The Constraining Power of the Purse: Executive Discretion and Legislative Appropriations *

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Abstract

Discretion is fundamental to understanding inter-branch interactions in our separation of powers system. Yet, measuring discretion in order to test various theories of delegation is challenging. The few existing measures have difficulty capturing both delegations and constraints in a consistent way over time. In this paper, we seek to overcome these challenges by offering a novel measure of executive discretion based on legislative appropriations to all agencies, weighted by the spending limitations imposed on these agencies found within appropriations committee reports. We first validate this measure by using it to test the "ally principle," finding that Congress gives greater discretion to agencies when ideologically aligned with the president. Further, we use our new measure to test additional discretion-based theories related to military combat, the "Two Presidencies," and agency insulation. Overall, this measure can be used to evaluate other previously difficult to test theories of policymaking.

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1 Introduction

Delegation serves as the bedrock beneath the principal-agent relationships fundamental to the functioning of a political society. As such, understanding delegation is essential to understanding the operations and interactions of governmental institutions. Consequently, scholars frequently ask questions about who delegates, when and why delegation occurs, and to which agents principals choose to delegate. With delegation also comes discretion. Not only is it important to examine whether a principal chooses to assign their responsibility to an agent, but it is also important to understand how much leeway is given to the agent in carrying out these tasks.

As a result, there is a rich theoretical literature that has explored these very questions, producing hypotheses ripe for empirical testing (Bendor, Glazer and Hammond 2001; Bendor and Meirowitz 2004; Epstein and O'Halloran 1994; Gailmard and Patty 2007; Huber and McCarty 2004; Volden 2002). Yet, empirical scrutiny of these questions has lagged, largely due to the difficulty of measuring discretion. Not only does this measurement deficit have implications for testing theories of delegation, but also for thoroughly testing other separation of powers and policymaking theories that implicitly rely on delegation and discretion (e.g. Howell 2003; Wildavsky 1966).

Even the few existing measures of executive discretion are not without their weaknesses. For instance, while the Epstein and O'Halloran (1999) measure of discretion importantly conceptualizes discretion as a function of delegation and constraint, it is limiting in that it only focuses on a small subset of legislation and overlooks key aspects of these bills. Further, measures of discretion based on the page length of the bill (Clinton et al. 2012; Huber and Shipan 2002) may also overlook important details, particularly levels of delegation, in their focus on constraints. Additionally, it may be difficult to isolate discretion given to different agencies as well as make comparisons across time with both of these measures.

Building from this previous literature, we seek to propose a new measure of discretion given to agencies based on all appropriations legislation passed by Congress for fiscal years

1980 through 2013. Here, discretion is measured by summing the total amount of budget authority given to an agency and weighting it by the number of pages devoted to instructing agencies on how to use their appropriation. This measure improves upon previous ones by accounting for the exact amount of spending authority delegated to an agency as well as its spending limitations, thus more precisely reflecting executive discretion. It also provides a consistent measure of discretion over time for all agencies because appropriations legislation is passed each year. Additionally, the measure captures both increases and decreases in discretion over time.

We explore the validity of our new measure by using it to test previous theories of policymaking. In particular, we find support for the ally principle, the two presidencies thesis, increases in discretion during military combat, and the idea that Congress differentiates among agency types based on their level of insulation from the president when granting discretion. These tests serve not only to validate our measure but also demonstrate its utility in testing existing hypotheses in the literature. We believe that this measure has vast potential for the testing of other separation of powers and policymaking theories that, to this point, have been somewhat difficult to test without a reliable measure of discretion.

The remainder of the paper proceeds as follows. We first provide background on previous theoretical studies of delegation and previous measures of executive discretion in Section 2. This is followed by a description of our new measure of discretion in Section 3. With this measure, Section 4 presents empirical tests of previous theories. Finally, we discuss our findings and offer concluding remarks in Section 5.

2 Discretion: Concepts and Measurement

2.1 Delegation, Constraints, and Discretion

Before moving to a discussion of measurement, we first seek to clarify exactly what we mean by "discretion." Clarification of this concept serves to aid in the evaluation of previous measurement schemes in addition to the one that we propose in this paper. In particular, we seek to delineate the distinctions and relationships between delegation, constraints, and discretion. When we speak of the latter, we consider it to be a combination of the former two, i.e. discretion is delegation net of constraints.

