and 2001-2009 (Figure 3.1). The first notable decrease in listings corresponds to the first few years of the Reagan administration. The Reagan Administration slowed the process of listing new species to a near halt in 1981. In a campaign speech in Utah in 1980, Reagan famously declared his support for the Sagebrush Rebellion saying, “Count me in as a rebel.”²⁹ Congress – led by a Democratic majority in the House and a Republican majority in the Senate, and still generally supportive of the ESA’s mission – imposed stricter deadlines on FWS, forcing the agency to respond to petitions for listing species more quickly.³⁰ The dip in 1995 corresponds to the six month moratorium on new listings imposed after the Republican Revolution and passed as a rider on a spending bill. The third dip in new species listings corresponds to the W. Bush administration. Judith Layzer

²⁹The Sagebrush Rebellion was a precursor to the wise use movement. These movements promoted the expansion of private property rights and opposed federal regulation and federal land ownership. They positioned themselves in opposition to the environmental movement and were tapped for support by new conservative politicians from the West in the lead up to the Republican Revolution of 1994.

³⁰Though the Senate majority was Republican at the time, the chair of the Senate Environment and Public Works Committee, John Chafee, R-RI, was passionate about the ESA and often sided with conservationists.

chronicles the W. Bush administration's intentional lag in listing:

[I]t was the first [administration] ever not to voluntarily list a single species as endangered or threatened; all listings were undertaken in response to lawsuits...According to journalist Juliet Eilperin, the administration accomplished this low rate of listing "through a variety of little-noticed procedural and policy moves." Internal documents revealed that the administration had erected "pervasive bureaucratic obstacles" to limit the number of species listed. (2012: 295-6)

These bureaucratic obstacles included decisions to manipulate scales when it came time to determine which populations of a species qualified for evaluation, or whether threats to "a significant portion" of a species' habitat was in reference to the historic range or current range. Non-governmental organizations responded to the W. Bush administration strategy by aggressively petitioning for new listings; this sudden rise in petitions is reflected in the bottom panel of Figure 3.1.

The backlog of aggressive petitioning under the W. Bush administration inundated the FWS and the agency continually failed to meet the 12-month deadlines imposed by the 1982 amendments after the Reagan administration attempted to stall listings. Non-governmental organizations, such as the Wild Earth Guardians and the Center for Biological Diversity began suing FWS for failing to make determinations in response to petitions on time. This continued into the Obama administration until September 2011 when the Obama administration negotiated a settlement with the two groups. The groups agreed to limit the number of species they would petition and limit the deadline-related lawsuits; in exchange, FWS agreed to process the backlog of petitions over the next six years (Taylor, 2013). Coinciding with this settlement, which is depicted in Figure 3.1 with a dashed line, the rate of new listings rises while the number of outstanding petitions drops.

The top panel of Figure 3.2 depicts the number of federal permits issued per year between 1982 and 2016. Though Congress granted FWS the authority to issue federal permits allowing incidental take of endangered species as part of the 1982 amendments, permits were rarely issued until the Clinton administration. In 1994, the Clinton administration introduced a "No Surprises"

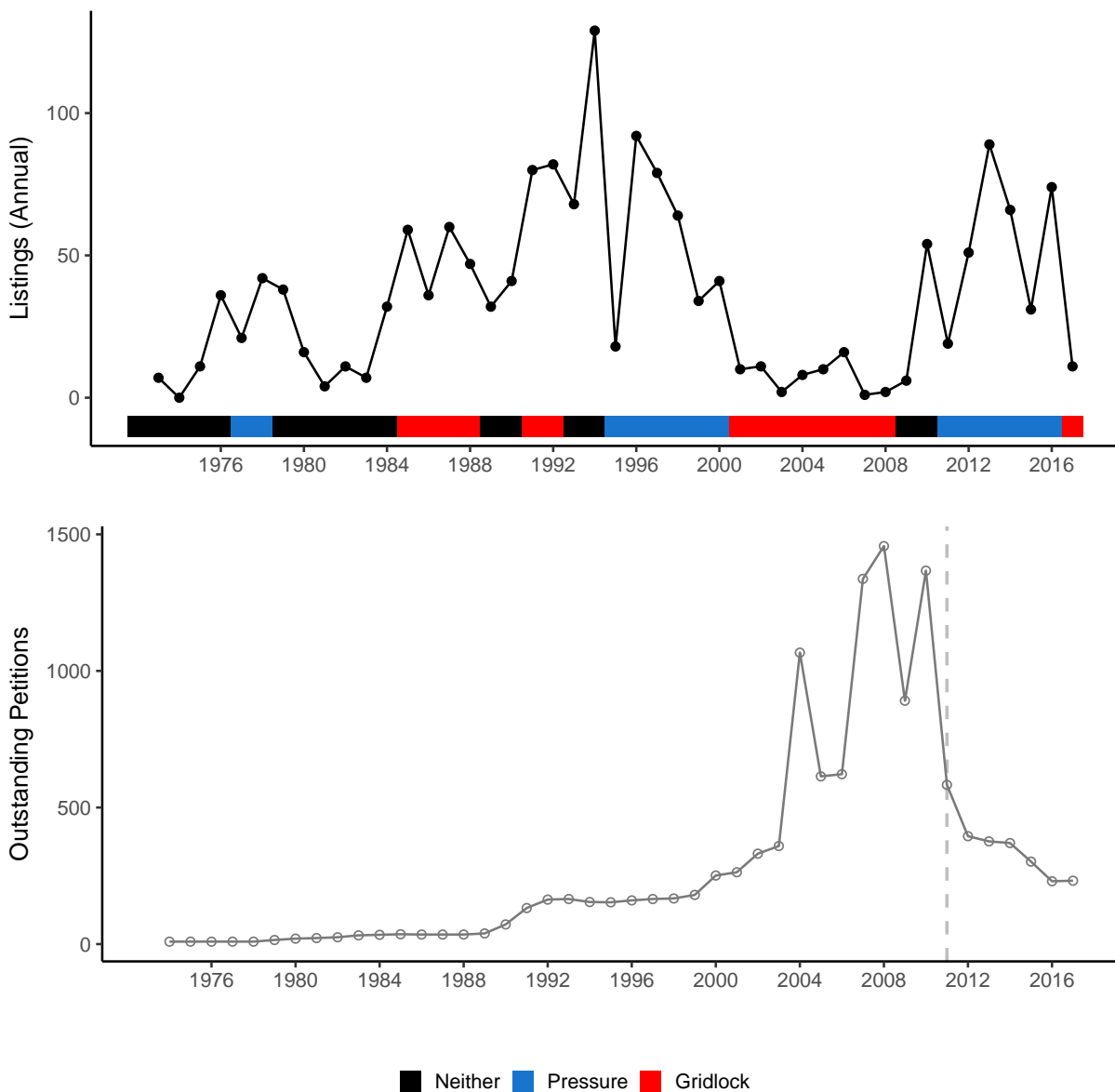


Figure 3.1: Annual Listing and Petition Counts. Top panel depicts annual species listings. Bottom panel depicts the number of outstanding petitions per year. Note that the number of petitions skyrockets just after listings stall under the W. Bush administration. Dashed gray line indicates year of negotiated settlement between the Obama administration and Wild Earth Guardians and Center for Biological Diversity. These groups agree to a five-year lawsuit hiatus in exchange for timely FWS decisions on hundreds of outstanding petitions.

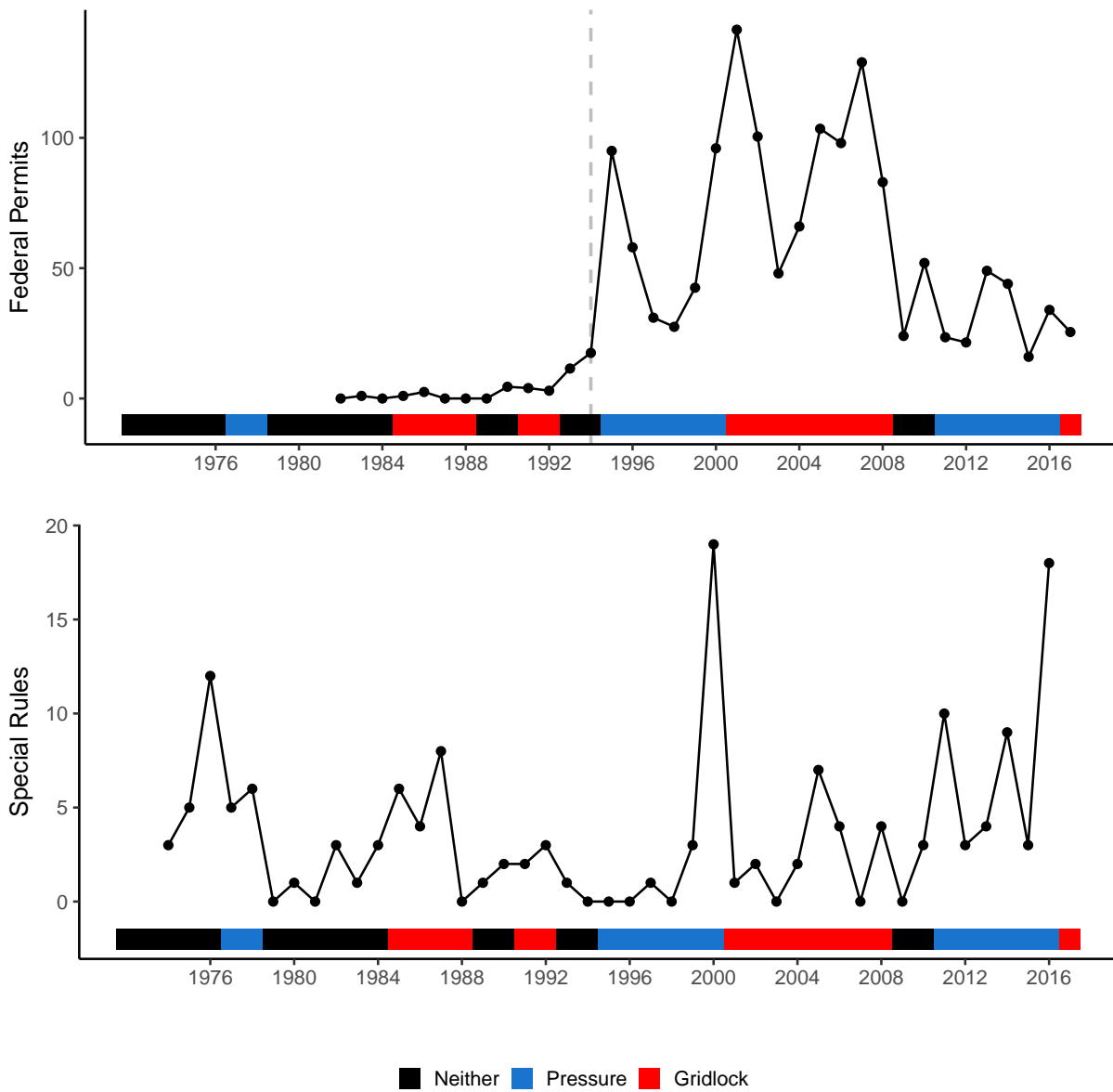


Figure 3.2: Number of Federal Permits and Special Rules Issued Per Year. Note that the permits dataset in top panel begins after the introduction of FWS authority to issue federal permits as part of the 1982 ESA amendments and extends through December 2016; the special rules dataset in bottom panel ends in May 2016. Dashed gray line marks the introduction of the “No Surprises” policy in 1994.

policy by memorandum which was meant to provide assurances to property owners that once a permit was issued as part of a Habitat Conservation Plan agreement, no additional restrictions would apply to that landowner with respect to the species covered in the plan should conditions change or unforeseen circumstances arise.

The new administrative policy was motivated by increasing pressure in Congress to roll back federal protection of endangered species (Layzer, 2012: 233). The strategy was to relax implementation of the ESA in order to placate its critics:

[T]he availability of assurances played an important role in muting criticism that the ESA is unworkable or too stringent. At a time when the ESA was under attack, the no-surprises policy and the HCP program it facilitated gave rise to a constituency of regulated entities willing to acknowledge that it is possible to balance conservation with development and resource use. (Donovan, 2002: 326-7)

The No Surprises policy contributed to the first peak in permit issuance, though subsequent legal challenges to the No Surprises policy precipitated a drop in permit issuance until 2000 (Figure 3.2). The W. Bush administration largely continued the Clinton administration's reliance on federal permits as a means for regulatory leniency. Permits aligned with the new administration's philosophy that the only role for the federal government in species protection was to encourage voluntary stewardship on private property (Layzer, 2012: 295). Though issuance of federal permits dropped under the Obama administration, issuance of special rules increased under Obama. Recall that federal rules are case-by-case, or project-by-project exemptions, while special rules provide exempt classes of activities or industries from the ESA takings clause.

In 2015, the E & E News Daily reported that the Obama Administration was “quietly reshaping the Endangered Species Act in hopes of tempering congressional critics,” citing a significant increase in the use of special rules (Taylor and Hiar, 2015). The bottom panel of Figure 3.2 shows the number of special rules issued per year. Though the time series reveals several peaks, the Obama administration issued a total of 50 special rules, compared to 24 issued during the Clinton administration.³¹

³¹Note that as of this writing the special rules dataset ends in May 2016 and therefore does not include any

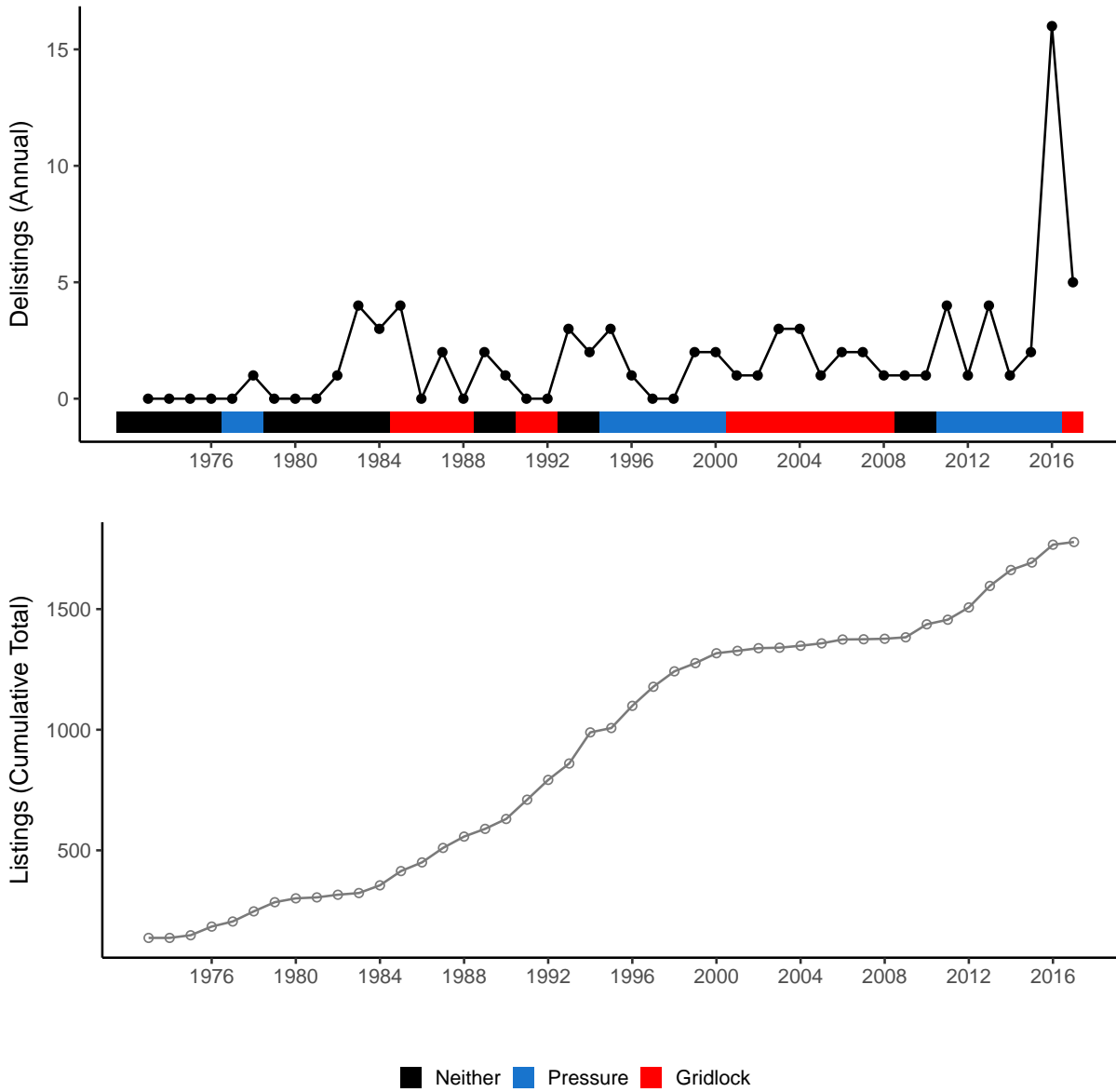


Figure 3.3: Annual Delisting and Total Listing Counts. Top panel depicts annual species delisting. Note the unprecedented number of delistings in 2016. Bottom panel depicts the cumulative number of species listed. Notable flatlines correspond to the early Reagan administration and W. Bush administration.

The most notable pattern presented in Figure 3.3 is the significant increase in delistings in 2016. The cumulative trend line of listings in the bottom panel of Figure 3.3 demonstrates that this peak in delistings coincides with a peak in listed species. In 2015, the Obama administration released a plan setting a target to delist more endangered and threatened species than all previous administrations combined. The motivation for the surge in delistings was political. Around this time, critics of the ESA often cited the low rate of species recovery as evidence that the law was broken. The low recovery rate justified Republican attempts to roll back the ESA in Congress (Hiar, 2015). Proponents of the ESA would generally counter that the low rate of species extinctions was evidence that the ESA was working, but more delistings offered additional proof: “Our successes in recovering and delisting species demonstrates both the Endangered Species Act’s effectiveness and the diverse collaborations it inspires,” said FWS Director Dan Ashe in a statement to *Greenwire* (Hiar, 2015). As shown in Figure 3.3, previous rates of delisting are relatively stable and that the effort to delist species demonstrated by the Obama administration was unprecedented. The juxtaposition of the specific ESA criticism from members of Congress regarding the low rate of species recovery suggests the spike in delistings under Obama may have been a response to deregulatory pressure.

3.4 Bivariate Comparisons

In this section, I present bivariate comparisons and *t*-tests to assess the face validity of the three propositions introduced in the previous chapter, using data from the case study introduced in this chapter. The Implementation Proposition states that Policy Opponents are less likely to implement a policy they oppose; conversely, Policy Custodians are more likely to implement a policy they support. Restating the proposition in terms of the case study, I expect Republican administrations to slow implementation of the ESA relative to Democratic administrations. As

additional rules issued in the last six months of the Obama administration.

shown above, I measure implementation rate using the number of annual listings of new species as endangered or threatened.

The Opponent Proposition states that Policy Opponents are more likely to use policy exemptions in periods when Congress is unable to pass policy revisions. Restating this proposition in terms of the ESA, I expect Republican administrations to issue more ESA exemptions when Congress is gridlocked and unable to pass ESA reform. Finally, the Custodian Proposition states that Policy Custodians are more likely to use policy exemptions in periods when Congress mobilizes to pass policy revisions. Restating this proposition in terms of the ESA, I expect Democratic administrations to issue more ESA exemptions in periods when members of Congress propose more legislative revisions to the ESA. Table 3.1 shows descriptive statistics for each leniency measure, including *t*-statistics derived from difference-in-means tests between the two types of presidential administrations. To better illustrate and compare the center and spread of the distributions, I also generate boxplots to depict changes in use for each leniency mechanism.

Table 3.1: Differences in Means By Party. Republicans list fewer species than Democrats.

	Republican		Democrat		<i>t</i> -statistic
	Mean	SD	Mean	SD	
Listings	24.6	24.7	51.6	31.2	-3.2***
Permits	40.6	50.5	40.2	25.5	0.03
Rules	3.2	2.9	4.3	5.7	-0.8
Delistings	1.4	1.5	2.2	3.5	-0.9

*** $p < 0.01$, ** $p < 0.05$, * $p < 0.1$

3.4.1 Implementation Proposition

According to Table 3.1, the difference between the two types of administration in listing new species is statistically significant. This is consistent with theoretical expectations that

Table 3.2: Differences in Means Within Party By Congressional Status. Republicans issue more federal permits in periods of gridlock; Democrats issue more special rules in periods of high deregulatory pressure. There are no significant results for delistings, though the timeseries depicted in Figure 3.3 shows the Obama administration as an outlier.

	Republican					Democrat				
	No Gridlock		Gridlock		<i>t</i> -stat	No Pressure		Pressure		<i>t</i> -stat
	M	SD	M	SD		M	SD	M	SD	
Listings	18.1	15.3	29.0	29.1	-1.2	51.8	44.3	51.5	25.9	0.02
Permits	1.1	2.0	53.7	52.1	3.9***	26.3	17.9	44.8	26.6	-1.6
Rules	3.3	3.6	3.1	2.6	0.2	0.8	1.2	5.8	6.2	-2.8**
Delistings	1.1	1.5	1.7	1.5	-0.9	1.2	1.2	2.6	4.1	-1.2

*** p<0.01, ** p<0.05, * p<0.1

the more passive form of leniency – delays in listing new species and the obstruction of protection expansion – is not necessarily conditional on Congress, but more closely connected to the president’s support or opposition to the ESA. This result is supported in Table 3.2, which presents descriptive statistics of all leniency measures by party and congressional status. The *t*-statistic corresponding to the *Listings* measure is not significantly different within Republican administrations during periods of congressional gridlock vs. no gridlock. Similarly, the *t*-statistic corresponding to the *Listings* measure is not significantly different within Democratic administrations during periods of congressional deregulatory pressure vs. no pressure.

Figure 3.4 compares the differences in listing between Republican administrations and Democratic administrations by periods of gridlock vs. no gridlock, and periods of deregulatory pressure vs. no pressure, respectively. The figure clearly shows no difference in listing within administration type, but a significant difference in listings across Republican and Democratic administrations. These results support the Implementation Proposition that Policy Opponents are less likely to implement policies they oppose, and that the effect of President Type is not mediated by Congress.

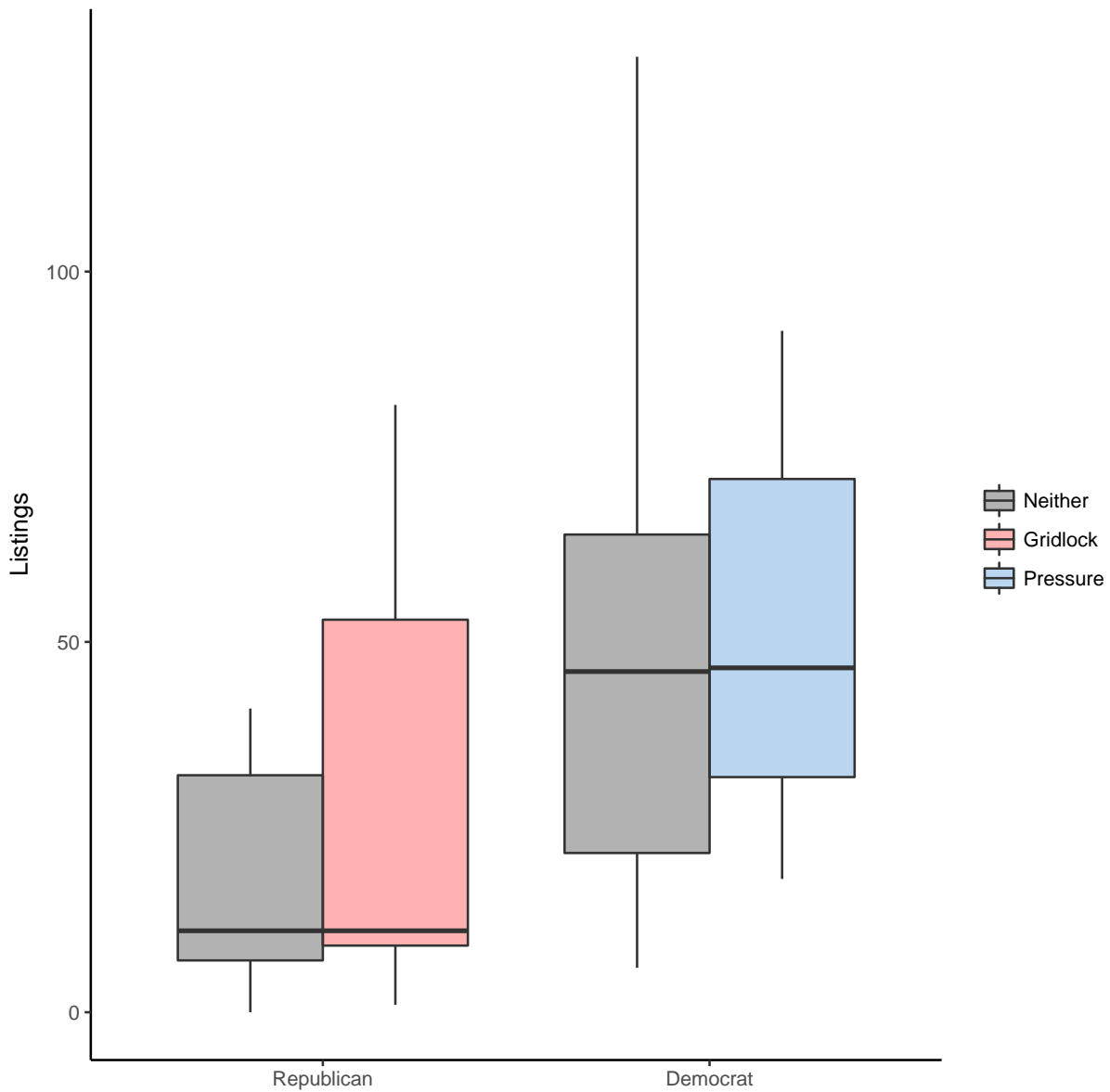


Figure 3.4: Endangered Species Listing By President Type and Congressional Status. Republican administrations list fewer species than Democratic administrations, regardless of Congressional gridlock or pressure to deregulate.

3.4.2 Opponent and Custodian Propositions

Table 3.1 shows no evidence of statistically significant differences between the two types of administrations in terms of more direct action regulatory exemptions – permits, special rules,

and delistings. This result conforms with the expectation that rises in direct action exemptions are conditional on congressional status. Table 3.2 shows that Republicans issue significantly more permits in periods of congressional gridlock than in periods without gridlock. Furthermore, the table shows that on average Democrats issue more permits in periods of high pressure than in periods of low pressure, but the difference is not statistically significant.

Figure 3.5 illustrates the significant difference in Republican use of federal permits specifically after the Clinton administration's introduction of the "No Surprises" provision in 1994. Republican use of federal permits is dramatically different than either periods of gridlock prior to 1994 or periods of no gridlock. In fact, permit use in periods of gridlock prior to 1994 and periods of no gridlock appears very similar. This result highlights the importance of the "No Surprises" provision in changing the nature and incentives of permits use. There were no periods of deregulatory pressure between the statutory addition of federal permit authority in the 1982 ESA amendments and the "No Surprises" provision in 1994 coinciding with the Republican Revolution. Therefore, Figure 3.5 does not distinguish pre- and post-1994 for Democrats. The figure does show that Democratic administrations issue more permits when facing higher pressure from Congress to deregulate than in periods of low deregulatory pressure, even though the difference in means does not reach statistical significance (Table 3.2).

Results of the *t*-test do not show significant differences in Republican administrations' use of special rules or delistings during gridlock vs. no gridlock. On the other hand, the table shows that Democrats do issue significantly more special rules in periods of high deregulatory pressure from Congress. Furthermore, the average number of delistings during a Democratic administration under pressure is higher than a Democratic administration facing little pressure from Congress, but the difference does not reach statistical significance.

Figure 3.6 illustrates the minor difference in number of special rules issued between Republican administrations facing gridlock vs. no gridlock, and the significant difference between Democrats under pressure vs. no pressure. This figure complements the timeseries in Figure 3.2

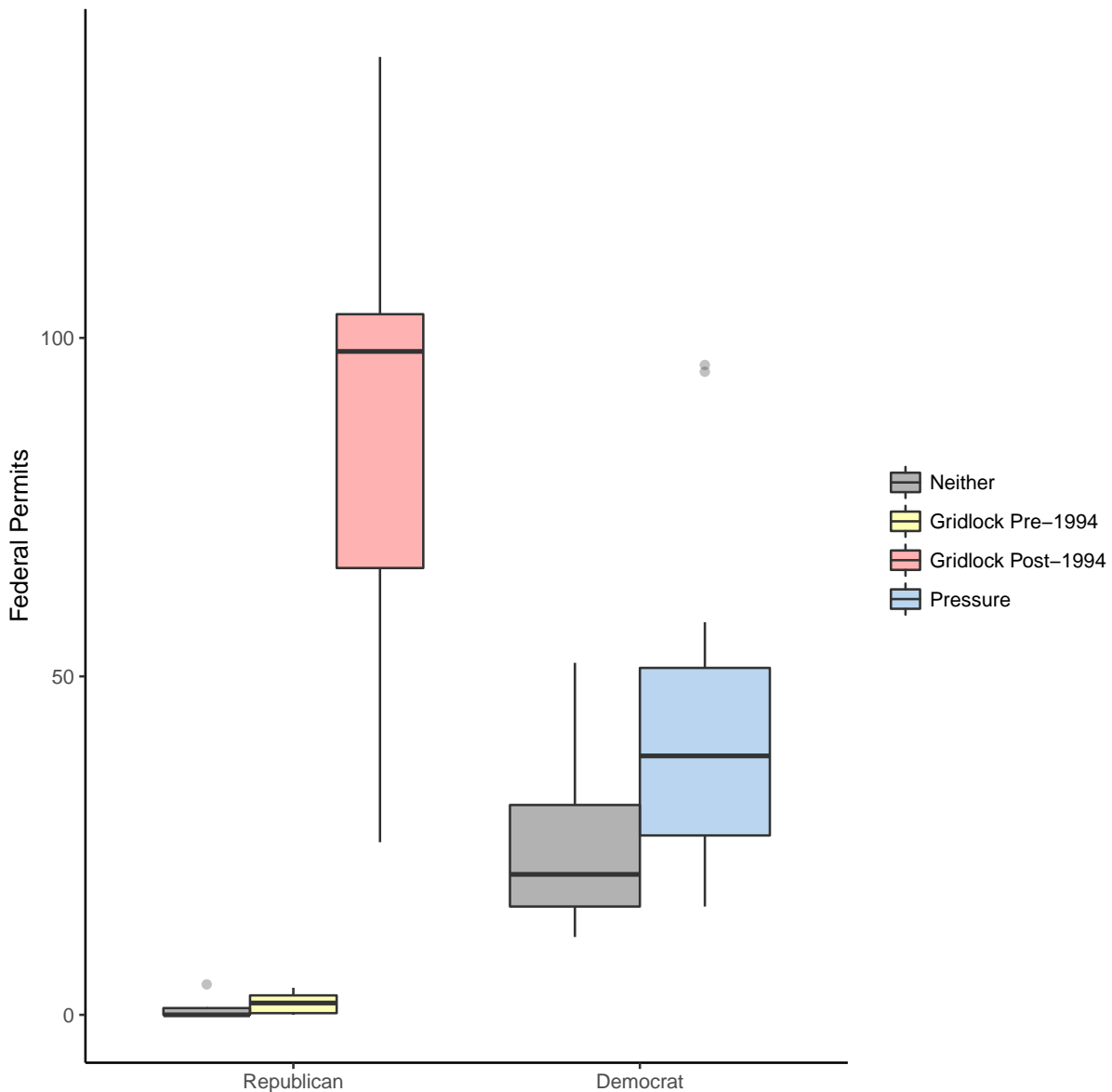


Figure 3.5: Federal Permits By President Type and Congressional Status. Republican administrations issue significantly more federal permits after the Clinton administration introduces the “No Surprises” policy in 1994, which strengthened the deregulatory nature of permits by offering long-term exemptions. Democratic administrations issue more federal permits when facing pressure from Congress to deregulate.

that shows notable peaks in special rules at the tail end of both Clinton and Obama administrations.

Finally, Figure 3.7 shows little difference between Republican and Democratic admin-

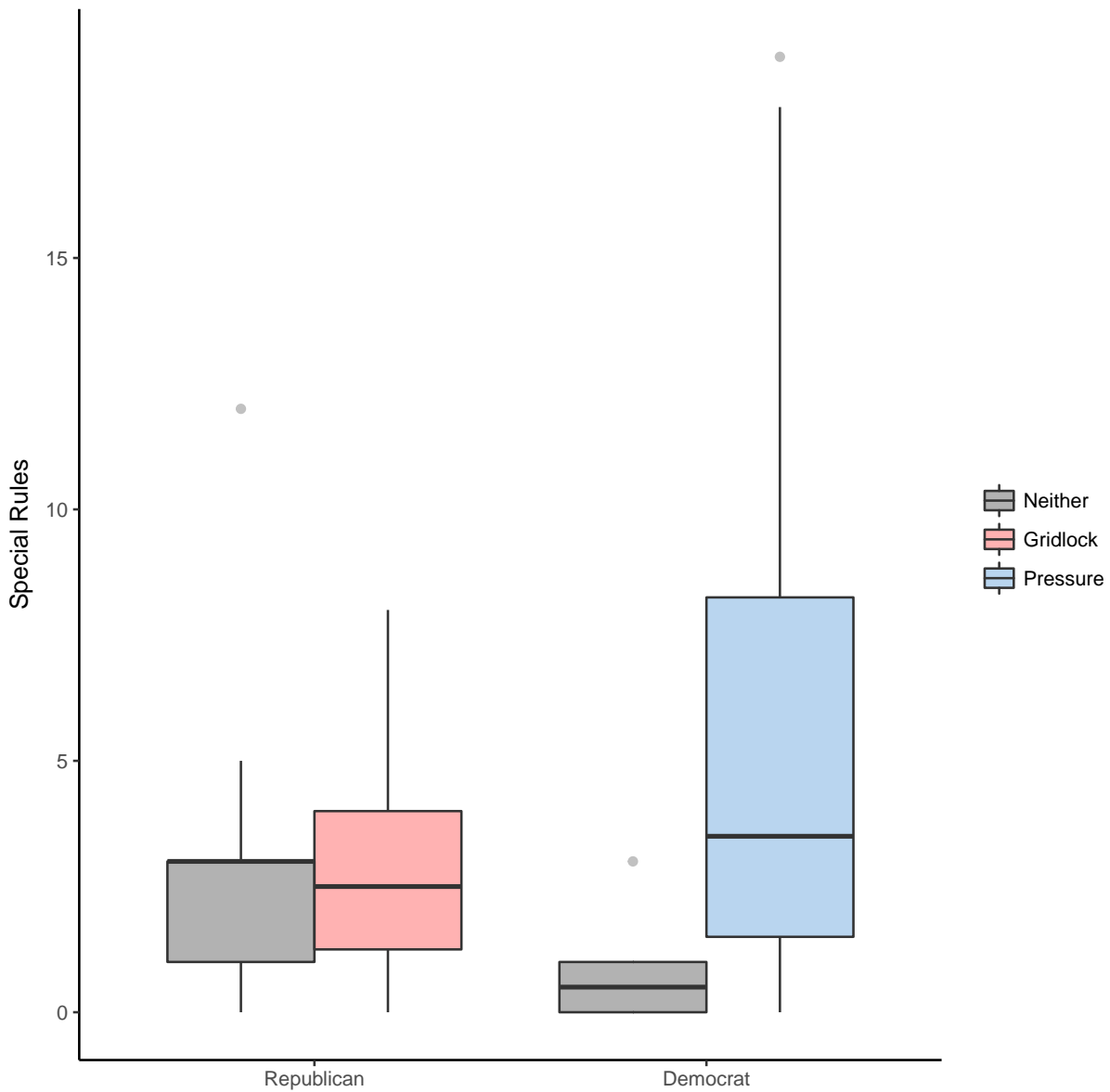


Figure 3.6: Special Rules By President Type and Congressional Status. Republican administrations introduce special rules at similar rates whether or not Congress is gridlocked. Congressional pressure to deregulate raises the median number of special rules issued by Democratic administrations from below the Republican median to just above the Republican average.

administrations in terms of delistings. In aggregate, Democrats may delist slightly more species annually than Republicans. The change in distribution within president type conforms to expectations; Republicans delist slightly more species when facing a gridlocked Congress than not,

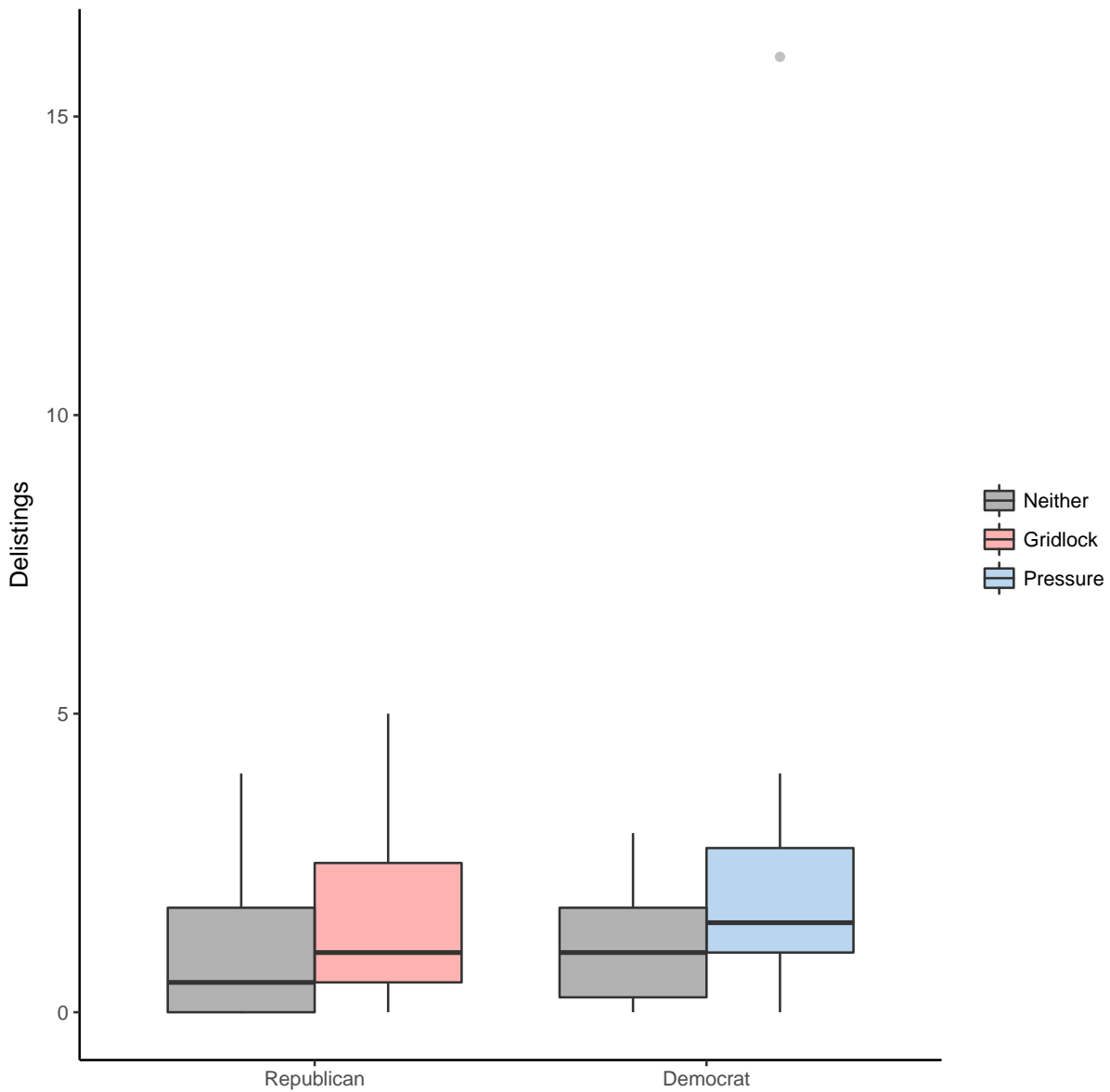


Figure 3.7: Species Delisting By President Type and Congressional Status. Republican administrations delist *slightly* more species when Congress is gridlocked and unable to deregulate. Democratic administrations delist *slightly* more species when facing pressure from Congress to deregulate.

and Democrats delist slightly more species when facing mounting pressure from Congress to weaken the ESA. However, these differences are not large enough to be statistically significant (Table 3.2).

3.5 Conclusion

This qualitative investigation accomplishes several important tasks. First, it introduces the case study referenced throughout this dissertation and provides detailed background relevant to the policy's enactment, implementation, and likelihood of reform. Second, this chapter provides preliminary evidence for my theory-based predictions. I trace the parameters of interest identified in the theory through each administration and congressional attempt to reauthorize the ESA, and track the emergence and use of leniency mechanisms in the implementation of the ESA. I present the timeseries for four different leniency mechanisms relevant to the ESA, and use these measures of leniency and my coding of the other parameters of interest to generate bivariate comparisons and difference-in-means tests. Using interviews with policy experts, transcripts of congressional hearings, and political reporting, I reveal a narrative that offers causal evidence supporting the theory presented in Chapter 2.

One conclusion drawn from this effort is that different presidents rely on different mechanisms for offering leniency. While the Reagan and W. Bush administrations slowed the listing of new species to minimize regulatory burdens on industry, the Clinton and Obama administrations used special rules offering blanket exemptions from the ESA for specific activities related to particularly controversial species. The Clinton administration relied heavily on permits in an attempt to appease ESA critics in Congress, and the W. Bush administration used this same tool in order to reduce regulatory burdens on developers. Breaking precedent, the Obama administration focused on delisting recovered species to prove the effectiveness of the ESA in response to a common criticism of the policy.

Importantly, this chapter reveals the appropriate operationalization for testing hypotheses quantitatively. For example, there may be several reasons for legislative gridlock in Congress (Binder, 1999); the qualitative work in this chapter points to the Senate as a consistent obstacle to ESA reauthorization. In the following chapter, I introduce new and more precise quantitative

measures for congressional gridlock and deregulatory pressure, which complement the qualitative coding presented in this chapter. The following chapter also sheds additional light on why certain administrations seem to favor some leniency tools over others.

Chapter 4

Federal Politics and Regulatory Leniency

In Chapter 2, I introduce a political theory for the use of leniency in policy implementation. I argue that a president will rely on regulatory leniency both when he opposes a policy he has inherited and when he supports a policy he has inherited, but under different conditions. Leniency can be passive in the form of delayed implementation, or active in the form of administrative action and decision-making. I offer three propositions. First, I predict that a Policy Opponent will be drawn toward inaction regardless of the likelihood of congressional policy reform.

Implementation Proposition: *A president who opposes an existing policy will use executive discretion to slow policy implementation.*

For leniency requiring administrative action, I build on Howell's model of presidential unilateral action. The theory hinges on the president's position relative to existing policy – whether he aims to change existing policy or protect existing policy – *and* the status of the contemporaneous Congress. The second and third propositions link leniency to the likelihood of legislative action and thus, unlike the Implementation Proposition, are conditional on Congress:

Opponent Proposition: *When Congress is unable to roll back a policy the president opposes, the president will offer more regulatory exemptions.*

Custodian Proposition: *When Congress threatens to roll back a policy the president supports, the president will offer more regulatory exemptions.*

In Chapter 3, I introduce a policy case study and gather qualitative evidence to investigate the validity of these propositions. The dependent variable at the core of this dissertation work is the use of regulatory leniency to advance the presidential policy agenda. Chapter 3 examines four mechanisms for leniency in the implementation of the Endangered Species Act (ESA): delays in listing new species, issuance of federal permits, issuance of federal rules, and delisting species. To isolate the driving variables, I examine party positions on endangered species and I use process tracing to categorize congressional attempts to reauthorize the ESA. In analyzing variation in the four types of leniency, I demonstrate that different presidents rely on different mechanisms for offering leniency. The Reagan and W. Bush administrations slowed the listing of new species to minimize regulatory burdens on industry. The Clinton administration relied heavily on permits in an attempt to appease ESA critics in Congress, and W. Bush administration continued the precedent to reduce regulatory burdens on developers. The Obama administration focused on delisting recovered species to prove the effectiveness of the ESA in response to a common criticism of the policy. Both the Clinton and the Obama administrations used special rules offering blanket exemptions from the ESA for specific activities related to particularly controversial species.

This qualitative work provides preliminary support for my political theory of regulatory leniency. Republican administrations, which tended to oppose the regulatory rigidity of the ESA, used leniency to reduce burdens on industry when ESA reform was unlikely to pass in Congress. Democratic administrations tended to support the preservation of the ESA but used leniency to appease outspoken critics in Congress who threatened to weaken the ESA through piecemeal legislative initiatives – as opposed to building consensus for reauthorization – and budget cuts and appropriations riders.

In this chapter, I derive and test hypotheses based on the propositions introduced in Chapter 2 and use measures informed by the qualitative work in Chapter 3. My theory and qualitative research suggests that Republican and Democratic administrations use regulatory

leniency in response to different congressional drivers. Therefore, I compare the Republican use of leniency mechanisms during varying levels of congressional gridlock, and I compare the Democratic use of leniency mechanisms during varying levels of deregulatory pressure from Congress.

4.1 Hypotheses

My theory predicts that a president is driven toward leniency in two scenarios: 1) when Congress is unable to repeal a policy the president opposes and leniency offers the president a means toward de facto deregulation, or 2) when Congress is poised to roll back a policy the president supports, and the president seeks to defuse some of this deregulatory pressure.