Delegations from Congress to the executive are grants of authority for the president or agencies to take actions in a particular area. For example, Congress may give a Cabinet secretary authority to issue regulations in a particular policy area. Why would Congress delegate power to agents that may have starkly different preferences? Political scientists have identified a number of different rationales for this behavior (see Krause (2010) for a thorough overview). Informational asymmetries between Congress and the executive branch have been central to previous theoretical explorations of the delegation decision. In particular, Congress is posited to lack expertise relative to the bureaucracy in understanding how policy *choices* map into policy *outcomes*. Because of this, when the executive's preferences are sufficiently close to the preferences of the legislature, Congress will delegate decision-making authority to the executive branch in order to avoid utility losses associated with the uncertainty inherent in the less-informed Congress making a policy decision. However, as the executive's preferences diverge from the legislature's, the ideological loss from bureaucratic implementation (from the perspective of the legislature) will outweigh the uncertainty costs, leading Congress to make its own policy decision.

While informational asymmetries between Congress and the executive branch underlie most models of delegation, scholars have also developed other strategic rationales for congressional delegation to the executive branch. For instance, a new strand of literature emphasizes how grants of authority to the executive branch change the incentives of bureaucratic actors. In particular, some scholars focus on endogenous human capital acquisition and how policy authority may lead bureaucrats to invest in expertise to make more informed decisions (e.g. Gailmard and Patty 2007; Cameron, de Figueiredo and Lewis N.d.). Alternatively, Congress may delegate to the bureaucracy in order to stimulate demand for its services when interest groups and constituents are dissatisfied with agency decisions (see Fiorina 1989, for an argument along these lines).

Contrary to claims that delegation amounts to congressional abdication (e.g. Lowi 1979), however, Congress is not powerless after giving the executive branch authority to implement policies. Indeed, Congress puts a number of constraints on the exercise of delegated authority. These constraints limit the scope of executive action in the implementation of vague congressional policies and can take a number of forms. First, they can refer to the specificity of a statute (e.g. Epstein and O'Halloran 1999; Huber and Shipan 2002). One classic example of statute specificity is a delegation to the a bureaucracy to set the level of a policy. For instance, Congress could simply delegate unconstrained authority for the Environmental Protection Agency (EPA) to set an acceptable level of a chemical that firms can put into water as waste. Alternatively, Congress could constrain this delegation by stating that the EPA should set a level of acceptable pollution within a range of alternatives, e.g between 100 and 500 parts per million. Another form of statutory constraint that has received attention in recent years are limitations riders that are included in annual appropriations laws (see MacDonald 2010). Limitations riders proscribe the obligation of funds for certain purposes, hamstringing the ability of agencies to carry out some tasks, such as issuing regulations in a particular area (Schick 2008).

Beyond the actual language of the statute, Congress can also impose procedural constraints on agencies that provide information to Congress about agency actions and involve interest groups in agency decision-making. These procedural constraints include notice and comment periods for agency rulemaking, deadlines, open meetings, and required public reports (e.g Bawn 1995; Epstein and O'Halloran 1996; McCubbins and Schwartz 1984; McCubbins, Noll and Weingast 1987). These types of procedural constraints may serve to limit administrative action to a set of policies that congressional principals would find acceptable should the "fire alarm" be pulled by interest groups opposed to agency actions.

The concept of discretion combines both delegation and constraints. Fundamentally, discretion refers to the leeway that agencies have in implementing the policies that Congress prescribes. It takes into account both the magnitude of the delegation as well as the constraints that are placed on executive exercise of that delegated authority (Epstein and O'Halloran 1999). Thus, knowing the number of delegations or the number of constraints is not sufficient to characterize the discretion that Congress has granted to an agency. Both need to be taken into account in order to characterize discretion. Having discussed the concept of discretion, we now turn our attention to its measurement.

2.2 Previous Measures of Discretion

Given the importance of discretion to the study of Congress, the bureaucracy, and the outcomes of policy decisions, there have been several attempts to operationalize the concept in order to test theoretical predictions. Measuring discretionary grants from Congress to the executive is no easy task, however. Issues of selection, what constitutes constraints or delegations, attribution of discretionary grants to specific agencies, and the sheer magnitude of the task plague attempts to empirically capture the discretion concept. Despite these challenges, great strides have been made in measuring discretionary grants from Congress to the executive. We begin by reviewing two of the most notable measurement strategies: that of Epstein and O'Halloran (1999) and measures based on the length of statutes (e.g. Huber and Shipan 2002; Clinton et al. 2012).

The most prominent theoretical and empirical work in the study of congressional grants of discretion is undoubtedly Epstein and O'Halloran's (1999) book *Delegating Powers*. In addition to the development of a rich theory linking internal congressional politics and separation of powers politics to discretionary grants, the book also offers a novel empirical measure of discretion in order to test the model's predictions. The Epstein and O'Halloran (EO) measure is based primarily on codings of the Congressional Quarterly (CQ) summaries of legislation designated as significant by Mayhew (1991). They subsequently extended this list of significant legislation through the end of the 102nd Congress (1992). In all, there are

257 significant pieces of legislation in the EO dataset.