The first type of leniency I examine relates to implementation of the law. The ESA grants the executive branch the authority to broaden the scope of the law by adding new species to the Endangered and Threatened lists. Listing new species expands restrictions on property use by increasing the number of species that industry and property owners are accountable to protect. Presidents seeking to minimize regulatory burdens on industry and property owners should attempt to limit the number of species listed, in spite of the fact that the ESA mandates listing decisions to be made purely on the basis of scientific evidence of the species' status. Republican presidents are more likely to look for ways to reduce regulatory burdens on industry, therefore:

Implementation Hypothesis: *Republican presidents list fewer endangered species than Democratic presidents.*

The remaining three leniency mechanisms relax the federal rules pertaining to species that are already categorized as Endangered, Threatened, or Candidates for listing under the ESA. The mechanisms grant regulatory leniency at different levels: permits offer ESA exemptions for individual projects, special rules offer ESA exemptions for categories of activities, and delisting removes ESA protections at the species level. I hypothesize that

***Opponent Hypothesis:** When Congress is gridlocked, Republican presidents issue more exemptions to the ESA.*

***Custodian Hypothesis:** When Congress threatens to roll back the ESA, Democratic presidents issue more exemptions to the ESA.*

4.2 Measurement

4.2.1 Dependent Variable

I include four measures of my dependent variable, leniency, to account for variation in scope. As mentioned in the previous chapter, there are at least four ways administrators can introduce regulatory leniency within the legal framework of the ESA. First, administrators may choose to delay implementation of the ESA by stalling listing decisions. This leniency mechanism requires little effort or administrative resources, provided that the delays are within the bounds of executive discretion, and I consider it a more passive form of leniency compared to the remaining three mechanisms.

A second way the administration can offer leniency under the ESA is through federal permits. There are two types of ESA permits: Incidental Take permits and Enhancement of Survival permits. Both types of permits offer ESA exemptions, typically to non-federal landowners, for otherwise lawful activities, such as timber harvest, ranching, housing development, or utilities development. In general, permits are issued for individual projects.

A third way the administration can introduce leniency is through the establishment of special rules. Special rules reduce protections for Threatened species, which otherwise are afforded the same protections as an Endangered species. These baseline protections typically prohibit import to or export from the US, takings (defined above), possession, sale, delivery, transport, or any commercial activity, interstate or foreign. Special rules carve out exemptions from these otherwise given protections allowing specific activities that might harm a Threatened

species or their habitat. While federal permits offer exemptions per project, special rules offer blanket exemptions per activity.

A fourth way the administration can offer leniency in the implementation of the ESA is by delisting species. Delisting offers the broadest scope of leniency and as such it is also vulnerable to litigation. In order to delist a species, FWS or NMFS must determine that the threats to extinction have been removed or controlled. The agency must evaluate recovery achievements and assesses population sizes and trends, and habitat quality and stability. Thus, the statutory bar for delisting species is highest in comparison to other forms of leniency, and the scope of exemption is the broadest at species-level.

Names and dates of species listings and delistings were taken directly from the Environmental Conservation Online System (ECOS) maintained by FWS and accessible online.¹ Federal permit data were downloaded on Feb 6, 2018 from the USFWS Tracking and Integrated Logging System (TAILS), a field office activity tracking system within the broader ECOS database. These data include identifying information about each Habitat Conservation Plan, Safe Harbor Agreement, and Candidate Conservation Agreement with Assurances the FWS has been involved in from 1982 until 2018.²

Each observation in the dataset consists of the title of the plan, the type of conservation plan, a plan ID number, location, status, land use proposed, applicant type, species covered, and field notes. Several dates associated with each plan are also provided, including the date USFWS assistance was initiated to develop the conservation plan, the date an agreement was signed (in the case of CCAs), and the date a permit was issued, denied, suspended, or revoked (in the case of HCPs, SHAs, and CCAAs).

Though the TAILS data system is intended to promote consistency in reporting from the field, not all entries are complete for each observation and the author encountered and corrected

¹<https://ecos.fws.gov/ecp0/reports/species-listings-count-by-year-report> and <https://ecos.fws.gov/ecp0/reports/delisting-report>

²Since NMFS oversees management of marine mammals, they are less involved in administrating permits associated with these plans, which are targeted for non-federal landowners.

several typos. For the purpose of analysis, the author considered an observation complete if it included the plan Title, Type, ID, State, and at least one of the above mentioned dates. All observations had entries for Title, Type, and ID. In the few cases where State was missing, the author was able to fill in the appropriate state using the surrounding information associated with the observation, often the USFWS Field Office or field notes. Eleven observations had no dates associated with them, making them impossible to include in any timeseries analyses; these eleven were dropped from analysis. Observations from Guam and Puerto Rico were also dropped.

Amendments to conservation plans are made for a variety of reasons, such as the transfer of property and permit to a new owner, a change in the species covered in the plan (typically the addition of new species or candidates), or a change in the property covered by the agreement. Amendments are issued a new federal permit and assigned a new ID in the TAILS database. Since amendments require the issuance of a new permit and reflect a change in conditions, but generally do not require the same amount of executive effort as the negotiation of a new agreement from scratch, I flag any amendments in the dataset.³

Data on special 4(d) rules issued by FWS and NMFS were procured from Ya-Wei Li at Defenders of Wildlife (Li et al., 2017).

4.2.2 Explanatory Variables

President Type

I use the president's party membership and the party's position on endangered species to categorize presidents as Policy Opponents or Policy Custodians. I use Republican and Democratic Party Platforms across time to determine that Republicans can consistently be coded as

³Observations reflecting amendments to conservation plans are typically identifiable with the word "Amendment" or "amendment" in the plan title. It is possible that some less well-documented amendments persisted in the dataset, though the number is likely too small to affect analyses.

Policy Opponents, and Democrats can consistently be coded as Policy Custodians. For deeper justification of this coding scheme, see Chapter 3.

Congressional Gridlock

The qualitative analysis presented in Chapter 3 demonstrates that the Senate remained a persistent obstacle for ESA critics and property rights advocates attempting to roll back the ESA. Senate rules empower each senator with the right to extend debate indefinitely over any bill brought to the Senate floor, unless a three-fifths majority of senators vote to end debate. This raises the bar for policy change in the Senate from simple majority rules in the House.

The position of the filibuster pivot on an ideological spectrum is a convenient continuous measure representing the likelihood of Senate gridlock. I use League of Conservation Voters (LCV) scores to determine the relative positions of senators on issues related to the environment. To calculate the scores, LCV first consults with a panel of experts from 20 environmental and conservation organizations to select the most important environmental votes each year. Annual scores for each member of Congress are calculated by dividing the member's pro-environment votes by the total number of key environmental votes taken that year. The resulting score is scaled from 0 to 100, with 0 corresponding to a member of Congress voting exclusively against the environment and 100 corresponding to a member of Congress voting exclusively for the environment.

Depending on the directionality of the ranking – lowest score to highest score, or highest to lowest – there are two potential filibuster pivots, a conservative pivot and a liberal pivot. A liberal legislative initiative must appease the conservative pivot, and conversely, a conservative legislative initiative must appease the liberal pivot to pass in the Senate. To test the Opponent Hypothesis, I am interested in gridlock on conservative initiatives to roll back the ESA. Therefore, I use the score of the liberal pivot specifically to measure the likelihood of gridlock on the conservative initiative. The higher the score corresponding to the liberal pivot, the higher the

likelihood of a filibuster stalling a conservative initiative on the Senate floor. Realistically, this type of gridlock would manifest in the form of a forced cloture vote or negative agenda setting to avoid consideration of a conservative bill likely to fail. The lower the score corresponding to the liberal pivot, the more likely a conservative initiative is to avoid filibuster purgatory.

I collect LCV scores for each senator between 1972 and 2017, rank them from lowest score to highest score, and isolate the 60th score. This 60th score corresponds to the liberal pivot and the filibuster threat for conservative initiatives with respect to environmental protection. Figure 4.1 depicts senators' LCV scores by party between 1972 and 2017. The figure demonstrates polarization in Congress on environmental policy; over time, fewer senators score in the middle, and more senators score at the extremes. Figure 4.1 also depicts an increasing trend in the liberal pivot score, widening the gap between liberal and conservative senators and decreasing chances of reaching consensus on environmental policy initiatives.

Congressional Pressure to Deregulate

To measure deregulatory pressure in Congress, I use the number of annual legislative attempts to weaken the ESA between 1996 and 2017 compiled by the Center for Biological Diversity (CBD), depicted in Figure 4.2. These legislative initiatives include both species-specific and general proposals to amend the ESA. Species-specific proposals attempt to permanently delist, temporarily delist, or delay listing of particular species and are introduced by members of Congress representing the states or districts inhabited by the targeted species. The most common species targeted are the gray wolf, the delta smelt, the greater sage-grouse, the lesser prairie-chicken, the northern long-eared bat, and the American burying beetle. General proposals vary from placing numerous constraints on the Secretary's authority to list new species – including eliminating funding to list new species, designate critical habitat, and monitor existing endangered species – to requiring the federal government to compensate property owners affected by the ESA, to prohibiting the consideration of climate change in decisions to list new species, and

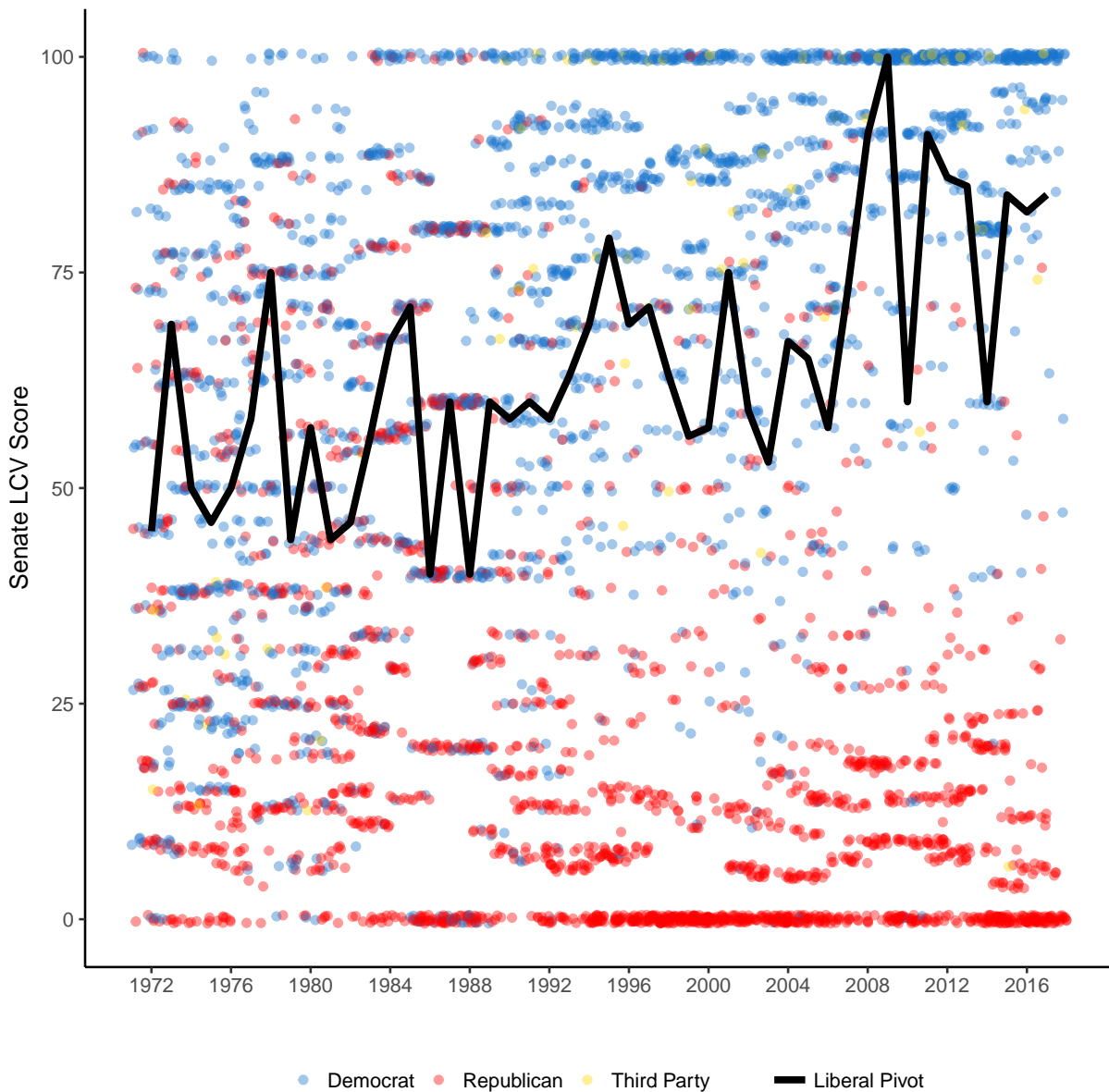


Figure 4.1: Senate LCV Scores by Party with Filibuster Pivot. A 0 score reflects more conservative votes on the environment; 100 reflects more liberal votes on the environment. This figure depicts polarization of LCV scores in the Senate; over time, fewer Democrats and Republicans overlap in scores and fewer senators score in the middle. As the liberal filibuster pivot moves further away from the middle, the likelihood of gridlock on ESA reauthorization increases. Note that data points are jittered.

requiring consideration of economic impacts in decisions to list new species. An overwhelming majority of proposals to roll back elements of the ESA do not pass Congress to be signed by the

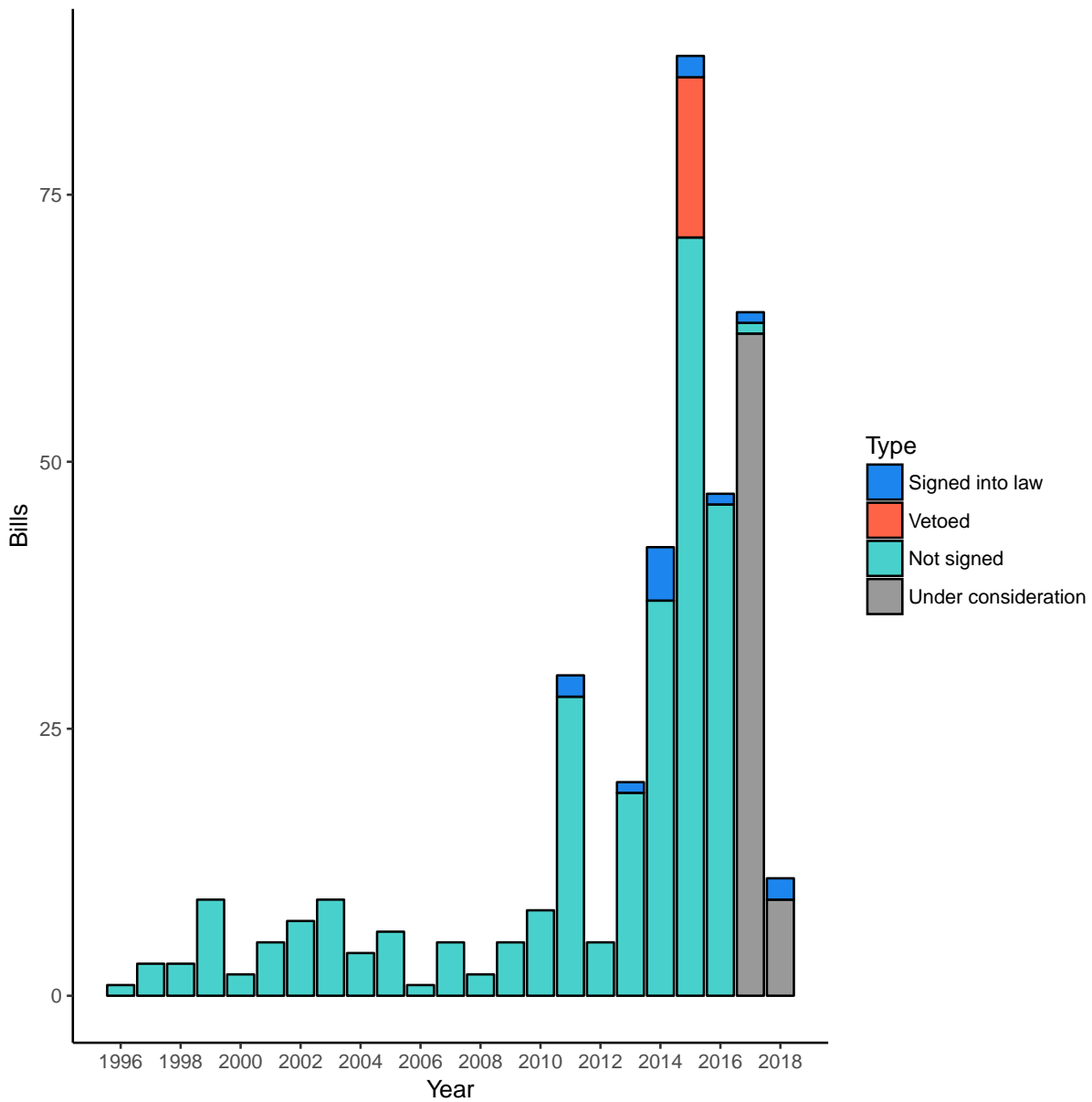


Figure 4.2: Legislative Threats to the ESA Introduced in Either Chamber 1996-2018. Data Source: Center for Biological Diversity. A majority (66%) of the bills signed into law were riders to appropriations bills. The remaining were provisions added to the farm bill, a water infrastructure bill, and a defense reauthorization bill.

president. In fact, only 14 out of 377 bills in the CBD dataset have been signed into law and the majority of these have been riders to appropriations bills, in essence forcing the president's hand.

A major limitation of these data is that the data do not include the year of the Republican takeover of the House which prompted several notable attempts to weaken the ESA, including a successfully passed 6 month moratorium on listing new species. Another limitation is that the total number of legislative threats to the ESA does not necessarily capture the number of credible threats to the ESA. It is possible that members of Congress propose extreme legislation symbolically to build the party brand or to excite the party base, with the understanding that these initiatives have little chance of passing (Lee, 2016). As is apparent in Figure 4.2, though not all threats to the ESA are enacted, a number of them are signed into law. Many of the attempts to weaken the ESA that are successfully signed into law are riders to appropriations bills, also known as must-pass bills. The pressure to pass government funding bills is high to avoid government shutdown, so compromises are often necessary. In general, the more attempts there are in Congress to weaken the ESA, the higher the likelihood that some of these attempts will be successful. Therefore, in spite of the limitations, the CBD data offer the most precise measure of the concept of interest, which is congressional mobilization to deregulate the ESA.

4.2.3 Controls

To test my hypotheses accurately, I control for several sets of factors likely to affect ESA implementation and ESA exemptions.

Political Controls

The first set of control variables are political factors. Presidential job approval ratings may affect ESA implementation and exemptions in a number of ways. First, the president may be moved to offer exemptions when his job approval ratings are low in an effort to improve his image among voters or interest groups that would benefit. Low approval ratings may also affect a Custodian President's inclination to publicly veto an ESA revision passed by both chambers of Congress, especially if the revision is a rider to an appropriations bill and a government shutdown

is imminent. Conversely, when presidential job approval ratings are high, the president has more flexibility to make unpopular policy decisions (Canes-Wrone and Shotts, 2004). To measure presidential job approval, I use the annual average of presidential job approval ratings aggregated by Roper Center and Gallup Analytics.

I also include an indicator variable for midterm and general election years to control for the possibility that exemptions are offered as part of an electoral strategy. Election years may elicit more presidential or party responsiveness (Canes-Wrone and Shotts, 2004), and exemptions may be considered a type of presidential pork (Hudak, 2014; Kriner and Reeves, 2015).

Economic Control

The ESA has considerable implications for economic development and growth; therefore, the state of the economy may affect the number of new species the administration is comfortable listing and the number of exemptions the administration chooses to issue. For example, an administration may choose to list fewer species as endangered or threatened when economic growth is slow to avoid broadening the scope of the regulation. Similarly, an administration may issue more ESA exemptions to minimize burdens on industry and boost the economy when economic growth is slow. Finally, since permits are tied to development projects, the state of the economy will likely influence the number of permits sought and granted. To measure the state of the economy, I rely on the annual inflation rate from the Bureau of Labor Statistics.

Capacity Controls

Implementation of the ESA and the ability to process and issue exemptions depends on administrative capacity. To measure administrative capacity, I use the annual change in budget authority granted to the Fish and Wildlife Service (FWS) by Congress. Budget authority represents the amount of funding appropriated to the agency in that year. Annual budget authority also reflects Congress's aggregate attitude toward the FWS mission, since Congress determines

the agency's annual appropriation. The Public Budget Database available in the Supplementary Materials of the Office of Management and Budget's Historical Tables⁴ only offer budget authority beginning in 1976. Therefore, I also collect the FWS annual change in budget outlays (spending) data from the same source since these are available beginning in 1962, and I use these as a robustness check in a model with all observations preserved. Outlays are one step removed from Congress, but these data do correlate with budget authority.

Public Demand Controls

A couple of the outcome measures require some additional and specific capacity control variables. To predict the number of annually listed species, I include the number of outstanding petitions. Outstanding petitions are the petitions left unresolved at the end of each year and this measure accounts for the public demand and administrative burden that might play into listing more species. When predicting annual federal permit counts, I also include the number of permits initiated to control for the demand for permits that might drive the supply of more permits.

Policy Controls

Time related to key policy changes may also affect the listing of new species or the number of exemptions issued annually. I generate an ESA time trend which corresponds to the number of years the ESA has been enacted. I also generate a permit time trend corresponding to the number of years federal permits have been offered, beginning after the 1982 amendments. Finally, I include a "No Surprises" fixed effect to control for the new permit regime following Sec. Bruce Babbitt's new policy toward permits.

⁴Available at <https://www.whitehouse.gov/omb/supplemental-materials/>

Testing Presidential Waiver Strategy

Finally, I control for Mann (2016)'s theory for presidential waivers. Though the model in Mann (2016) uses year-state-policy units of observation, Mann's explanatory variables of interest – ideological distance between the president and the pivotal player in Congress interacted with the share of governors who are the president's co-partisans – vary by year, and not by state or policy. Therefore, I can include these variables in my model to test Mann's measures' explanatory power for my dependent variables.

4.2.4 Estimation

I use three estimating equations to test my three hypotheses. My first hypothesis is that Republican administrations are less likely to implement the ESA, a policy Republicans generally oppose for being too restrictive; specifically, I hypothesize that Republican administrations are less likely to list new species as Endangered or Threatened under the ESA. To test this hypothesis, I use the following equation:

$$L_t = \mu + \beta Republican_t + \gamma X_t + \varepsilon_t \quad (4.1)$$

where L_t is the number of listings in year t , β is the coefficient of interest associated with the dummy variable $Republican_t$, and X_t is a vector of control variables.

My second hypothesis is that Republican administrations, which are more likely to oppose the prohibitive nature of the ESA, grant more exemptions from the ESA when Congress is unlikely to roll back the ESA. To test this hypothesis, I use the following equation:

$$Y_t^k = \mu + \alpha^k Republican_t + \eta^k Gridlock_t + \beta^k (Republican_t * Gridlock_t) + \gamma^k X_t + \varepsilon_t^k \quad (4.2)$$

where Y_t^k is the number of exemptions of type k in year t , β^k is the coefficient of interest associ-

Table 4.1: Descriptive Statistics of the Data.

	N	Mean	St. Dev.	Min	Max
<i>Measure of Implementation:</i>					
Annual Listings	45	36.6	30.6	0	129
<i>Measures of Leniency:</i>					
Federal Permits	36	40.4	40.8	0	141.5
Special Rules	45	2.7	3.7	0	18
Annual Delistings	45	1.8	2.6	0	16
<i>President Party:</i>					
Republican (n=0, y=1)	45	0.56	0.5	0	1
Democratic (n=0, y=1)	45	0.44	0.5	0	1
<i>Measure of Gridlock:</i>					
Filibuster Pivot LCV Score	45	64.6	14.4	40	100
<i>Measure of Deregulatory Pressure:</i>					
Number of ESA Threats	22	16.6	23.3	1	88
<i>Political Controls:</i>					
President Approval %	45	50.5	10.6	25.8	71.7
Election Year (n=0, y=1)	45	0.5	0.5	0	1
<i>Economic Control:</i>					
Inflation Rate	45	4.0	3.0	-0.4	13.5
<i>Capacity Controls:</i>					
FWS Budget Authority Δ	41	1.03	0.09	0.87	1.30
FWS Outlays Δ	45	1.03	0.06	0.90	1.16
<i>Public Demand Controls:</i>					
Outstanding Petitions	45	287.40	379.90	0	1,457.00
Permits Initiated	36	58.20	61.00	0.5	218.5
<i>Policy Control:</i>					
ESA Time Trend	45	22.0	13.1	0	44
Permit Time Trend	36	17.5	10.5	0	35
No Surprises FE (n=0, y=1)	45	0.5	0.5	0	1
<i>Measures from Mann (2016):</i>					
DW-NOM Distance	42	0.8	0.2	0.4	1
Share of Co-Partisan Governors	43	0.5	0.1	0.3	0.7

ated with the interaction between a *Republican* president and congressional *Gridlock* in year t , and X_t is a vector of control variables.

My third hypothesis is that Democratic administrations, which are more likely to support the protections associated with the ESA, grant more exemptions from the ESA when Congress is more likely to roll back some of these protections. To test this hypothesis, I use this equation:

$$Y_t^k = \mu + \alpha^k Democrat_t + \eta^k Pressure_t + \beta^k (Democrat_t * Pressure_t) + \gamma^k X_t + \epsilon_t^k \quad (4.3)$$

where Y_t^k is the number of exemptions of type k in year t , β^k is the coefficient of interest associated with the interaction between a *Democratic* president and deregulatory *Pressure* from Congress in year t , and X_t is a vector of control variables.

To clarify, k denotes the type of exemption, which vary in breadth: federal permits, special rules, or delistings. Given that my dependent variables are count variables, and there is evidence of overdispersion, I use a negative binomial specification for all models.⁵

4.3 Results

4.3.1 Analysis of Implementation Hypothesis

The first type of regulatory leniency I examine is delay in policy implementation, which is a more passive form of leniency when compared to permits, special rules, and delistings, which require a direct act of exemption. The theory predicts that a Policy Opponent is more likely to delay implementation of a policy he opposes. More specifically, the Implementation Hypothesis states that Republican presidents will list fewer new species under the ESA.

Table 4.2 presents the results of the negative binomial model testing the Implementation Hypothesis. Model 1 presents a simple bivariate model excluding control variables, and Model

⁵Likelihood ratio tests comparing negative binomial and Poisson models for each of the four dependent variables – listings, permits, special rules, and delistings – strongly and consistently suggest alpha is non-zero.

2 presents the adjusted model accounting for other variables. In Model 1, the coefficient corresponding to *Republican President* is negative and significant, and the effect is even stronger in the adjusted Model 2. These results support the Implementation Hypothesis that Republican presidents list fewer species as endangered or threatened than Democratic presidents. This evidence also provides important context for the interpretation of the results of subsequent analyses, particularly in the models predicting the use of special rules (see Discussion).

Note that Model 2 has four fewer observations than Model 1; this is because FWS Budget Authority data were not available before 1976, thus *FWS Budget Change* could only be calculated for 41 years. Since the low number of observations is already cause for concern, I rerun the models using change in FWS Outlays (Table A1); spending data are available beginning in 1962 and I am able to recover the four observations. As Table A1 demonstrates, the difference in results is negligible.

4.3.2 Analysis of Opponent and Custodian Hypotheses

The next set of models test the Opponent and Custodian hypotheses on three different types of ESA exemptions: federal permits, special rules, and delisting species. These different measures reflect the variety of tools presidents and their administrations have in offering leniency across different breadths and scopes. Federal permits are for the most part individual exemptions, special rules are activity-based or industry exemptions, and delistings are species-level exemptions. Unlike the model testing the Implementation Hypothesis, these sets of models include a multiplicative interaction term to capture the conditional effects.

Table 4.3 presents results predicting the use of federal permits, Table 4.4 presents results predicting the use of special rules, and Table 4.5 presents results predicting the delisting of species. Each table displays the results of five models following the same structure. Model 1 is a simple bivariate test estimating the effect of the president's party on the three types of exemptions. Models 2 and 3 test the Opponent Hypothesis using the interaction *R President*

Table 4.2: Negative Binomial Models Testing Implementation Hypothesis.

	<i>DV: Number of Annually Listed Species</i>	
	(1)	(2)
R President	-0.739*	-0.882**
	(0.386)	(0.343)
Pres Approval		0.00319
		(0.0101)
Election Year		0.406***
		(0.146)
Inflation Rate		-0.176***
		(0.0286)
FWS Budget Change		-0.0875
		(0.765)
Outstanding Petitions		-0.00120***
		(0.000371)
ESA Time Trend		-0.0216**
		(0.00950)
ln Alpha	-0.280	-0.826***
	(0.262)	(0.171)
Constant	3.944***	5.188***
	(0.149)	(0.778)
Pseudo R ²	0.0174	0.0653
Observations	45	41
Years	1973-2017	1977-2017

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by presidential administration in parentheses. Model 2 has fewer observations because FWS budget authority is only available from 1976-2017. The same model using FWS budget outlays, for which data are available from 1973-2017, in place of budget authority produces the same results (See Table A1 in Appendix).

* *Gridlock* to estimate the effect of a Republican President moderated by congressional gridlock on the number of ESA exemptions. Recall that *Gridlock* is measured using the League of Conservation Voters score of the liberal filibuster pivot, or the 60th senator when the scores are

ranked from most conservative (0) to most liberal (100).

Models 4 and 5 test the Custodian Hypothesis using the interaction $D\text{ President} * \text{Pressure}$ to estimate the effect of a Democratic President moderated by congressional pressure to roll back the ESA on the number of ESA exemptions. Models 2 and 4 offer unadjusted tests of the Opponent and Custodian hypotheses, respectively; Models 3 and 5 include the control variables. Recall that *Pressure* is measured using the number of legislative threats to the ESA introduced in Congress in a given year.

Federal Permits

Table 4.3 displays the models predicting the number of federal permits issued annually. Again, Model 1 is a simple bivariate model estimating the relationship between president party and use of federal permits; it is included as a reference. Though the coefficient is positive, suggesting Republican presidents might be more likely to issue federal permits, it does not reach statistical significance. Models 2 and 3 estimate the multiplicative interaction effect of $\text{Republican President} * \text{Gridlock}$, with and without control variables, respectively. The unadjusted Model 2 demonstrates that congressional gridlock during a Republican administration is significantly likely to increase the number of permits issued, and this effect holds in Model 3 with the inclusion of control variables.

Models 4 and 5 estimate the interaction effect of $\text{Democratic President} * \text{Pressure}$, with and without control variables. Model 4 demonstrates that deregulatory pressure from Congress during a Democratic administration corresponds to more permits issued, and Model 5 demonstrates that this effect remains statistically significant with the inclusion of control variables.

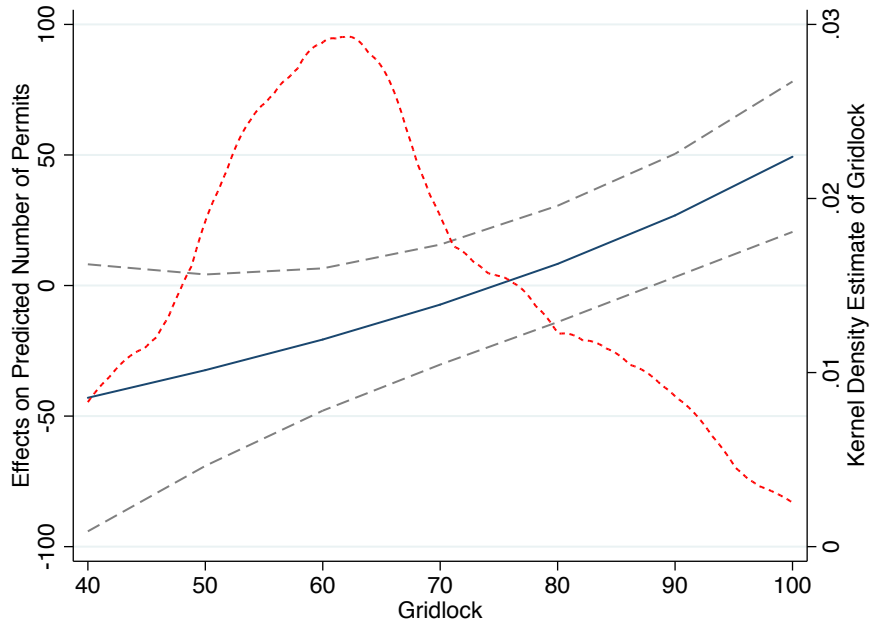
Mann (2016) hypothesizes that the president's use of policy waivers is determined by the ideological distance between the president and the pivotal member of Congress moderated by the share of governors in the president's party. The larger the ideological distance between the president and Congress, and the larger the share of co-partisan governors, the more waivers

Table 4.3: Negative Binomial Models for Federal Permits.

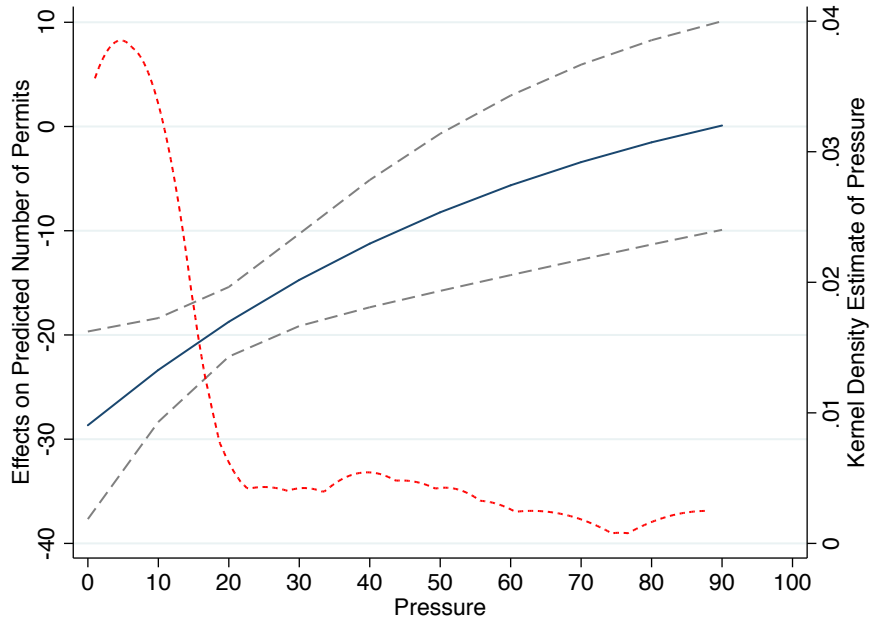
	<i>DV: Number of Permits Issued</i>				
	(1)	(2)	(3)	(4)	(5)
R President	0.00898 (0.752)	-5.676* (3.350)	-2.483*** (0.809)		
Gridlock		-0.0150** (0.00631)	-0.00836 (0.0124)		
R Pres * Gridlock		0.0856** (0.0436)	0.0332*** (0.00973)		
D President				-0.813*** (0.116)	-0.445*** (0.0636)
Pressure				-0.0229*** (0.000185)	-0.0109*** (0.00343)
D Pres * Pressure				0.0129*** (0.00250)	0.00497** (0.00246)
Pres Approval			-0.0243** (0.0115)		-0.0115** (0.00520)
Election Year			0.176** (0.0746)		0.147 (0.126)
Inflation Rate			-0.0808 (0.130)		0.0731 (0.0449)
FWS Budget Change			-0.261 (0.493)		0.968 (0.611)
Permits Initiated			0.0122*** (0.00250)		0.00424*** (0.000318)
Permit Time Trend			0.00840 (0.0255)		0.00215 (0.00304)
No Surprises FE			1.499*** (0.315)		
In Alpha	0.612 (0.673)	0.467 (0.613)	-1.708*** (0.431)	-2.149*** (0.231)	-2.673*** (0.203)
Constant	3.694*** (0.139)	4.778*** (0.392)	3.561** (1.438)	4.677*** (0.000881)	3.288*** (0.421)
Pseudo R ²	0.0000	0.0166	0.2025	0.1062	0.1515
Observations	36	36	36	22	22
Years	1982-2017	1982-2017	1982-2017	1996-2017	1996-2017

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by presidential administration in parentheses. The No Surprises fixed effect is not included in Model 5 because data for Model 5 are post-1994.



(a) Republican



(b) Democrat

Figure 4.3: Marginal Effects of President on Number of Permits Issued. 95% confidence intervals depicted with gray dashed lines. Red dashed line in plot (a) depicts the kernel density estimate of gridlock measured as the LCV score of the liberal filibuster pivot; red dashed line in plot (b) depicts the kernel density estimate of deregulatory pressure, measured as annual legislative threats to the ESA.

are submitted and approved according to Mann (2016). Though waivers and permits are not exactly the same in terms of administrative tools, they are similar. The models in Mann (2016) are presented using state-year-policy unit of analysis, but *Distance* and *Share of Co-Partisan Governors* are variables that vary only by year. Therefore, I can include the interaction of these two variables in my model as a test of Mann's hypothesis. I present the results of this test in Table A2 in the Appendix. In Table A2, Model 3 shows that the coefficient corresponding to the *R President * Gridlock* interaction maintains significance with the inclusion of the *Distance * Co-Partisan Governors* interaction. Model 5 shows that the coefficient corresponding to the *D President * Pressure* interaction also maintains significance with the inclusion of the *Distance * Co-Partisan Governors* interaction. *Distance * Co-Partisan Governors* is not a statistically significant predictor of federal permits in these models.⁶

To further assess my hypotheses, I analyze the marginal effects of the president's type across varying levels of *Gridlock* or *Pressure* in Congress. According to the Opponent Hypothesis, a Republican president relies on regulatory exemptions more if it seems Congress is unable or unwilling to pass ESA reform because he opposes the ESA. Figure 4.3a illustrates the marginal effect of *Republican President* – an opponent of the ESA – across varying values of *Gridlock*. The solid line is the marginal effect of a Republican administration, the dashed gray lines represent 95% confidence intervals, and the dashed red line is a kernel density estimate of filibuster pivot LCV scores, my operationalization of *Gridlock*.

Figure 4.3a suggests that the effect of a Republican president on the number of federal permits issued is contingent on how liberal the Senate filibuster pivot is, which corresponds to the likelihood of ESA roll back. Consistent with the Opponent Hypothesis, the more liberal the filibuster pivot is with respect to environmental protection, the higher the effect of a Republican president on the number of permits issued.

This makes sense substantively, too. If the liberal pivot had an LCV score of 40, the

⁶I ran the same models including all controls and the results were substantively the same, so I include only the unadjusted versions in the Appendix for brevity.

Senate overall would have to be quite conservative on the issue of environmental protection. A low scoring liberal pivot would likely correspond with a homogenous Congress and a low level of “gridlock” on the environment. According to the marginal effects plot, a liberal pivot at 40 corresponds with a -42.99 marginal effect (standard error 26.09, p-value 0.09). This is a -42.99 difference between a Republican and Democratic president, meaning that a Democratic president is more likely than a Republican president to issue more permits when the liberal pivot has a score of 40 on the environment. This indirectly proves the Custodian Hypothesis in that a homogeneously conservative Congress, which is more likely to pass legislation to weaken the ESA, elicits more federal permits from a Democratic administration.

At the other extreme, a liberal pivot with a score of 100 corresponds with a 49.34 marginal effect (standard error 14.7, p-value 0.001). This means that a Republican president facing a Senate with a filibuster pivot scoring 100 (out of 100) on environmental protection is much more likely to issue more federal permits than a Democratic president facing the same Senate. The kernel density plot suggests few instances where the liberal pivot reaches 100, however, as Figure 4.1 shows with the raw data, the liberal pivot is moving closer to 100 over time.

According to the Custodian Hypothesis, a Democratic president uses exemptions if it seems that Congress is mobilizing to roll back the ESA because he supports the ESA and prefers the statutory status quo. Figure 4.3b illustrates that the marginal effect of a Republican president is actually higher than that of a Democratic president on the number of federal permits issued; this is reflected in the negative differential effect. However, as deregulatory pressure increases, the effects of the two different president types converge. Substantively, we can interpret this to mean that Democratic presidents behave more like Republican presidents in issuing more permits when facing a Congress that proposes more regulatory rollbacks.

A limitation of the CBD legislative threats data is that these data do not include the multiple congressional proposals to suspend implementation of the ESA in the first year of the Republican Revolution during the Clinton administration. Thus, the kernel density estimate reflects

the particularly sample in the time period with the highest deregulatory pressure, corresponding with the final few years of the Obama administration and first year of the Trump administration.

Special Rules

Table 4.4 displays the models predicting the use of special rules. Recall that while federal permits are issued for individual projects, special rules are issued for specific categories of activity that might cause harm to an endangered species or habitat. Results of Model 1 suggest that a Republican president is less likely to issue special rules, and conversely, Democratic presidents are more likely to issue special rules. Model 2 and Model 3 estimate the interaction effect of *Republican President * Gridlock* on the use of special rules; these two models show little evidence for the Opponent hypothesis with respect to special rules. Though both coefficients for the unadjusted and adjusted models are positive, they fail to reach statistical significance.

Models 4 and 5 estimate the interaction effect of *Democratic President * Pressure* on the use of special rules. Model 4 demonstrates that deregulatory pressure from Congress during a Democratic administration corresponds to more special rules issued, and Model 5 shows that this effect remains statistically significant with the inclusion of control variables. Taken together with Model 1, the results suggest that Democratic presidents are more likely in general to issue special rules, and even more so when Congress is mobilizing to weaken the ESA. I will address the nuance of this result in the Discussion section.

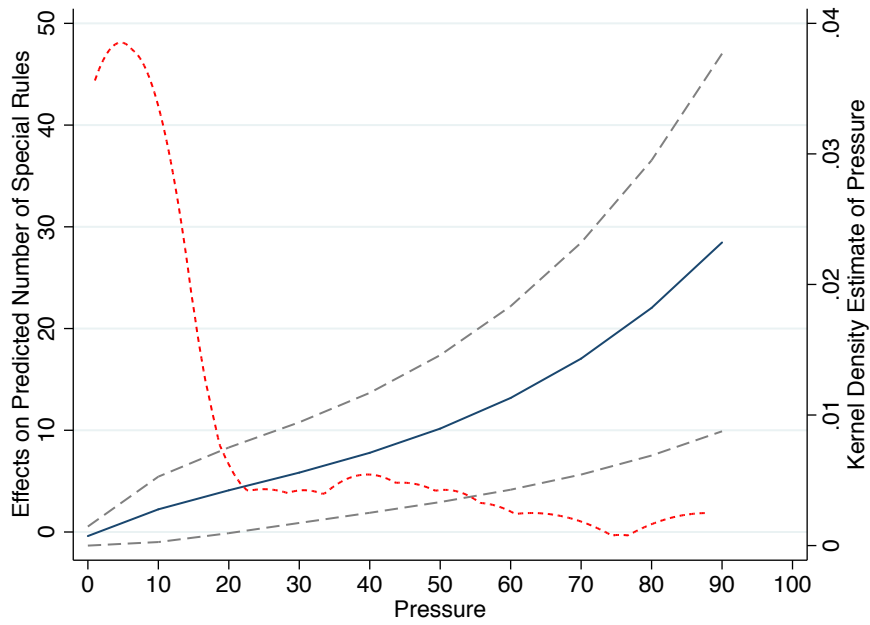
Since only the *Democratic President * Pressure* interaction reached statistical significance in predicting the use of special rules, I focus my marginal effects analysis on the Custodian Hypothesis. According to the Custodian Hypothesis, a Democratic president uses regulatory exemptions when Congress is mobilizing to weaken the ESA because the president otherwise prefers the policy status quo. Figure 4.4a depicts the marginal effects of a Democratic president on the number of special rules issued across varying levels of deregulatory pressure, measured in number of proposals in Congress to weaken the ESA. Figure 4.4a illustrates that Democratic

Table 4.4: Negative Binomial Models for Special Rules.

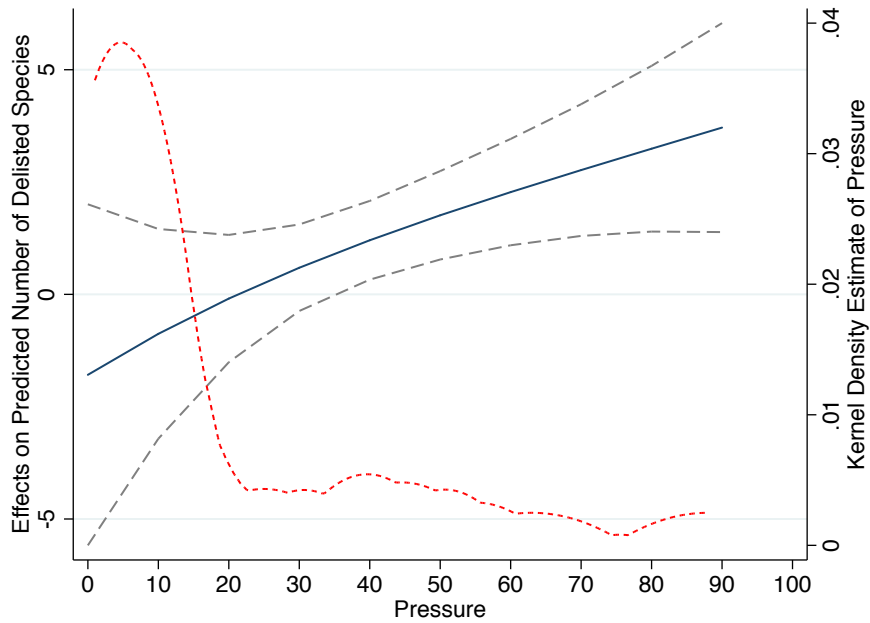
<i>DV: Number of Special Rules Issued</i>					
	(1)	(2)	(3)	(4)	(5)
R President	-0.468*	-1.198	-1.481		
	(0.260)	(1.262)	(1.550)		
Gridlock		-0.00171	-0.00299		
		(0.0153)	(0.0138)		
R Pres * Gridlock		0.0118	0.0189		
		(0.0204)	(0.0242)		
D President				-0.434***	-0.131
				(0.133)	(0.182)
Pressure				-0.153***	-0.0809*
				(0.00373)	(0.0462)
D Pres * Pressure				0.168***	0.107**
				(0.00233)	(0.0452)
Pres Approval			0.00177		0.0665***
			(0.0191)		(0.0217)
Election Year			0.599**		0.751
			(0.294)		(0.771)
Inflation Rate			-0.0741		1.171***
			(0.206)		(0.437)
FWS Budget Change			1.973		0.0172
			(3.012)		(4.276)
ESA Time Trend			0.00212		0.143***
			(0.0492)		(0.0532)
ln Alpha	0.209	0.201	-0.0712	-0.0292	-1.298
	(0.349)	(0.354)	(0.363)	(0.441)	(0.844)
Constant	1.238***	1.359	-0.866	1.549***	-10.36**
	(0.209)	(1.041)	(5.356)	(0.0170)	(4.756)
Pseudo R ²	0.0077	0.0089	0.0295	0.0540	0.2001
Observations	45	45	41	22	22
Years	1973-2017	1973-2017	1977-2017	1996-2017	1996-2017

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by presidential administration in parentheses.



(a) Democrat



(b) Democrat

Figure 4.4: Marginal Effects of Democratic President on (a) Number of Special Rules Issued, and (b) Number of Delisted Species. 95% confidence intervals depicted with gray dashed lines. Red dashed line corresponds to the kernel density estimate of deregulatory pressure, measured in the number of annual legislative threats to the ESA.

presidents are consistently more likely to issue special rules than Republican presidents, since the effect is positive across all values, and that this effect increases as pressure to deregulate increases.

Delisting Species

Table 4.5 displays models predicting species delistings. Recall that delisting species is interpreted here as the broadest type of leniency. Model 1, the bivariate party model, shows no evidence that Republican presidents delist more or less species than Democratic presidents. Models 2 and 3 estimate the interaction effect of *Republican President * Gridlock* on the annual count of delisted species. These two models, unadjusted and adjusted, show no evidence supporting the Opponent hypothesis with respect to delisting species.

Model 4 estimates the interaction effect of *Democratic President * Pressure* on delisted species without control variables. The coefficient of interest in this model, corresponding to the interaction, is positive but does not reach significance.⁷ The coefficient does reach significant with the inclusion of a single control variable in Model 5.⁸ The fully adjusted model, including all controls, produces a larger, positive, and statistically significant coefficient for the *Democratic President * Pressure* interaction (Table A3). Given that the unadjusted model does not produce a statistically significant coefficient for the interaction of interest, overfitting is of particular concern when assessing the results of the fully adjusted model. Therefore, Model 5 in Table 4.5 includes only the *ESA Time Trend* control variable, and the fully adjusted model is included in Table A3 in the Appendix.

As with the analysis of special rules presented above, I focus the marginal effects analysis on the Custodian Hypothesis since only the *Democratic President * Pressure* interaction reached statistical significance in predicting species delistings. The Custodian Hypothesis states that a Democratic president will delist more species as Congress proposes more cutbacks to the ESA,

⁷The p-value is 0.16.

⁸p-value=0.04.

Table 4.5: Negative Binomial Models for Delisted Counts.

	<i>DV: Number of Annually Delisted Species</i>				
	(1)	(2)	(3)	(4)	(5)
R President	-0.424 (0.424)	0.304 (2.012)	0.250 (1.361)		
Gridlock		0.0465*** (0.0159)	0.0261*** (0.00940)		
R Pres * Gridlock		-0.00327 (0.0288)	0.000551 (0.0233)		
D Pres				-0.202 (0.300)	-0.215 (0.190)
Pressure				0.0182*** (0.000186)	-0.000188 (0.00469)
D Pres * Pressure				0.00878 (0.00625)	0.00740** (0.00365)
Pres Approval			-0.00665 (0.0130)		
Election Year			-0.0464 (0.292)		
Inflation Rate			-0.191 (0.130)		
FWS Budget Change			-1.935 (1.316)		
ESA Time Trend			0.000491 (0.0312)		0.0891*** (0.0207)
ln Alpha	-0.228 (0.477)	-0.653 (0.444)	-1.017** (0.518)	-0.973 (0.676)	-1.381* (0.784)
Constant	0.788** (0.370)	-2.661** (1.328)	1.632 (1.864)	0.468*** (0.000884)	-2.262*** (0.628)
Pseudo R ²	0.0089	0.0772	0.1015	0.0860	0.1220
Observations	45	45	41	22	22
Years	1973-2017	1973-2017	1977-2017	1996-2017	1996-2017

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by presidential administration in parentheses. The coefficient of interest in Model 4 is out of significance range with a p-value of 0.16. Given the small sample size and concern for overfitting, Model 5 controls for Time Trend only. See Table A3 for model with full controls.

in an attempt to diffuse some of the deregulatory pressure. Figure 4.4b depicts the marginal effects of a Democratic president on the number of delisted species across varying levels of deregulatory pressure, measured in number of proposals in Congress to weaken the ESA. Figure 4.4b illustrates that as the number of congressional attempts to roll back the ESA increases, the marginal effect of a Democratic president on the number of delisted species also increases.

4.4 Discussion

The results demonstrate that Democratic presidents are more likely to list new species as endangered or threatened. However, the results also indicate that Democrats under pressure to deregulate use executive discretion and a variety of administrative tools at their disposal to relieve pressure to roll back the ESA.

Republican presidents, on the other hand, use executive discretion to delay the listing of new species under the ESA and offer more individual exemptions when Congress is unable or unwilling to pass more significant roll backs. There is little evidence that Republican presidents issue special rules or delist species at greater rates when gridlock prevents policy revision in Congress. Why don't Republican administrations use these tools more often to offer broader exemptions in periods of congressional gridlock?

It is possible that the president's position relative to a certain policy – whether he is an Opponent or a Custodian – determines how far in the future he looks in his decision-making. For example, a Policy Custodian may be particularly concerned with preserving a policy in the long-term. Realizing that moderate policies have a better chance at survival, a Policy Custodian may be incentivized to moderate the policy more using multiple tools aimed to please multiple interests. On the other hand, a Policy Opponent who desires rollback or deregulation may be less inclined to put resources into relaxing the policy across multiple avenues, and may be more interested in sweeping reform. The options for sweeping reform are limited when Congress is

unable to pass revisions; a Policy Opponent can choose to wait and hope for reform in a future administration, delaying implementation and granting individual permits in the meantime, or a Policy Opponent can attempt to rewrite the rules within the bounds of executive discretion.

A closer look at special rules, for example, reveals how different tools may be more appealing to a president seeking leverage to moderate the policy versus a president seeking roll-back. Threatened species have the same blanket protections as endangered species under the ESA and special rules allow an administration to relax these protections for threatened species for specific activities that might harm these species on a case-by-case basis. This is a more favorable regulatory arrangement for Policy Custodians since the blanket protections offer threatened species a high level of protection generally, and each special rule is a compromise to appease ESA critics and special interests. The special rules offer Policy Custodians leverage as they continue to list more species (Table 4.2). This also feeds the Policy Custodian's status quo preference.

Policy Opponents, on the other hand, would be less driven to issue special rules indiscriminately. First, special rules are not formally petitioned or applied for like listings or permits. Second, it would require a lot of bureaucratic work to draft up special rule after special rule to relax protections for as many threatened species as possible. A Policy Opponent's approach might be to use executive discretion to change the blanket rules for threatened species. In fact, the Trump administration has proposed exactly that. As of this writing, the Trump administration is seeking to reverse the special rules procedure by removing the blanket ESA protections for threatened species and deciding to add any additional protections for threatened species on a case-by-case basis (Green, 2018).

Another possible explanation is that broader ESA exemptions require resources and expertise to process and Policy Opponents are unwilling to invest these resources in the FWS. This would explain why Policy Opponents delay listings – divert resources away from broadening the regulatory scope and increasing burden on industry – but at the same time would issue more

ESA permits. It is possible that Republican administrations tended to divert resources away from other FWS functions and toward processing permits to ensure that economic development projects are minimally impacted by the ESA.

4.5 Conclusion

Taken together, the results presented in this chapter support the hypotheses derived from the theory of regulatory leniency presented in Chapter 2. Though the explanatory variables testing these hypotheses did not all reach statistical significance across all measures of leniency, these results offer more information regarding the preference for different leniency mechanisms in different types of administrations.

I derive three hypotheses from the theory of regulatory leniency and use four empirical measures of leniency to test these hypotheses. First, I show that the president's position toward a policy determines the extent to which that policy is implemented. I interpret slow or delayed policy implementation to be a form of leniency that is not necessarily an active exemption. I hypothesize that a Policy Opponent is more likely to slow implementation regardless of Congress's position and status on the policy. In other words, the president's implementation of the policy is not conditional on Congress, but rather determined by his own position toward the policy. I show that Republican administrations – more likely to *oppose* the regulatory constraints of the ESA – are less likely to list new endangered or threatened species, a key aspect of ESA implementation. Conversely, Democratic administrations – more likely to support the protections extended under the ESA – are more likely to list new species.

Next, I hypothesize that a president's use of policy exemptions is conditional on Congress's status with respect to policy revision. I measure exemptions in the number of federal permits issued, the number of special rules issued, and the number of species delisted. I show that Republican presidents are more likely to issue federal permits offering exemptions from the ESA

when Congress is unlikely to roll back the policy. However, I do not find evidence of Republican presidents using executive authority to issue special rules or to delist species more in periods of congressional gridlock. This may be a manifestation of Policy Opponents biding their time until Congress is able to pass sweeping rollbacks, or a byproduct of Policy Opponents' bias toward limiting resources and FWS functions to necessary tasks.

On the other hand, I show that Democratic presidents are more likely to offer policy exemptions when facing deregulatory pressure from Congress across all three measures. Conditional on pressure from Congress in the form of bills seeking to weaken the ESA, Democratic presidents issue more federal permits, issue more special rules, and delist more species. These results are consistent with the theoretical assessment of Policy Custodians as custodians of the status quo aiming to preserve both the protections offered by regulation and the leverage available for moderating the policy under pressure.

Chapter 5

State Politics and Regulatory Leniency

“Political power, like electricity, does not run all in one direction,”

– William Anderson, quoted in Nugent (2009).

5.1 Introduction

On January 9, 2018, Secretary of Interior Ryan Zinke announced that Florida would be exempt from an offshore drilling rights lease sale plan that would significantly expand drilling areas to include almost the entire outer continental shelf. Nearly all of the coastal state governors expressed concern about the plan, citing the likely negative impacts on coastline and tourism; Florida’s exemption appeared to be a political favor from the Trump administration to Florida governor Rick Scott (R) who was planning a run for Senate after being term limited out of the gubernatorial race. Phone records, text messages, and emails reviewed by *Politico* as part of a public records request later affirmed the perception that “the Trump administration’s decision to reverse course and remove Florida from the list was carefully choreographed to give Scott a political win in his widely expected challenge...to unseat [Democratic Sen. Bill] Nelson” (Dixon, 2018).

Florida’s exemption from the broadly unpopular offshore drilling plan is a case of pres-

idential particularism. A particularistic president leverages administrative power to target benefits strategically. Presidential particularism has been documented in the distribution of benefits from federal grants (Hudak, 2014; Kriner and Reeves, 2015) to emergency declarations and base closures (Kriner and Reeves, 2015), but political favors might also motivate the spatial distribution of regulatory exemptions. This chapter is the first study to test the reach of presidential particularism with respect to regulatory exemptions.

Previous chapters of this dissertation introduce regulatory leniency as a tool for presidents to achieve their policy goals, including deregulation or safeguarding a policy from repeal. Chapter 4 demonstrates that the timing of leniency use correlates with the president's position on a policy and legislative action or inaction. I show that presidents who oppose a federal policy, but cannot expect policy reform from Congress, use leniency tools to soften the policy, while presidents who support an existing federal policy, but face threats of policy reform in Congress, use leniency tools to appease policy critics. Building on previous chapters, I also test a set of hypotheses rooted in the premise that the president is motivated by his policy goals. A Policy Opponent is interested in deregulation to alleviate burdens on industry, and a Policy Custodian is interested in preserving the existing policy. The second set of hypotheses is rooted in the theory of the particularistic president. Finally, I test the possibility that variation in state administrative resources and economic costs of the regulation drive decisions regarding the distribution of leniency benefits.

5.2 Background

What drives the distribution of leniency? Are they political, policy, or resource and economic concerns? Regulatory leniency is a particularistic benefit that can be used by the federal government to reward or incentivize states toward electoral or policy ends. It is also a benefit lobbied for by state governing officials offering the competitive advantage of relaxed

federal standards and lower costs of compliance (Jensen, 2016). With elections and policy at stake, presidential administrations and state governments must actively persuade each other to ensure their preferred outcomes. Before proceeding, it is helpful to review mechanisms through which the federal and state governments amplify their concerns and priorities, and how these mechanisms have evolved over time. This brief section introduces several mechanisms that have evolved within the American federal system to offer avenues for the federal government to influence state policy – e.g., through incentivizing the implementation of federal policy – as well as avenues for state governments to influence federal policy.

5.2.1 Federal Influence Over State Policy

Franklin Delano Roosevelt’s New Deal programs greatly expanded the federal government’s presence in the states in an attempt to provide jobs and stimulate the economy during the 1930s in response to the Great Depression. Grants-in-aid from the federal government to state governments intensified interactions between federal and state agencies, and provided avenues for federal agencies to simultaneously professionalize and influence state agencies (Gais and Fossett, 2005).

Federal grants-in-aid to states continued to grow and diversify in type and across program areas into the 1970s, but regulation and rule-making by the federal executive also increased in the 1960s and 1970s. In fact, there was a notable shift away from financial incentives toward regulation as a way to influence states. According to Gais and Fossett, this shift was the result of “disenchantment with positive and indirect incentives,” slower economic growth, and tensions over the federal budget (2005: 496). Ronald Reagan’s Administration in the 1980s further cut federal spending and outsourced the delivery of many government services to state or private entities, but also increased the number of regulations governing the entities delivering these services, particularly favoring direct orders (Gais and Fossett, 2005; Windholz, 2017). Gais and Fossett describe the Reagan Administration as a consolidation of regulatory and administrative

power at the top of the federal executive branch:

With respect to intergovernmental regulations, the Reagan presidency was distinctive in its reliance on administrative rather than legislative means to achieve its goals. Rather than asking Congress to pass new laws or amend old ones, the administration altered federal regulatory policies through administrative rule making, selective cuts in federal staffing, aggressive reviews by the Office of Management and Budget of the costs and benefits of agency actions, and appointments of ideological allies to top agency posts. Sometimes these management powers were used to reduce regulatory burdens, and sometimes to tighten controls. What was clear, however, was that the choices regarding the severity and character of federal control over the states were increasingly in the hands of top political executives and the presidency. (Gais and Fossett, 2005: 498).

During the 1990s and into the 2000s, the George H. W. Bush, Clinton, and George W. Bush administrations used flexible block grants and waivers to increase state discretion in policy implementation. These new flexibility mechanisms were sometimes accompanied by measures of accountability, e.g. performance standards, meaning that states had to meet certain standards in order to continue to qualify for federal funding. A common critique of this arrangement was that the cost of reaching the federal standard was uncertain or differed for each state, and the amounts appropriated through block grants did not sufficiently offset the financial burden placed on states to meet the standard. According to Gais and Fossett, one of the primary administrative innovations of this time, characterized by increased discretion and flexibility to the states, was the precedent set by federal and state executives negotiating performance indicators (2005: 502). These federal-state negotiations provide a platform for states to negotiate leniency from the federal government with respect to federal laws that do not align with state policy preferences.

5.2.2 State Influence Over Federal Policy

State governments use their role as implementers and enforcers to influence federal policy to promote their own interests. In his book, *Safeguarding Federalism: How States Protect Their Interests in National Policy Making*, John Nugent creates a typology of state interests

based on variation in the type of benefit states seek to secure from the federal government, and the scope of state consensus. Nugent defines three types of state interests: legal decision-making authority, funding for federal programs, and flexibility in implementation and enforcement of federal programs. He defines scope as universal (an interest shared by all states), categorical (an interest shared by categories of states), and particularistic (an interest shared by one or a few states). (2009: 22)

Nugent then categorizes state attempts to influence federal policy as pre-legislative, legislative, and post-legislative. For example, before Congress considers federal legislation on a policy issue, state legislators may pass quality legislation at the state-level to retain authority and obviate the need for Congressional action. Should Congress decide to write and debate new federal laws in a policy area of state interest, state officials can attempt to influence the content of federal legislation by providing language or lobbying for specific provisions. Finally, state officials can use the discretion delegated to them in policy implementation to enforce federal rules according to their own interests. (2009: 6)

If a state fails to attain a preferred benefit at one stage of the policymaking process, there are other opportunities to affect the policy's content, implementation, interpretation, or reauthorization (Nugent, 2009: 215). Presidential transitions, for example, offer an opportunity for states to introduce their own policy ideas and priorities to an incoming administration. The President of the Association of Fish and Wildlife Agencies (AFWA) reveals this tactic in AFWA's 2016 Annual Report:

[O]ur western states directors stimulated an effort to design and conduct an in-depth survey of state fish and wildlife agencies to inform and influence the transition and new federal agency leadership in powerful ways. This excellent groundwork in 2016 positioned the priorities for AFWA and interests of our member agencies front and center with key members of the Trump administration transition team and will certainly have a lasting impact going forward. (*Message from the President*)

The administration's rule-making process offers additional opportunities for states to exert influence. State officials can coordinate comments during the public comment period during

the rule-making process. State governors associations can lobby against the finalization of rules they opposed. Furthermore, state officials can lobby presidents to issue executive orders directing federal agencies to interpret federal statutes in a particular way or devolve more authority to states.

In terms of federal policy implementation, state officials sometimes enjoy discretion to interpret vague terms in legislation. Notably, the No Child Left Behind education statute allows each state to define the meaning of student “proficiency” as a standard for education. States sometimes have authority to determine program funding or determine program eligibility. Some policies, notably federal welfare, healthcare, and education policies, allow states to apply for waivers. Street-level bureaucrats have discretion when implementing and enforcing federal policies, often redefined by state officials and bolstered by informal norms (Keiser and Soss, 1998).

Nugent writes: “State officials may face powerful political incentives not to expend money or administrative effort in the service of federal policies, and they may simply drag their feet when it comes to meeting federal deadlines or performance standards” (2009: 210). Most environmental laws, such as the Endangered Species Act and the Clean Air Act, include a partial preemption provision. This arrangement means that state plans for policy implementation and enforcement must be approved by the implementing federal agency. Once approved, the state is responsible for carrying out the plan. If the state fails to implement and enforce the policy according to the federally-approved plan, the federal agency reassumes authority over implementation and enforcement. This arrangement provides an incentive for states to comply in order to avoid giving up authority.

Federal agencies, on the other hand, have a strong incentive to ensure states comply with implementation and enforcement. The citizen-suit provision in many environmental policies means that private citizens and non-governmental organizations can sue a federal agency for not implementing and enforcing the federal law. Thus, to avoid litigation, federal agencies must ensure state efforts to implement and enforce are sufficient.

5.3 Hypotheses

5.3.1 Presidential Particularism

Electoral Particularism

Scholars have documented the particularistic behavior of presidents and their administrations. “Presidents systematically use their leverage over policies from base closings to budgets to target federal benefits to battleground states in search of votes; to reward their core partisan base; and to help members of their party in Congress” (Kriner and Reeves, 2015: 11). The state-centered, winner-take-all design of the Electoral College incentivizes the president to use administrative authority as a campaign tool, even though the normative hope is that the administration works for the universal good (Hudak, 2014; Kriner and Reeves, 2015). Particularistic presidents pursue policy strategies that disproportionately benefit or prioritize a narrow portion of the population at the expense of the remaining population. More specifically, Kriner and Reeves (2015) show that in election years presidents tend toward electoral particularism, meaning they offer benefits to swing states; these results are also supported in Hudak (2014).

While Kriner and Reeves (2015) measure benefits using disaster declarations, military base closures, and federal grants, leniency is another way in which presidents may bestow particularistic benefits by granting regulatory exemptions to a small portion of the population. An electoral strategy suggests the president minimizes regulatory costs for electorally competitive states. The *Electoral Strategy Hypothesis* predicts swing states will benefit most from regulatory leniency.

Electoral Strategy Hypothesis: Swing states are granted more leniency in election years.

Partisan Particularism

Kriner and Reeves (2015) find that in non-election years presidents offer more benefits to core partisan states. A partisan strategy suggests that the president minimizes regulatory costs for co-partisan states. As leaders of their political party, presidents are incentivized to ensure their policy agenda rewards co-partisans (Kriner and Reeves, 2015: 124). This bias can manifest in two ways. First, following the logic of Kriner and Reeves (2015), presidents pursue a policy agenda that rewards their core voting bloc. This particular motivation would predict a relationship between most recent presidential election returns and rewards in the subsequent term. The president's core partisan voter states would benefit most from regulatory leniency.

***Partisan Strategy Hypothesis 1:** Core partisan states are granted more leniency than opponent states.*

Another possibility is that presidents offer disproportionately more benefits to co-partisan governors. In this case, the president is motivated by the desire to support co-partisan governors and a sense of indifference toward opponent governors. Governors, as chief executives of the state government, must grapple with the implementation of federal policy. This means bearing some if not all of the cost. Regulatory leniency reduces costs of compliance with federal law, providing a particularistic benefit to those granted federal exemptions.

***Partisan Strategy Hypothesis 2:** Co-partisan governors are granted more leniency than opponent governors.*

5.3.2 Presidential Policy Strategy

In Chapter 4, I demonstrated that the president's position toward an inherited policy matters in determining the use of leniency over time. In this chapter, I test whether a president's policy position is a contributing factor in determining which states are offered more leniency.

Traditionally, political scientists have focused on presidential policy-making at the national level. Presidents negotiate with Congress, or take unilateral action to influence policy.

Recently, a few scholars have noted that presidents can also influence policy at the state-level. According to Gais and Fossett (2005), “In the last two decades...the executive branch has used a growing range of administrative tools to negotiate directly with states over specific policies or to alter the context of state policy making without specific congressional approval” (487). Elizabeth Mann (2016) suggests that presidents are especially likely to attempt policy-making at the state-level when Congress is unable or unlikely to move policy in the direction the president prefers and there are sufficient co-partisan governors to ensure regulatory flexibility is used in the states to further the president’s agenda. In Chapter 4 of this dissertation, I show that the president issues permits offering individual and state-level exemptions to federal rules in order to stave off Congressional threats to a policy he supports.

When a president opposes the policy status quo and Congress is gridlocked on the policy issue, he is more likely to issue federal exemptions (see Chapter 4). In theory, a Policy Opponent opposes regulation because of the costs imposed on the national economy. Rather than grant leniency indiscriminately, a Policy Opponent may grant more leniency to states vulnerable to higher economic costs from the policy in question. This hypothesis predicts that an interaction between a Policy Opponent and state economic cost will result in more federal exemptions.

Policy Opponent Strategy Hypothesis: *A president who opposes an inherited policy will grant leniency to states with highest economic cost.*

A president who supports the policy status quo grants leniency to appease policy critics (see Chapter 4). I expect a Policy Custodian to be selective in terms of which states are awarded exemptions and I expect him to grant more leniency to states that oppose the policy he supports. This is contrary to the theory in Mann (2016), but Mann generally assumes the president is motivated to change national policy and is therefore looking for ideologically-safe partners in state government. I argue that presidents are sometimes forced to relax federal rules they support in order to prevent further rollback. In this case, Policy Custodians seek out those states that oppose the policy he supports in order to placate constituents in those states and quell any national

momentum against the policy.

Policy Custodian Strategy Hypothesis: A president who supports an inherited policy will grant leniency to policy opponent states.

5.3.3 Administrative Capacity

Another possible explanation for variation in compliance with federal standards is that state governments vary in administrative capacity to implement federal policy. When the federal government passes a law and sets a federal standard, the state bureaucracy is charged with implementing policy to meet the standard. Therefore, compliance with the federal standard at the state level fundamentally depends on the state bureaucracy's ability to implement and enforce the federal policy.

There are several ways in which bureaucracies might lack the capacity to comply with federal directives. State governments may vary in personnel quality, organizational structure, and financial resources (Huber and McCarty, 2004). Variation may result from diversity across states in natural resource endowments and the ways in which rents from these resources feed into the public sector. Additionally, differences in state political culture and norms may affect personnel quality and retention, which also contributes to variation in administrative capacity.

State governments differ in the way they prioritize policy areas. Specifically, governors might direct resources to certain initiatives and ignore others based on their policy agenda. A few scholars have conceptualized state executive spending decisions according to a developmental-redistributive tradeoff, where developmental priorities include investments in physical and social infrastructure and redistributive priorities include state investments structured by class rather than geography (Barrilleaux and Berkman, 2003; Peterson, 2012). Regardless of the precise characterization, trade-offs are certainly inherent to governance and administrative capacity with respect to specific policy implementation goals does vary across states.

For decades, scholars have quantified variation in U.S. state administrative performance

based on measures of personnel quality vis-à-vis professionalism, political neutrality, and representativeness (Sigelman, 1976; Barrilleaux, Feiock and Crew, 1992). Complementary studies based rankings of U.S. state administrative performance on the characteristics of organizational reforms in the 1990s (for a comparison of two measures, see Burke and Wright (2002)). Finally, financial resources from state revenue and spending levels have been shown to vary across states and time (Alt and Lowry, 2014).

Capacity is conceptually, theoretically, and empirically linked to performance and policy implementation across levels of government (Lipsky, 1980; Scholz and Wei, 1986; Hasenfeld, 1991; Alt and Lassen, 2014; Jaeger, 2016). Burke and Wright describe capacity as “an antecedent to performance” (2002: 17). Huber and McCarty (2004) and Ting (2011) formalize the relationship between low administrative capacity and low performance in policy-making. Jaeger (2016) empirically demonstrates that availability of financial resources predicts local implementation of federal immigration policy. The general consensus is that administrative capacity is positively correlated with policy implementation and compliance with federal rules.

Administrative capacity may also relate to the magnitude of the implementation task, which varies across states. States are differentially impacted by immigration and demographic change, attract different federally-regulated industries, and are endowed with different kinds of natural resources. The *Administrative Capacity Hypothesis* focuses on state governments’ level of administrative investment relative to administrative demand. The administrative capacity model predicts that leniency is offered to states that fail to adequately invest in the implementation of federal policy.

Of course, if leniency were a definite outcome of limited state investment in federal policy implementation then we would expect all states to limit state investment under the assumption they will benefit from federal leniency. There is substantial observable variation in administrative capacity to suggest the relationship is not so determinative and additional factors are at play. It is likely, for example, that some states’ political incentives align with federal policy goals and

investment in the state-level administration of federal regulation is politically expedient.

Administrative Capacity Hypothesis: States with low capacity relative to the magnitude of the task are granted more leniency from the federal government.

5.3.4 Economic Cost

As mentioned above, states are differentially impacted by policy problems which may affect their level of administrative investment toward managing these problems. States are also differentially impacted by federal law. For example, federal policy seeking to elevate lagging states to a national standard based on a given policy metric may be more costly for some states to implement and less costly for other states to implement. Variation in economic cost of federal policy implementation across states may correlate with variation in federal offers of regulatory leniency to states.

There are a few potential mechanisms linking economic cost of implementation and federal leniency. For example, the federal government has a direct incentive to minimize economic costs of regulation to maintain a healthy national economy. It is well documented that economic strength correlates with political benefits, including job approval and electoral success (Kramer, 1971; Fair, 1978; Erikson, 1989; Brody, 1991). Therefore, the federal government may opt to grant leniency to states with high costs of compliance out of concern for the national economy and the incumbent party's future success.

State governments also have an incentive to encourage a healthy economy within their state by attracting and retaining a variety of industries. State governments may hesitate to implement federal regulations that increase costs to industries in their state. Increasing regulatory costs to state industries may threaten any financial windfalls to the public sector and campaign contributions to the incumbent party. State elected officials may also be sensitive to the political repercussions associated with economic costs of implementing federal regulations.

Federal and state governments benefit financially and politically from healthy national

and state economies. The federal government may wish to offer regulatory leniency to states with the highest economic costs of compliance in order to minimize the impact of federal regulation on the national economy; state governments may request exemptions from federal rules, or lobby for new avenues for leniency, in order to minimize the impact of federal regulation on state economies.

***Economic Costs Hypothesis:** States with higher economic costs of compliance are granted more leniency.*

5.4 Case Study

I test these groups of hypotheses by examining federal implementation of the Endangered Species Act (ESA) in the United States. The ESA is a national policy and the U.S. domestic implementation mechanism of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The aim of the treaty and the accompanying U.S. law is to protect species threatened with extinction as a result of human activities. Congress passed the Endangered Species Act (ESA) in 1973 and delegated enforcement of the ESA to the US Fish and Wildlife Service (USFWS) in the Department of Interior.¹ The ESA provides USFWS with statutory authority to:

1. List species as threatened or endangered with extinction,
2. Require all federal agencies to consult with USFWS on projects that might affect listed species or their habitat, including federal approvals of private projects,
3. Enforce the federal prohibition against harming listed species or their habitat,

¹The ESA is technically jointly enforced by the USFWS in the Department of Interior and the National Marine Fisheries Service (NMFS) in the Department of Commerce. With respect to the administrative tools used to offer regulatory leniency, the USFWS is overwhelmingly the primary agency responsible for negotiating with landowners who participate in these programs. An extension of this research agenda might explore whether NMFS offers regulatory leniency in the context of property rights/quotas for fisheries.

4. Issue permits allowing the harm of listed species or habitat incidental to otherwise lawful activities.

Endangered species management provides an ideal case to investigate the role of leniency because this policy issue satisfies the important conditions. First, the policy is a prohibitive, one-size-fits-all policy as written in the statute. Once a species is listed as endangered or threatened, it is protected through universal land and water use restrictions. This type of universal prohibition across a multitude of species and their habitat ranges provides ample opportunity for exemptions. Second, the policy covers a large geographic scale and is thus susceptible to heterogeneous preferences. While there is generally broad popular support for endangered species protection, the costs are inherently borne by a concentrated set of interests, particularly those industries that are most threatening to species or their habitat. This feeds demand for exemptions.

Endangered species management, often framed by critics as the federal government's attempt at land use control, lends itself to polarizing views on the issue and contention in Congress. In fact, the ESA and the programs implementing it have not been reauthorized by Congress in over twenty years in spite of regular attempts to do so. Contention in Congress makes policy-making and reform more likely to occur in the executive branch through negotiations with states (Gais and Fossett, 2005). Over the course of a few decades, an issue arose regarding the efficacy of the law that needed to be addressed through amendment and reform. The perverse incentives resulting from the regulatory structure of the law became apparent. Reports that private landowners were preemptively destroying habitat to discourage species from inhabiting their land and to limit the ESA's reach on their property began to surface; the effects were measurable (Lueck and Michael, 2003).

The absence of legislative updates and fixes to the ESA afforded the executive branch the opportunity to initiate its own set of reforms to address this and other problems. In the mid-1990s, USFWS began to offer special exemptions tailored to nonfederal landowners in response to chronic noncompliance with the ESA. This involved lowering the cost of compliance

and promising regulatory leniency even if conditions changed in the future. In other words, if preserving habitat attracted more endangered species, a landowner with a permit would not be subject to additional property restrictions or commitments. The fear of growing federal restrictions was perceived to be the primary driver of preemptive habitat destruction among property owners.

5.4.1 Assurances of Regulatory Leniency

I focus on two types of permits in this study: Incidental Take permits and Enhancement of Survival permits. Incidental Take permits are associated with Habitat Conservation Plans (HCP).² Though these permits were administratively available following the 1983 ESA amendments, the “No Surprises” provision enacted by the Clinton administration in 1994 added important assurances. The “No Surprises” assurances guaranteed to permit-holders that their permits would not be void if, for example, the endangered populations on their property grew or if the listing status of a species changed. Before these formal assurances were made in 1994, the prior permit regime offered no such protection, prompting the National Association of Home Builders to write in their Guide to Endangered Species Regulation: “the highest level of assurance that a property owner will not face an ESA issue is to maintain the property in a condition such that protected species cannot occupy the property...This is referred to as the ‘scorched earth’ technique” (1996; quoted in Lueck and Michael, 2003).

Enhancement of Survival (EOS) permits were initially intended for researchers and zoos, but around the time the Clinton administration announced the “No Surprises” initiative for HCPs, Enhancement of Survival permits were also adapted for new voluntary conservation programs. Landowners who enrolled in voluntary Safe Harbor Agreement (SHA) beginning in 1995 or Candidate Conservation Agreement with Assurances (CCAA) beginning in 2000 were issued Enhancement of Survival permits. SHAs and CCAs contain assurances similar to those pro-

²The plan is a prerequisite to the permit.

vided by the “No Surprises” provision for HCPs. SHAs are voluntary agreements that apply to species that are already federally listed as threatened or endangered with extinction. CCAAs are voluntary agreements that apply to species that are not yet federally listed but that have been identified by USFWS as “candidates” for listing. The important point here is that though the administrative mechanisms are a bit different for HCPs, SHAs, and CCAAs, all permits included in this study provide landowners the assurance of regulatory leniency from the federal government irrespective of changing legal or ecological conditions.

The primary purpose of permits-with-assurances is to provide more regulatory certainty and lower the cost of compliance for nonfederal landowners. Regardless of whether the permit is affiliated with an HCP, SHA, or CCAA, it is negotiated on a case-by-case basis between USFWS and the individual party or parties. An HCP or a voluntary agreement may involve one species, or many. Typically, the nonfederal landowner – a private landowner, or a state, local, and tribal government – applies with USFWS to initiate the process, but there is heavy federal involvement and encouragement throughout the process so true initiating actor is sometimes obscured. In exchange for these permits and regulatory leniency assurances, the landowner agrees to participate in some habitat management activities on their property. These requirements are described in greater detail below.

5.4.2 Net-Neutral Habitat Management

HCPs and Incidental Take (IT) permits require landowners to agree to net-neutral habitat management. As mentioned above, an IT permit allows nonfederal landowners to engage in projects or activities that may cause harm to protected species or their habitat. In order to obtain an IT permit from USFWS, landowners must develop a Habitat Conservation Plan (HCP), usually with the help of a USFWS Field Office. HCPs specify the types of activities the landowner plans to engage in, the species and habitat affected by these activities, the ways in which the activities may be harmful, and alternatives the landowner considered, including reasons why

the alternatives were not pursued. HCPs also must include a list of measures taken to monitor, minimize, and mitigate harm to protected species and habitat.

The process of developing an HCP involves negotiating appropriate mitigation measures with USFWS (*GAO Report to Congress*, 1994). Mitigation measures are actions intended to reduce potential adverse effects; these actions can include preservation of existing habitat through federal acquisition or conservation easement, enhancement or restoration of degraded habitat, or creation of new habitat. The key component of HCPs is that the impact to the protected species and habitat is net-neutral, so that landowner is merely offsetting the adverse impact on species incidental to the otherwise lawful activity taking place on the landowners property.

HCPs are approved by the USFWS Regional Director and an IT permit is issued. HCPs are evaluated based on the following criteria:

1. Harm is incidental to an otherwise lawful activity,
2. Impacts are minimized and mitigated to the extent practicable,
3. Funding is provided,
4. Harm to the species or habitat will not reduce likelihood of species recovery.

Generally, if these conditions are met along with the requirements of any other relevant laws, a permit is issued (*HCP Fact Sheet*, 2017). Violation of the terms of the HCP would result in illegal “take” under Section 9 of the ESA,³ in which case the USFWS may send the landowner a notice of noncompliance before pursuing legal action.

5.4.3 Net-Positive Habitat Management

Net-benefit leniency is targeted at property owners who want to contribute to the recovery of species or habitat, but are constrained by regulatory uncertainty. To put it plainly, if a

³The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Harm includes habitat modification that impairs a species essential behavior, including breeding, feeding, or sheltering (*HCP Fact Sheet*, 2017)

landowner engages in an activity that attracts protected species to his or her property, the presence of the protected species results in new property use restrictions under the ESA, possibly limiting economic returns from the property. Thus, net-benefit leniency offers property owners an exemption from future use limitations under the ESA so long as the activities on the property provide a net conservation benefit contributing to species or habitat recovery. Examples of conservation benefits include: maintenance or restoration of existing habitat, reduced habitat fragmentation, increased numbers of species in question, creation of buffer zones for protected areas, experimentation of new habitat management techniques (*SHA Fact Sheet, 2017*). Once landowners commit to certain conservation strategies in a SHA or CCAA with USFWS, they receive the assurance that they will not have to change these activities even if circumstances change (e.g., federal protection status increases, number of individuals present on the property increases).

The process for setting up an SHA or CCAA begins with the establishment of contact between the property owner and USFWS, usually the nearest USFWS field office. Contact is sometimes initiated by the property owner, and sometimes USFWS “in concert with state agencies or other federal agencies” present property owners with a proposal for a voluntary agreement (*SHA Fact Sheet, 2017*). The two parties collaborate to gather information including a map of the property, proposed management actions, and information regarding the candidate or listed species on the property. This information is used to develop and describe baseline conditions with respect to species population estimates and distribution, and habitat characteristics that contribute to species use of the property (*SHA Fact Sheet, 2017*). The baseline then informs negotiations between the property owner and USFWS regarding objectives for land use for the property owner and habitat quality for USFWS to meet the “net-benefit” standard. With USFWS help, the property owner drafts an SHA or CCAA and submits an application for an EOS permit. The draft agreement and application are subject to internal review and public comment to ensure that all the relevant requirements are met. The agreement and permit expire, and the du-

rations vary, but they can be renewed as long as the parties mutually agree. If the property owner chooses to sell the property, the new owner can become party to the agreement and USFWS will honor the regulatory leniency assurance.

SHAs and CCAAs take three forms: individual, template, and programmatic. Individual voluntary agreements are the simplest form, in which an individual property owner signs an agreement directly with USFWS. Sometimes, a species would benefit from a common set of conservation actions on habitat spanning multiple properties. Both template and programmatic agreements allow USFWS to reduce administrative burden by developing a template agreement with terms that apply to multiple properties, and processing EOS permits in batches (Bean, 2017). This saves USFWS the redundant cost of undergoing the same process over and over for similar properties where the terms would be nearly identical.

Under a template agreement, individual property owners agree to the general terms and enter the agreement with USFWS directly; these property owners are then issued EOS permits directly, much like individual agreements. Under a programmatic agreement USFWS issues one EOS permit to a single program administrator who takes on many of the enrollment and monitoring functions the USFWS would otherwise take on. The program administrator works with USFWS to develop the programmatic agreement specifying general baseline conditions and outlining the necessary conservation actions for species recovery; property owners must commit to these actions in order to enroll in the agreement with the administrator. The administrator issues “Certificates of Inclusion” to property owners upon enrollment and, so long as the terms of the programmatic agreement are met, these property owners are covered by the single umbrella EOS permit.

Both governmental and non-governmental entities can act as program administrators; most commonly, administrators are state wildlife agencies or environmental NGOs. In some cases, soil and water conservation districts, or resource conservation and development councils, administer programmatic agreements. In rare cases, a USFWS employee serves as a program-

matic agreement administrator; this saves USFWS the cost of processing redundant permits, but still requires USFWS to bear the cost of development, enrollment, and monitoring. (Bean, 2017)

Aside from efficiency, another benefit of programmatic agreements is that the administering entity may have existing positive relationships with many of the property owners, and may be in a better position to encourage participation from property owners than the USFWS. In some cases, administering entities may bring additional resources and capacity for enrollment and monitoring to supplement limited and constrained federal resources. (Bean, 2017)

In terms of analysis, programmatic agreements force an undercount of permits at the individual level since Certificates of Inclusion are not accounted for in the USFWS TAILS dataset.

5.4.4 Permits vs. Waivers

Regulatory leniency is more specific than flexibility as a policymaking tool. A few scholars have investigated the use of waivers by presidential administrations to provide regulatory space for policy innovation in the states (Bulman-Pozen and Metzger, 2016; Mann, 2016). Waivers can work in two directions – as a safety valve to ease requirements and relax regulation, or as a pass to foster innovation through policy experimentation. Overwhelmingly, waivers tend to be applied toward the latter end.⁴

While flexibility granted through waivers might allow states to surpass federal standards, leniency specifically allows states to underperform relative to federal standards. This chapter focuses on permits in order to isolate the role of regulatory leniency from policy experimentation. Permits explicitly allow permit-holders to engage in activities that harm endangered species or habitat.⁵

⁴Personal communication with Elizabeth Mann.

⁵EOS permits – those that require net-positive habitat management – can be interpreted as providing flexibility for habitat management innovation. Unlike waivers, where the overwhelming majority are issued to encourage innovation, a minority (under 10%) of permits used in this study are intended to encourage innovation.

5.5 Data and Methods

5.5.1 Outcome Variable

The outcome variable is a count of the number of federal permits issued to each state. Federal permit data were downloaded on Feb 6, 2018 from the USFWS Tracking and Integrated Logging System (TAILS), a field office activity tracking system within the broader ECOS database. The USFWS approved 1,438 permits associated with either Habitat Conservation Plans, Safe Harbor Agreements, or Candidate Conservation Agreements with Assurances between 1983 and 2017 covering over 1,000 species.⁶ Figure 5.1 depicts the number of permits issued per year, by plan or agreement type.

5.5.2 Explanatory Variables

Presidential Particularism

To measure presidential particularism, I use the definition and measurement of core and swing states presented in Kriner and Reeves (2015). Kriner and Reeves define core states as states in which the incumbent president party candidate received an average of 55 percent or more of the two major party vote in the preceding three elections; the authors define swing states as states in which the losing presidential candidate averaged 45 percent or more of the two major party presidential vote over the preceding three elections (2015: 124-5). I collected state-level major party vote shares for each presidential election between 1968 and 2016 from the CQ Voting and Elections Collection. Following Kriner and Reeves (2015), I identified core partisan and swing states between 1980 and 2016 (Table 5.1). President and governor co-partisanship was determined using data compiled by the National Conference of State Legislatures.

⁶Some entries in the database are amendments to existing permits or renewals of expiring permits. Amendments and renewals sometimes changes the range of land or species covered, or are sometimes necessary when the land changes ownership. These entries are treated as 0.5 rather than 1.

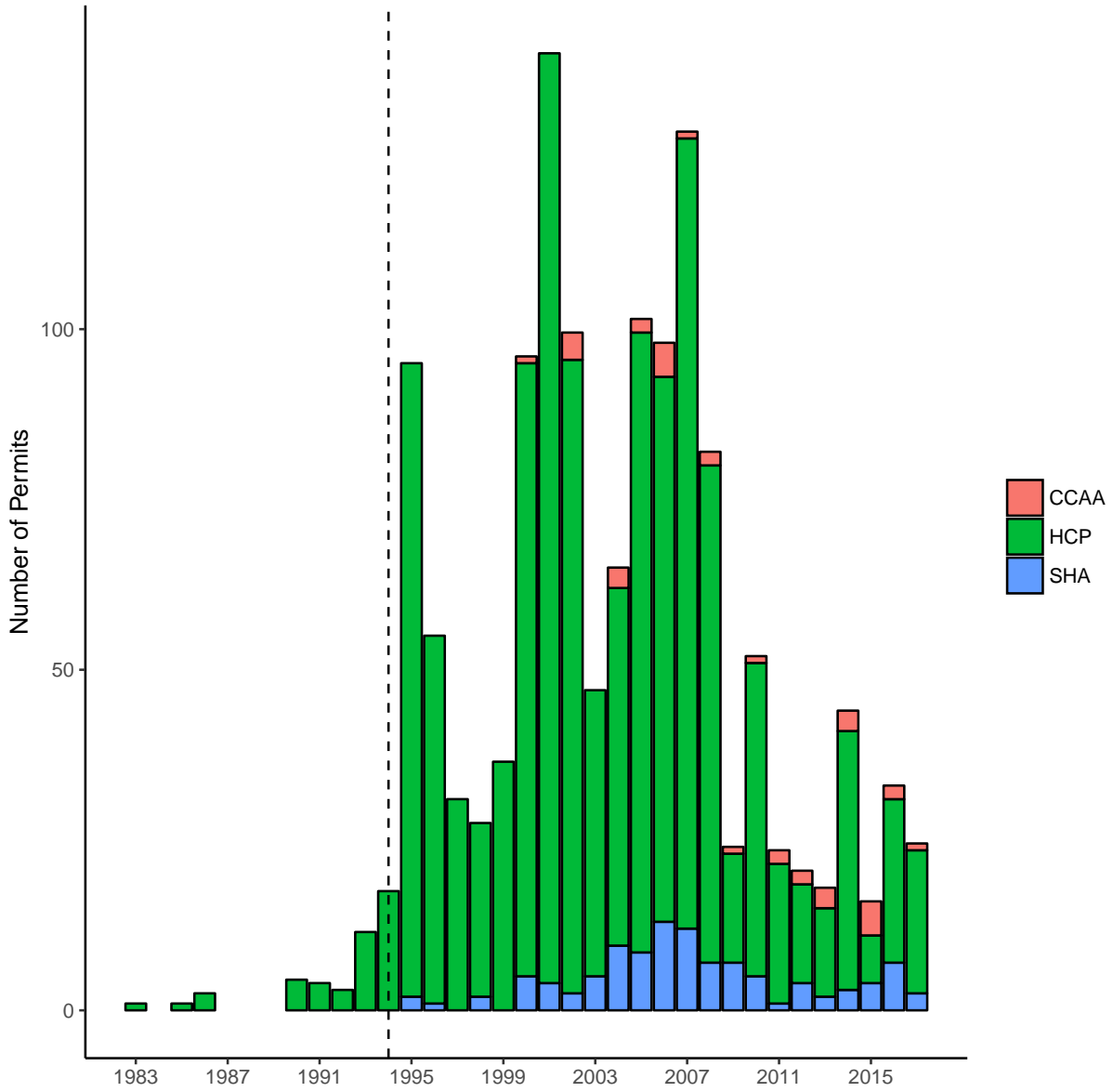


Figure 5.1: Number of Federal Permits Issued Over Time by Candidate Conservation Agreements, Habitat Conservation Plans, and Safe Harbor Agreements. Dashed line represents the start of the “No Surprises” permit regime.

Table 5.1: List of Core Partisan and Swing States by Presidential Election.

Year	Core Partisan	Swing
1980	MA, RI	CA, CT, IL, MI, MO, NJ, NY, OH, OR, PA, SD, WA, WI
1984	AK, AL, AZ, CA, CO, CT, FL, IA, ID, IN, KS, LA, MS, MT, NC, ND, NE, NH, NJ, NM, NV, OH, OK, SC, SD, TX, UT, VA, VT, WA, WY	DE, HI, IL, MA, ME, MI, MN, NY, OR, RI, WI
1988	AK, AZ, CA, CO, CT, FL, ID, IN, KS, MI, MT, ND, NE, NH, NJ, NM, NV, OH, OK, SD, TX, UT, VA, VT, WA, WY	DE, HI, IA, IL, KY, MA, MD, ME, MN, MS, NY, OR, PA, RI, TN, WI
1992	AK, AL, AR, AZ, CA, CO, CT, DE, FL, ID, IN, KS, KY, LA, ME, MI, MO, MS, MT, NC, ND, NE, NH, NJ, NM, NV, OH, OK, SC, SD, TN, TX, UT, VA, WY	HI, IL, MA, MD, MN, NY, OR, PA, RI, VT, WA, WI, WV
1996	RI	IA, MD, MN, PA, WA, WI
2000	HI, IL, MA, MD, MN, NY, RI, VT, WA, WV	AZ, CO, GA, IA, KY, LA, MO, MT, NC, NM, NV, OH, OR, PA, SD, TN, TX, VA, WI
2004	AK, AL, ID, KS, MS, ND, NE, OK, SC, SD, TX, UT, WY	AZ, CO, FL, GA, IA, IN, KY, LA, MI, MO, NC, NH, NM, NV, OH, OR, PA, TN, VA, WI
2008	AK, AL, ID, IN, KS, KY, MS, MT, NC, ND, NE, OK, SC, SD, TX, UT, WY	AZ, CO, FL, GA, IA, MI, MN, MO, NH, NM, NV, OH, OR, PA, TN, VA, WA, WI
2012	CA, CT, DE, HI, IL, MA, MD, ME, NJ, NY, RI, VT, WA	AZ, CO, FL, IA, MI, MN, MO, NC, NH, NM, NV, OH, OR, PA, VA, WI
2016	CA, CT, DE, HI, IL, MA, MD, ME, NJ, NY, OR, RI, VT, WA	AZ, CO, FL, GA, IA, MI, MN, MO, NC, NH, NM, NV, OH, PA, VA, WI

Note: Core partisan states are defined as states in which the incumbent president party candidate received an average of 55 percent of the vote in the preceding three elections; swing states are states in which the losing candidate averaged 45 percent or more in the preceding three elections.

Presidential Policy Position

Based on my qualitative assessment of presidential policy positions on endangered species policy (see Chapter 3), I code Republican presidents as Policy Opponents and Democratic presidents as Policy Custodians. Republican presidents are more likely to oppose the ESA based on the Republican Party's ideological commitment to small government, limited regulation, and economic growth. The ESA is a prohibitive policy that statutorily restricts private property use and development. On the other hand, Democratic presidents are more likely to support the ESA based on the Democratic Party's ideological commitment to environmental protection.

State Policy Position

To code state policy positions, I use two distinct measures. First, I rely on governor party as a proxy for position on endangered species protection; following the coding of presidential policy position, I take Republican governors to oppose ESA implementation and Democratic governors to support ESA implementation. Second, I use the average League of Conservation Voters (LCV) score of each state's congressional delegation as a measure of the state's record on the environment. Each measure has its own limitations. The state executive branch is responsible for implementing federal law, but governor party is a coarse measure of policy position since political parties hold positions on a range of ideological issues. The LCV scores mitigate some of this concern since the scores are generated to capture state positions on environmental issues specifically; however, the state's congressional delegation has indirect influence on the allocation of federal permits.

Administrative Capacity

To capture the capacity of a state government to meet the challenge of implementing the Endangered Species Act, I calculate the ratio of state public employees charged with managing natural resources to the total number of imperiled species in a state. I use state level govern-

ment employment data compiled by the U.S. Census.⁷ Counts of imperiled species, along with counts of species listed under the ESA, were generated for each state by NatureServe, a non-profit network of natural heritage programs and database of biodiversity information. Unlike “Endangered” and “Threatened,” which are statutory categorizations referring to levels of extinction risk and legal protection, “imperiled” is a biological term that indicates low population counts and risk of species extinction irrespective of legal protection under the ESA.

Economic Cost

To capture economic costs of compliance with endangered species law, I downloaded state GDP by industry from the Department of Commerce’s Bureau of Economic Analysis.⁸ I selected industries most likely to be affected by endangered species law – agriculture, mining, construction, and real estate – and calculated these industries’ contribution to the total state GDP.

Control Variables

In order to account for the effects of population size and land ownership on the number of permits granted by the federal government, I include measures of these variables in my models. I expect a higher state population to create more conflict between development and species protection, leading to more opportunities for permits. I obtained intercensal state population data from the U.S. Census Bureau’s Population Estimates Program. The 1990-2014 data were compiled by Jean Roth and downloaded by the author from the National Bureau of Economic Research,⁹ and updated by the author with estimates for 2015-2016 from the U.S. Census.¹⁰

Land ownership also will affect the number of permits issued. The permits in this study are issued exclusively to nonfederal landowners; therefore, the proportion of nonfederal land in the state likely correlates with the number of federal permits issued. I also use the total number

⁷<https://www.census.gov/programs-surveys/apes.html>

⁸<https://www.bea.gov>

⁹<http://www.nber.org/data/census-intercensal-county-population.html>

¹⁰<https://www2.census.gov/programs-surveys/popest/datasets/2010-2016/counties/totals/>

of imperiled species per state as a control to account for variation in the opportunity to apply for permits. I specifically use imperiled species, as opposed to ESA listed species, since some permits – those associated with CCAAs – relate to species that are still just candidates for listing. I obtained both state land ownership data and imperiled species counts from NatureServe.

Many states have state-level laws that act as a mechanisms to enforce and implement the federal Endangered Species Act. These laws vary from state to state; most state endangered species laws have provisions prohibiting the import, export, sale, or transport of endangered species. Some states include provisions preventing take, or harm, to endangered species or their habitat. A few states maintain their own endangered species lists and their state laws have provisions protecting state endangered species habitat. For an excellent review of state endangered species laws, see Fischman et al. (2018).

To account for this variation in state legal mechanisms protecting endangered species, I include an ordinal variable indicating the level of state endangered species protection. I procured this information from data compiled for the Caughey and Warshaw (2016) dynamic assessment of state policy liberalism. According to their coding of state endangered species policy, 0 corresponds to the absence of state endangered species provisions; 1 corresponds to the existence of a state endangered species program that offers fewer protections than the federal program; 2 corresponds to the existence of a state endangered species program that meets or exceeds federal guidelines.

5.5.3 Estimation

The outcome variable is a count of the number of permits issued per state per year. The data show overdispersion due to an excess number of zeros. In these data, zeros are caused by two different processes. First, zero permits in a given state or given year might result from limited interaction between endangered or threatened species and nonfederal landowners. In other words, a lack of permits in some cases may have more to do with habitat ranges and

Table 5.2: Summary Statistics.

	N	Mean	St. Dev.	Min	Max
Permits Granted	1,750	0.83	5.01	0.00	116.00
Initiated Permits	1,750	1.20	6.24	0.00	129.50
Opponent President	1,750	0.54	0.50	0	1
Custodian President	1,750	0.46	0.50	0	1
Democratic Governor	1,750	0.48	0.50	0	1
Republican Governor	1,750	0.51	0.50	0	1
Co-partisans	1,750	0.44	0.50	0	1
Core State	1,750	0.35	0.48	0	1
Swing State	1,750	0.30	0.46	0	1
Election Year	1,750	0.26	0.44	0	1
LCV Score	1,750	46.48	24.87	0	100
Imperiled Species Count	1,750	136.50	221.68	5	1,386
Listed Species Count*	1,750	46.62	72.02	4	433
State Total FTE*	1,100	83,839.10	71,287.64	10,863	411,142
Natural Resources FTE*	1,100	2,895.12	2,688.62	310	17,642
Capacity	1,100	58.76	56.00	1.27	334.00
Economic Cost	1,700	0.20	0.06	0.11	0.55
State Sq. Mi.*	1,750	82,152.03	117,542.80	1,171.58	818,129.10
Percent Nonfederal Land	1,750	80.84	23.24	12.80	99.30
Population (100,000s)	1,700	55.49	61.27	4.53	392.50
State ESA Code	1,600	1.60	0.66	0	2

*Not included in the models, but included in summary statistics for context.

Note: Most data are available from 1983-2017; state employee data available from 1993-2015, economic cost and population data from 1983-2016, and state ESA code available from 1983-2014. Recall that amendments to permits are counted as 0.5.

distribution of threats to the species (which can be dynamic) than political or administrative drivers. This process of zero generation relates to states with limited opportunities to apply for permits, and these zeros are excess zeros rather than count zeros.

Alternatively, zeros might occur in the data in spite of opportunities and demand for permits. These zeros are generated where there are interactions between humans and endangered or threatened species, but political or administrative variables preclude the issuance of permits. These zeros are true count zeros. In order to account for these two different processes of zero generation, I use a zero-inflated negative binomial specification to model the excess zeros simultaneously and independently. To predict which zeros are excess zeros and which are count zeros, I use the number of permits initiated per state per year. I expect the number of permits initiated to predict opportunities as well as demand for permits.¹¹

5.6 Results

The spatial distribution of permits by presidential administration is depicted in Figures 5.2-5.4. A cursory inspection suggests permit counts appear to correlate with state population numbers. The most permits are issued during the Bush administration, with Texas receiving the highest count.

5.6.1 Presidential Particularism

The first set of hypotheses I examine test presidential particularism. The theory of presidential particularism predicts that the administration will issue permits based on partisan or electoral goals. The assumption is that the president uses regulatory leniency as a benefit either to reward core partisans or to incentivize swing states in an election year. Table 5.3 presents the

¹¹Note that in the results, a negative coefficient corresponding to the predictor in the inflation model means that the variable is negatively associated with the excess zeros and, conversely, positively correlated with the count zeros.

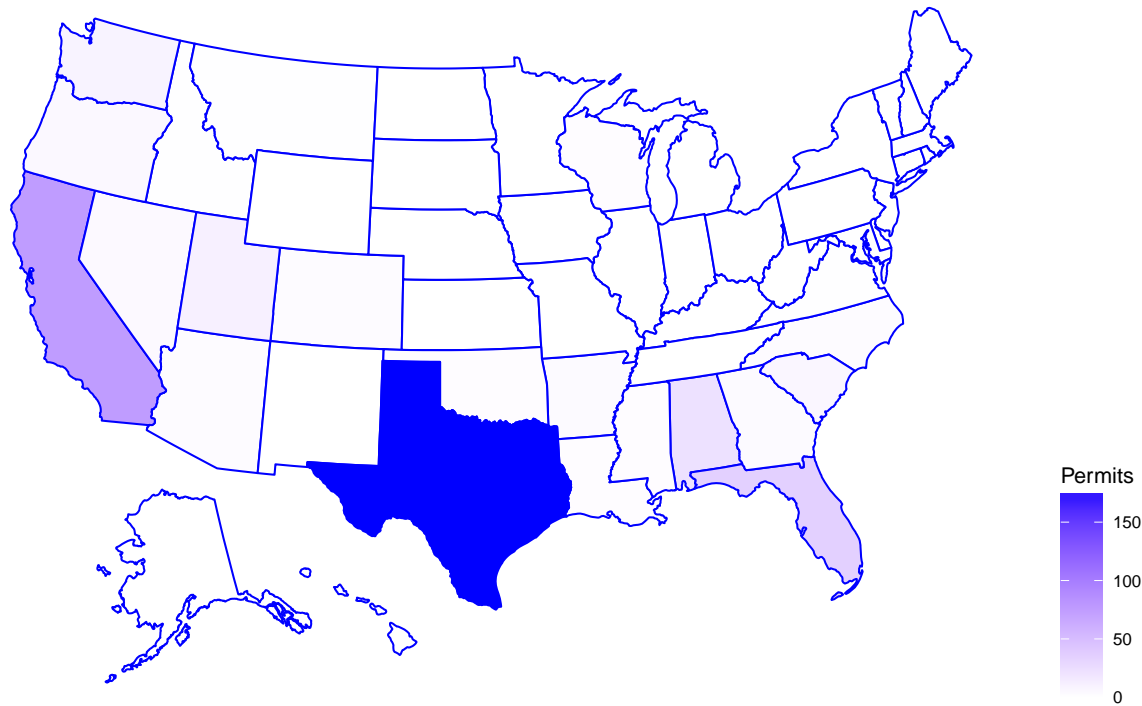


Figure 5.2: Federal Permits Issued During the Clinton Administration.

results of the zero-inflated negative binomial model testing the Partisan Particularism Hypothesis. Models 1 and 2 use the Kriner and Reeves (2015) measure of core states to operationalize the president’s co-partisan states, while Models 3 and 4 use co-partisan governors to operationalize the president’s co-partisan states.

I included simple bivariate models (Model 1 and 3) estimating the relationship between the key drivers and the number of permits received. I include the No Surprises fixed effect in all four models, even the unadjusted models, because of the importance of the “No Surprises” provision on the overall magnitude of permits issued. The coefficient corresponding to *Core State* is not significant in the unadjusted model (Model 1) and statistically significant in the adjusted model (Model 2). Model 3 shows that a *Copartisan Governor* significantly increases the likelihood of more permits, and this result holds with the inclusion of control variables in

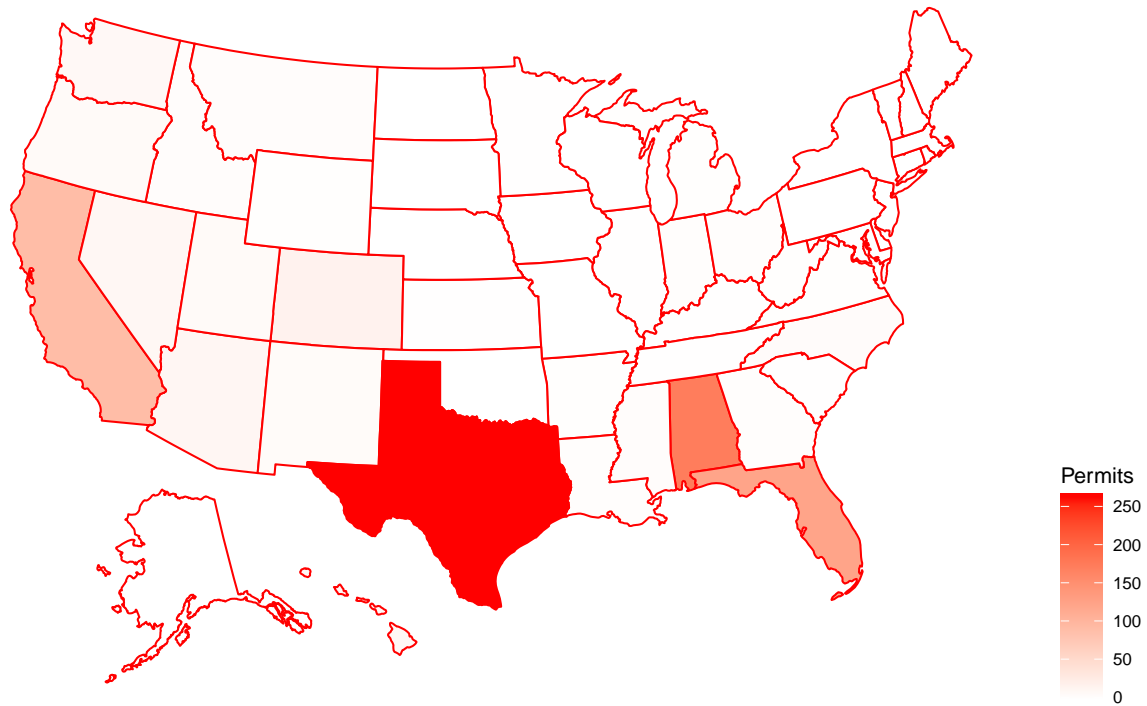


Figure 5.3: Federal Permits Issued During the Bush Administration.

Model 4.

To test whether an electoral strategy might impact the distribution of permits, I use the Kriner and Reeves (2015) measure of swing states to operationalize competitive states and interact this variable with a dichotomous variable indicating an election year. Table 5.4 shows the results of two models testing the Electoral Particularism Hypothesis. Model 1 presents results of the unadjusted model, and Model 2 presents results of the adjusted model including control variables. Again, I include the No Surprises fixed effect in both models because of the policy significance of the “No Surprises” provision.

Neither the unadjusted model (Model 1) nor the adjusted model (Model 2) indicates a significant relationship between *Swing States* in an *Election Year* and the number of permits issued. In Model 2, the un-interacted *Swing State* variable is modestly significant, indicating

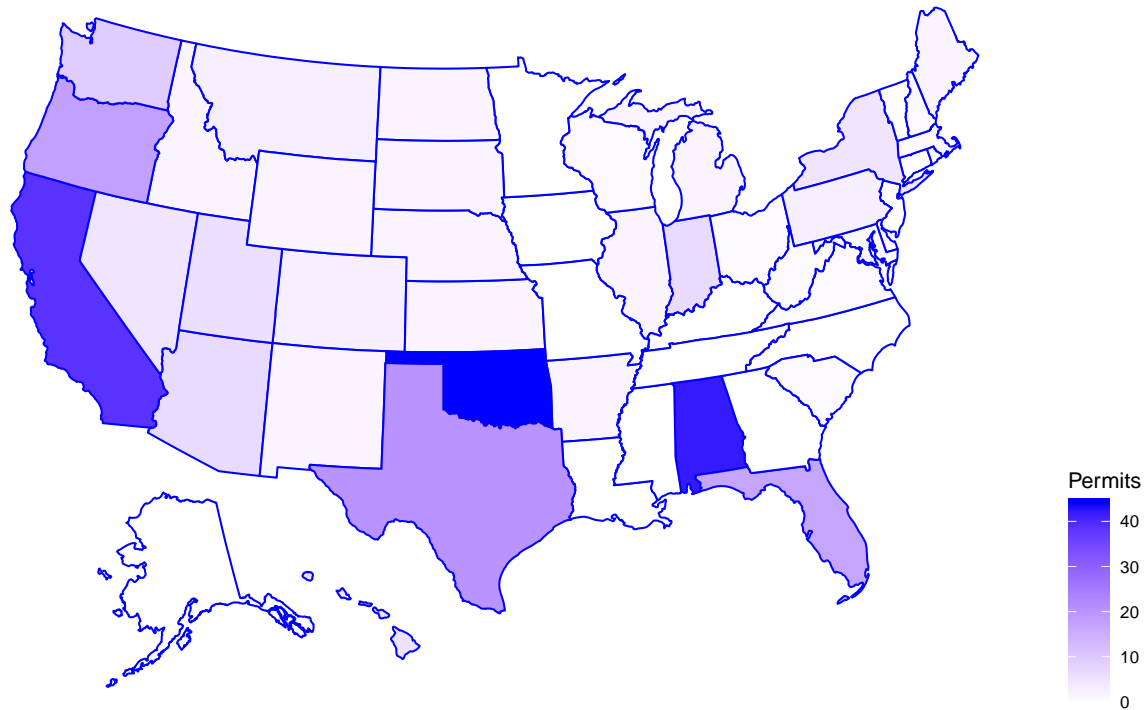


Figure 5.4: Federal Permits Issued During the Obama Administration.

that swing states might receive more permits in non-election years when controlling for other variables, but the relationship is tenuous and would require further investigation to confirm.

Though these results do not support the theory of presidential electoral particularism, federal permits are a different class of particularistic benefit compared to federal grants or emergency relief. Grants and aid are decisions that can be made relatively quickly, credit is more easily attributable, and the impacts may be felt more broadly. Federal permits, while still a particularistic benefit, are narrowly targeted at special interests and in some cases take years to negotiate.

Table 5.3: Zero-Inflated Negative Binomial Models: Partisan Particularism.

	<i>DV: Number of Federal Permits Issued</i>			
	(1)	(2)	(3)	(4)
<i>Partisan Politics</i>				
Core State	0.608 (0.435)	0.737* (0.380)		
Copartisan Governor			0.583*** (0.195)	0.392** (0.153)
<i>Resources</i>				
Administrative Capacity		-0.0233*** (0.00445)		-0.0224*** (0.00471)
Economic Cost		4.900 (4.037)		3.781 (4.070)
<i>Controls</i>				
Nonfederal Land		0.0135* (0.00697)		0.0167* (0.00852)
State Population		0.0142*** (0.00231)		0.0131*** (0.00289)
Imperiled Species		-0.00114 (0.000841)		-0.000823 (0.000969)
State ESA		-0.126 (0.289)		-0.297 (0.325)
No Surprises FE	2.481*** (0.560)	1.644*** (0.309)	2.171*** (0.523)	1.302*** (0.336)
Constant	-1.572** (0.785)	-3.158*** (0.812)	-1.416** (0.714)	-2.498** (0.907)
<i>Logit</i>				
Initiated	-3.152** (1.359)	-25.93*** (2.530)	-3.072** (1.196)	-29.01*** (2.443)
Constant	1.441*** (0.292)	0.911*** (0.245)	1.446*** (0.301)	0.901*** (0.253)
Observations	1,750	1,050	1,750	1,050
Years	1983-2017	1993-2015	1983-2017	1993-2015

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by state in parentheses.

5.6.2 Presidential Policy Strategy

The second set of hypotheses I examine test presidential policy strategy. A policy-driven theory predicts that the distribution of federal permits depends on the president's policy position. If a president opposes the prohibitive federal policy, he is likely motivated by ideological goals to

Table 5.4: Zero-Inflated Negative Binomial Models: Electoral Particularism.

	<i>DV: Number of Federal Permits Issued</i>	
	(1)	(2)
<i>Electoral Politics</i>		
Swing State	0.0731 (0.454)	0.387* (0.224)
Election Year	-0.0113 (0.0767)	0.00549 (0.247)
Swing*Election	-0.246 (0.181)	-0.284 (0.342)
<i>Resources</i>		
Administrative Capacity		-0.0241*** (0.00462)
Economic Cost		3.375 (4.040)
<i>Controls</i>		
Nonfederal Land		0.0187** (0.00874)
State Population		0.0126*** (0.00257)
Imperiled Species		-0.000599 (0.000872)
State ESA		-0.394 (0.355)
No Surprises FE	2.129*** (0.459)	1.210*** (0.301)
Constant	-1.059 (0.693)	-2.241** (1.142)
<i>Logit</i>		
Initiated	-3.101** (1.239)	-25.65*** (2.339)
Constant	1.470*** (0.301)	0.901*** (0.247)
Observations	1,750	1,050
Years	1983-2017	1993-2015

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by state in parentheses.

deregulate, and will guide his administration to grant permits to states where economic costs of the policy are high. If a president supports the prohibitive federal policy, he is likely motivated to insulate the federal policy from his opponents, and will guide his administration to grant permits

to states that oppose the policy.

Table 5.5 presents the results of three models testing the Policy Opponent Hypothesis. Model 1 confirms results from Chapter 4 that Policy Opponents are more likely to issue federal permits. However, Models 2 and 3 demonstrate that the Policy Opponent is not swayed by cost to state economies in determining where to allocate federal permits. The coefficient corresponding to the interaction between an *Opponent President* and *Economic Cost* is not significant in either the unadjusted or adjusted model; in fact the direction of the coefficient changes.

Table 5.6 presents the results of four models testing the Policy Custodian Hypothesis. Model 1 depicts a negative and statistically significant coefficient for the interaction between a *Policy Custodian* president and a *Republican Governor*. This result holds in the adjusted model (Model 2). This result means that a Policy Custodian president is more likely to grant permits to governors who are also likely to support the policy (Democratic governors), and deviates from the expectations generated by the policy-based theory. On the other hand, because the operationalization of the *Policy Custodian* variable is based on political party, this result further supports the Partisan President Hypothesis.

Interestingly, Models 3 and 4 suggest that the states receiving permits as a particularistic benefit are not likely to be the most extreme partisans. While Model 3 shows a modestly significant positive coefficient for the interaction between *Policy Custodian* and *LCV Score*, indicating that Custodian presidents grant more permits to states with congressional delegations that more often support the environment, the statistical significance is lost when control variables are added in Model 4. This suggests that while Custodian presidents are granting more permits to co-partisan states, the states receiving more permits are likely to be the more moderate on the environment. This suggest the Custodian president faces a important trade-off between offering permits to relieve deregulatory pressure and preserving the integrity of the policy by offering permits to ideologically similar states that less likely to abuse the leniency.

Table 5.5: Zero-Inflated Negative Binomial Models: Policy Opponent.

	<i>DV: Number of Federal Permits Issued</i>		
	(1)	(2)	(3)
<i>Opponent Strategy</i>			
Opponent President	0.301** (0.127)	-0.346 (2.035)	1.020 (0.868)
Economic Cost		4.037 (6.529)	4.769 (4.026)
Opponent*Econ Cost		3.225 (9.572)	-3.089 (4.270)
<i>Resources</i>			
Administrative Capacity			-0.0241*** (0.00494)
<i>Controls</i>			
Nonfederal Land			0.0159* (0.00827)
State Population			0.0132*** (0.00274)
Imperiled Species			-0.000896 (0.000928)
State ESA			-0.199 (0.326)
No Surprises FE	2.108*** (0.507)	2.117*** (0.493)	1.037*** (0.307)
Constant	-1.188* (0.700)	-2.037 (1.486)	-2.531** (1.139)
<i>Logit</i>			
Initiated	-3.053*** (1.137)	-3.431* (1.906)	-25.25*** (2.457)
Constant	1.492*** (0.306)	1.494*** (0.320)	0.881*** (0.252)
Observations	1,750	1,700	1,050
Years	1983-2017	1983-2016	1993-2015

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by state in parentheses.

5.6.3 Capacity and Cost

Administrative Capacity is negatively correlated with the number of permits issued and this result is significant across all models. This means that a higher state employee to imperiled species ratio translates to fewer federal permits issued. Conversely, a lower state employee

Table 5.6: Zero-Inflated Negative Binomial Models: Policy Custodian.

	<i>DV: Number of Federal Permits Issued</i>			
	(1)	(2)	(3)	(4)
<i>Custodian Strategy</i>				
Custodian President	0.610*** (0.204)	0.0361 (0.208)	-0.783** (0.338)	-0.686* (0.365)
R Governor	1.806*** (0.395)	1.103*** (0.331)		
Custodian*R Governor	-1.187*** (0.351)	-0.586** (0.284)		
LCV Score			-0.0249* (0.0142)	-0.0236*** (0.00845)
Custodian*LCV			0.0126* (0.00661)	0.00709 (0.00695)
<i>Resources</i>				
Administrative Capacity		-0.0217*** (0.00425)		-0.0202*** (0.00414)
Economic Cost		3.214 (3.728)		3.984 (3.932)
<i>Controls</i>				
Nonfederal Land		0.0143* (0.00796)		0.0153* (0.00810)
State Population		0.0119*** (0.00256)		0.0108*** (0.00258)
Imperiled Species		-0.000661 (0.000850)		4.97e-05 (0.00105)
State ESA		-0.122 (0.270)		0.174 (0.293)
No Surprises FE	1.823*** (0.287)	0.848*** (0.275)	1.938*** (0.437)	0.989*** (0.313)
Constant	-1.950*** (0.564)	-2.454** (1.072)	0.244 (0.853)	-1.784 (1.138)
<i>Logit</i>				
Initiated	-2.973*** (1.097)	-28.85*** (2.451)	-2.914*** (0.987)	-25.55*** (2.510)
Constant	1.469*** (0.279)	0.855*** (0.252)	1.468*** (0.314)	0.749*** (0.263)
Observations	1,750	1,050	1,750	1,050
Years	1983-2017	1993-2015	1983-2017	1993-2015

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by state in parentheses.

to imperiled species ratio corresponds to *more* federal permits issued. This conforms to the expectation that states with lower administrative capacity garner more leniency from the federal government to lower the standard of compliance. Lowering the regulatory bar for states that do not invest in or prioritize natural resource protection is a reasonable strategy for an administration looking to soften regulations for ideological reasons, as well as an administration hoping to reduce friction with a law the administration would like to insulate from large-scale reform.

Surprisingly, the *Economic Cost* variable is not significant in any of the models. Contrary to the political rhetoric, this result suggests that the economic costs of the policy are less important than political or administrative considerations when it comes to allocating federal permits.

As for the remaining control variables, a higher proportion of state *Nonfederal Land* is positively and significantly correlated with more permits received, across all models. This fits expectation since the permits specifically target non-federal landowners. A higher *State Population* is also positively and significantly correlated with more permits received, across all models. This supports my expectation that higher state populations precipitate more growth and development, both threatening endangered populations and creating demand for permits.

5.6.4 Marginal Effects

Table 5.7: Net Change in Predicted Number of Permits.

Hypothesis	Variable	Change in x (from, to)	Net Change in Permits	Percent Change in Permits
Partisan	Core States	(0, 1)	.75	+108.93%
	Co-Partisan Governors	(0, 1)	.29*	+40.97%
Resources	Administrative Capacity	(2.76, 114.76)	-3.51**	-92.76%

*Note: Net change in predicted number of permits is calculated as the change between 0 and 1 for the dichotomous variables, and the change between one standard deviation below and above the mean for the continuous variable. Control variables are set at their means, and the No Surprises fixed effect is set at 1. Net Change for Administrative Capacity was calculated using the Co-Partisan model, with the Co-Partisans variable set to 1, though the Core States model demonstrated no difference in results. * $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$.*

After testing a series of hypotheses, I am able to narrow down the significant drivers of

federal permit distribution. Surprisingly, economic cost and number of imperiled species are not significant predictors of federal permits. Furthermore, there is not much evidence supporting the use of federal permits as part of an electoral strategy.

Instead, results of the models presented in this chapter consistently support the partisan particularism theory; Republican presidents grant more permits to Republican governors, and Democratic presidents grant more permits to Democratic governors, taking into account the number of permits initiated. Finally, low administrative capacity also appears to be a significant driver of federal permit allocation.

I calculated the magnitude of the effects by predicting the number of permits given specified changes in the statistically significant drivers. The net changes in these predicted values are presented in Table 5.7. A change from non-core state to core state more than doubles the number of predicted permits. States with governors belonging to the president's party get almost 41% more permits than states with governors belonging to the president's opposing party. As the number of state employees per imperiled species climbs from about 3 to about 115, the predicted number of permits drops by nearly 93%.

5.7 Conclusion

This chapter demonstrates that the distribution of regulatory leniency follows the pattern of a presidential particularistic good. I show that the most important state-level drivers of leniency with respect to endangered species policy are core partisanship, governors that share partisanship with the president, and low administrative capacity. I find no evidence that regulatory leniency, as measured in permits, is part of a swing state presidential electoral strategy; however, as the introductory anecdote suggests, leniency as a partisan favor may sometimes correspond with the desire to offer an electoral boost in a future state-level election.

Next steps for this project include refining the co-partisan result by exploring possible

party asymmetries, as well as any heterogenous effects for ideologically moderate versus extreme governors. While I find little evidence that state economic costs factor in to administrative decisions to grant regulatory leniency, future work should attempt to capture economic costs using other measures.

Chapter 6

Conclusion

In this concluding chapter, I summarize the central findings of this dissertation addressing when and why presidents choose to relax federal rules, and which states tend to benefit from regulatory leniency. I then discuss the implications of these findings, particularly for how leniency might affect policy outcomes. Finally, I offer several suggestions for how to refine and extend this work.

6.1 Summary

In Chapter 1, I introduce and define the concept at the center of this dissertation: regulatory leniency. Regulatory leniency is the relaxation of prohibitive rules. Unlike flexibility, which implies the allowance of under- or over-performance with respect to the federal law, leniency refers to the allowance of underperformance exclusively and the terms of leniency are sometimes cooperatively negotiated between the regulatory agency and the regulated party. The goal of this dissertation is to identify whether political variables drive executive decisions to relax federal rules in the timing and allocation of regulatory leniency.

In Chapter 2 and 3, I present the theory and introduce the case study I use to test the theory. Chapter 4 demonstrates that the timing and type of regulatory leniency used depends

largely on the president's policy goals. Presidents who oppose an existing prohibitive policy are more likely to stall implementation and rely on issuing individual exemptions to relax the policy, particularly when Congress is unable or unwilling to repeal the policy. Presidents who support an existing policy, however, will generally implement the policy, but also rely on broader exemptions to relax the policy when Congress is threatening to repeal it. The results are consistent with predictions for Policy Opponents and Policy Custodians derived from the theory, though the inclusion of four distinct measures of regulatory leniency offered additional insights into each President Type's preference for different administrative tools.

Chapter 5 demonstrates that the distribution of regulatory leniency follows the pattern of a presidential particularistic good. I show that the most important state-level drivers of leniency with respect to endangered species policy are core partisanship, governors that share partisanship with the president, and low administrative capacity. I find no evidence that regulatory leniency, as measured in permits, is part of a swing state presidential electoral strategy; however, as the introductory anecdote suggests, leniency as a partisan favor may sometimes correspond with the desire to offer an electoral boost in a future state-level election.

6.2 Contributions

This dissertation makes several theoretical and empirical contributions. The first contribution is the refinement of regulatory leniency as a concept distinct from flexibility or forbearance. Regulatory leniency is the relaxation of prohibitive policy through the issuance of exemptions that may vary in scope. The exemptions are intended to allow for underperformance relative to a federal requirement or standard, unlike flexibility which encourages policy innovation. The specific terms vary and are often negotiated, unlike forbearance which is framed as a binary decision by the federal government to enforce or not enforce the law.

The second contribution is the application of the theory of presidential unilateral ac-

tion (Howell, 2003) to policy implementation. Though this required a “responsive bureaucracy” assumption, the empirical results appear to support the theoretical extension. The third contribution is to the executive federalism literature. An increasing number of studies highlight ways in which the president uses administrative flexibility to bypass Congress in policymaking, focusing on presidents’ use of this strategy when they are dissatisfied with existing policy (Mann, 2016). My work specifically highlights the fact that presidents seeking to preserve the status quo are also incentivized to use administrative flexibility – in particular, leniency – to appease critics in Congress and avoid policy rollback.

Fourth, I expand the empirical scope of both the executive federalism literature and the presidential particularism literature by focusing on a novel policy area, endangered species and biodiversity. While many studies of executive federalism focus on waivers for welfare, health care, and education policy, mine is the first to my knowledge to study the allocation of federal ESA permits. Federal permits offer a new type of particularistic benefit to test the scope of the presidential particularism theory, and my results suggest permits follow a pattern of partisan particularism.

Finally, my analysis of four different leniency mechanisms reveal divergent patterns of leniency use. I find evidence that presidents opt for issuing narrower or broader exemptions depending on their position on the policy and the likelihood of congressional action on the policy. Presidents who oppose a policy and attempt to bypass Congress to deregulate will opt for slowing policy implementation and issuing individual-level, or narrower, policy exemptions. Presidents who support a policy and attempt to appease critics in Congress threatening rollback will opt for broader policy exemptions.

6.3 Policy Implications

Laws exist at the federal level to protect public goods from common market failures, and to hold public goods and services to a universal standard. For example, all U.S. citizens have the right to a free public education and it is normatively important that the quality of education does not differ drastically for children who happen to live in one state versus another. Federal education policy ensures that education standards are met across the United States. The Endangered Species Act (ESA) is another example of a federal law protecting the quality of a public good by creating a universal standard. In this case, biodiversity is a public good and each species contributes to the quality of this good. A greater number of species equates to better biodiversity. The universal standard imposed by the ESA mandates the protection of species at risk of extinction, ensuring greater numbers of species and better biodiversity.

On one hand, regulatory leniency via exemptions may threaten the efficacy of federal laws by chipping away at the quality of the public good the laws intend to protect. The logic is similar to the logic underlying the Tragedy of the Commons. If exemptions are offered liberally to lessen the burden of compliance, the overall quality of the public good deteriorates because the quality depends on collective action and universal compliance. In the education example, offering exemptions from federal education standards to some states may induce more states to seek exemptions. This “exemption cascade” could reduce the overall quality of public education and make federal standards ineffectual. In the biodiversity case, if too many property owners are issued permits to “take” species at risk of extinction or to harm critical habitat then species may well go extinct and the quality of biodiversity suffers.

On the other hand, a case can be made that regulatory leniency preserves, rather than subverts, federal law. As demonstrated in this dissertation, presidents who support a federal law are sometimes pressured by critics in Congress to relax rules associated with the law. The use of regulatory exemptions by the president and his administration to relax a prohibitive law

can act as a pressure release valve, relieving building pressure from critics seeking repeal. If a law's critics in Congress are satisfied by the use of exemptions, a president can successfully divert any legislative momentum toward the rollback of the law he supports. In other words, if the alternative is repeal, regulatory leniency can protect a law by keeping it on the books. In terms of the law's efficacy, though full compliance is not attainable with the use of exemptions, a limited compliance regime still offers greater-than-zero compliance in the case of repeal.

The regulation paradox is a concept that suggests overregulation, and regulations with strict penalties, lead to less compliance since regulators are less inclined to carry out enforcement. When regulators are less likely to enforce the law, the regulated tend to ignore the law under the assumption that the risk of punishment for noncompliance is low. Proponents of a deterrence-based model of regulatory enforcement argue that regulated firms comply with regulations only under the threat of tough sanctions from a regulating agency. More recently, a voluntary compliance model has emerged, which suggest that regulatory compliance can be achieved through "gentle persuasion" on the part of the regulator and self-enforcement on the part of the regulated (Ayres and Braithwaite, 1994: 20).

Ayres and Braithwaite's concept of responsive regulation fits between these two extremes, and brings nuance to the otherwise polarized debate over the optimal strategy for regulation and enforcement. In their book, they acknowledge that regulated actors may have diverse motivations, including financial, reputational, legal, ethical. But drawing on the game theoretic contributions of John Scholz and the empirical work of John Braithwaite, the authors demonstrate that a tit-for-tat strategy can work well for purely economically-motivated regulated actors, as well as cooperative or civically-minded regulated actors. They argue that the optimal regulatory approach for maximizing compliance is one in which regulators have flexibility to structure enforcement protocols responsively to the regulated actors' motivations and behaviors.

6.4 Future Research

There are many opportunities for future research. The first task is to refine measurement of certain parameters and test the robustness of results presented in this dissertation. One of the biggest challenges of this project has been finding satisfactory measures of the explanatory variables. For example, scores generated by interest groups (such as the League of Conservation Voters) are not necessarily reliable for temporal analysis; since the underlying votes used to generate the scores change annually, it is difficult to say whether scales are comparable year to year. One way to address this issue is to run the same models using DW-NOMINATE Common Space scores, which allow for comparison of ideological scores across time (Poole and Rosenthal, 2011). The unfortunate drawback of DW-NOMINATE is that, unlike LCV scores, NOMINATE scores are not generated exclusively from votes on environmental policy.

In addition to refining measurement, future work should explore opportunities for causal identification. For example, results from the models presented here suggest that economic cost of the Endangered Species Act to the state GDP is not a significant predictor of federal permits. It may be possible to exploit a sudden or exogenous change in economic costs of the ESA in order to identify, or discount, the potential for a causal link between costs and regulatory leniency.

Another opportunity for future research is to explore the extent of partisan particularism in the allocation of federal exemptions. In Chapter 5, I find evidence of partisan particularism in the distribution of federal ESA permits, but no evidence of electoral particularism. However, I measure electoral particularism using national-level swing state designations and election years. As mentioned in the opening anecdote to Chapter 5, Florida's exemption from oil drilling leasing was a partisan favor, but the favor was linked to state-level elections. An extension of the analysis in Chapter 5 might test the relationship between federal permits and competitive state-level elections. Another opportunity to extend the work in this chapter is to investigate links between particularism and broader types of federal exemptions. One way to distinguish between areas

that benefit from leniency and areas that do not is to identify the habitat ranges of species with special 4(d) rules under the ESA.

Finally, among the more interesting results in this work was the evidence that presidents had differential preferences for broader versus narrower exemptions, depending on whether they supported or opposed the federal policy. Somewhat counterintuitively, Policy Custodians opted for broader exemptions while Policy Opponents opted for narrower exemptions. One reason why Policy Custodians might opt for broader exemptions is that broader exemptions offer a more visible and impactful way to relieve compliance costs and ease rollback pressure. On the other hand, it is possible that these preferences are idiosyncratic. Given only a few administrations of each type, Opponent and Custodian, it is difficult to draw more general conclusions. Additional qualitative work may offer some possible explanations for these differential preferences.

6.5 Final Thoughts

The objective of this dissertation was to identify whether politics drive the use of regulatory exemptions to federal law. Not only did this inquiry produce theoretical and empirical contributions to the discipline, the investigation was normatively important as well. Federal laws are intended to safeguard public goods and it is unclear how exemptions to the federal law affect the quality of these public goods. On one hand, exemptions may degrade the quality of public goods through the sanctioning of noncompliance. On the other hand, limited compliance is better than noncompliance. Offering exemptions to federal standards and opening the door for limited compliance may ease pressure to do away with federal standards altogether. In some cases, formal exemptions, such as federal permits, pave the way for compliance monitoring in the future. Understanding the motivations driving political actors to offer regulatory leniency is an important first step toward determining the effects of leniency on policy outcomes.

Appendix A

Table A1 is offered as a supplement to Table 4.2. Table A1 controls for FWS Budget using FWS Outlays (agency spending data), while Table 4.2 controls for FWS Budget using the budget appropriated to FWS by Congress in that fiscal year. FWS Outlays data are available for four additional years than the FWS Budget data. There is negligible difference in the model results when using one measure over the other. The main result, that Republican presidents list fewer species under the ESA than Democratic presidents still holds.

Table A2 is presented as a supplement to with Table 4.3 to demonstrate that the coefficients of interest remain statistically significant with the addition of Mann's variables of interest. In Model 3, the coefficient corresponding to *R President * Gridlock* remains statistically significant with the inclusion of *Distance * Co-Partisan Governors*. Model 5 shows that the coefficient corresponding to *D President * Pressure* also maintains significance with the inclusion of *Distance * Co-Partisan Governors*. *Distance * Co-Partisan Governors* is not a statistically significant predictor of federal permits in these models.

Table A3 is a supplement to Table 4.5. Table A3 offers a fully adjusted model, including all controls, whereas Table 4.5 includes only the *ESA Time Trend* variable out of concern for overfitting. Model 5 in Table A3 produces a larger coefficient for the *Democratic President * Pressure* interaction than Model 5 in Table 4.5; both coefficients are positive and significant.

Table A1: Negative Binomial Models Testing Implementation Hypothesis, with FWS Outlays in place of FWS Budget Authority.

<i>DV: Number of Annually Listed Species</i>		
	(1)	(2)
R President	-0.739*	-0.959***
	(0.386)	(0.256)
Pres Approval		0.00458
		(0.00962)
Election Year		0.454**
		(0.177)
Inflation Rate		-0.198***
		(0.0370)
FWS Outlays Change		2.707
		(1.656)
Outstanding Petitions		-0.00137***
		(0.000321)
ESA Time Trend		-0.0128
		(0.0113)
ln Alpha	-0.280	-0.781***
	(0.262)	(0.160)
Constant	3.944***	2.133
	(0.149)	(2.078)
Pseudo R ²	0.0174	0.0739
Observations	45	45
Years	1973-2017	1973-2017

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by presidential administration in parentheses.

Table A2: Negative Binomial Models for Permits, testing competing hypotheses.

<i>DV: Number of Permits Issued</i>					
	(1)	(2)	(3)	(4)	(5)
R President	0.00898 (0.752)	-5.676* (3.350)	-8.333*** (1.029)		
Gridlock		-0.0150** (0.00631)	-0.00715 (0.0112)		
R Pres * Gridlock		0.0856** (0.0436)	0.0688*** (0.0244)		
D President				-0.813*** (0.116)	-0.241 (0.865)
Pressure				-0.0229*** (0.000185)	-0.0352*** (0.00418)
D Pres * Pressure				0.0129*** (0.00250)	0.0303*** (0.00325)
NW-Nom Distance			3.234 (27.99)		3.451 (5.917)
Governor Share			0.164 (38.27)		3.437 (7.660)
Distance * Gov Share			14.18 (45.61)		-3.004 (7.721)
In Alpha	0.612 (0.673)	0.467 (0.613)	-0.367 (0.561)	-2.149*** (0.231)	-2.078*** (0.291)
Constant	3.694*** (0.139)	4.778*** (0.392)	-1.590 (21.93)	4.677*** (0.000881)	1.166 (5.803)
Pseudo R ²	0.0000	0.0166	0.1037	0.1062	0.0829
Observations	36	36	33	22	19
Years	1982-2017	1982-2017	1982-2014	1996-2017	1996-2014

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by presidential administration in parentheses. DW-Nominate Common Space scores were only available through 2014. See Results section in main text for analysis.

Table A3: Negative Binomial Models for Delisted Counts, with all controls in Model 5.

	<i>DV: Number of Annually Delisted Species</i>				
	(1)	(2)	(3)	(4)	(5)
R President	-0.424 (0.424)	0.304 (2.012)	0.250 (1.361)		
Gridlock		0.0465*** (0.0159)	0.0261*** (0.00940)		
R Pres * Gridlock		-0.00327 (0.0288)	0.000551 (0.0233)		
D President				-0.202 (0.300)	-0.631 (0.503)
Pressure				0.0182*** (0.000186)	-0.0214 (0.0146)
D Pres * Pressure				0.00878 (0.00625)	0.0296** (0.0119)
Pres Approval			-0.00665 (0.0130)		0.0591** (0.0283)
Election Year			-0.0464 (0.292)		0.118*** (0.0281)
Inflation Rate			-0.191 (0.130)		0.372*** (0.105)
FWS Budget Change			-1.935 (1.316)		-2.840*** (0.453)
ESA Time Trend			0.000491 (0.0312)		0.173*** (0.0549)
ln Alpha	-0.228 (0.477)	-0.653 (0.444)	-1.017** (0.518)	-0.973 (0.676)	-2.404*** (0.776)
Constant	0.788** (0.370)	-2.661** (1.328)	1.632 (1.864)	0.468*** (0.000884)	-5.860** (2.755)
Pseudo R ²	0.0089	0.0772	0.1015	0.0860	0.1886
Observations	45	45	41	22	22
Years	1973-2017	1973-2017	1977-2017	1996-2017	1996-2017

*** p<0.01, ** p<0.05, * p<0.1

Note: Robust standard errors clustered by presidential administration in parentheses.

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