Appendix C of Epstein and O'Halloran (1999) describes in great detail how the CQ bill summaries were coded. We briefly review some of the key aspects of the measure here. First, each provision described in the summary was coded for whether or not it delegated "significant policy discretion" to another governmental actor. This information was then used to calculate a "delegation ratio" for each piece of legislation in the dataset, which is defined as the number of major provisions with summaries that include a mention of a delegation to the executive branch divided by the total number of major provisions. The legislation summaries were also coded for whether or not they contained each of fourteen different constraints identified *ex ante* by the authors.[1] The authors then calculate a "constraint ratio" for each piece of legislation, which is defined as the number of *types* of constraints in a bill divided by 14. This constraint ratio is then multiplied by the delegation ratio, yielding a measure of "relative constraint."

The EO measure of discretion is calculated as the delegation ratio minus the relative constraint for a piece of legislation. This yields a measure of discretion that runs between zero and one. By construction, legislation in which there is no delegation (i.e. no summarized major provision includes an explicit mention of delegation) contains zero discretion. Indeed, Epstein and O'Halloran (1999) find that 25 laws (or nearly ten percent of the sample of legislation) contain no delegation to the executive branch, and thus have zero discretion. On the other hand, two pieces of legislation have discretion equal to one, which indicates that every major provision had an executive delegation and that there were no constraints in these pieces of legislation.

This measure has much to recommend it. It pioneered the linking of empirical analysis to theories of legislative discretion. The EO operationalization was the first to take into account *both* delegation and constraints in order to create a measure of discretion that truly

[1] These constraints are: appointment power limits, time limits, spending limits, legislative action required, executive action required, legislative veto, reporting requirements, consultation requirements, public hearings, appeals procedures, rule-making requirements, exemptions, compensations, and direct oversight.

reflected its role in formal theories. However, several aspects of the measure make it difficult to use in broader empirical analyses, which leave room for further development of discretion measures.

First, the focus of Epstein and O'Halloran on significant legislation potentially limits the generalizability of the measure as a tool for assessing discretion. By focusing on particular, potentially one-off pieces of legislation, making comparisons between them and across time becomes difficult. What types of unobservable and uncontrolled for factors may also be affecting levels of discretion? To the extent that different kinds of laws (with respect to substance and issue area) are passed under different ideological arrangements, this may cause concerns about the validity of results presented with such a measure. Additionally, focusing only on significant legislation does not allow researchers to examine when Congress takes discretion away from an agency. An improvement on the EO measure would allow for repeated, over time observations within the same policy areas or agency. A measure with these attributes would allow for fairer comparisons based on within policy or agency variation.

Most fundamentally, the focus on *legislation* as the unit of analysis may limit the number of theories that it is possible to test with the EO discretion measure. The actions that agencies and their employees take in response to changes in discretion are often important predictions that emerge from formal models of discretion. For instance, some classes of models lead to empirical hypotheses in which employees invest in expertise in response to increased discretion from Congress (see, for example, Gailmard and Patty 2007). It would be difficult to test such a prediction using the EO measure. Legislation, particularly significant legislation, typically delegates to multiple agencies. It is not clear whether the EO measure could be decomposed in a way that fully captures the differences in discretion in a piece of legislation for different agencies. The lack of comparability in the measure across time would further frustrate such an analysis.

Second, the EO measure likely understates the magnitude of constraint that Congress includes in laws. The constraint ratio only includes indicators for the inclusion of any given type of constraint. Thus, a bill that contains one hundred instances of time limits, for instance, would be coded as exhibiting less constraint than a bill that contains one instance of a time limit and one instance of a reporting requirement. Because of this, the constraint measure may not always accurately reflect the true magnitude of included constraints and thus lead to measurement error in the discretion measure.

Third, the reliance on CQ summaries raises some concerns about whether or not the measure accurately captures the levels of delegations and constraints in a bill. To examine this question, we focus on two bills – one that the EO measure suggests had zero delegations and one that the measure suggests had zero constraints. We focus on these cases because they most clearly demonstrate the issues we raise here. A closer examination of the statutes suggest that the characterizations of no delegation or no constraint in the summaries may not necessarily match the statutory language.

Consider, for example, the Revenue and Expenditure Control Act of 1968 (PL 90-364). The EO measure records this bill as having zero delegations, and thus zero discretion. One key provision of this act was to cap the total number of federal civilian employees at the level on June 30, 1966. This employee cap and others like it throughout the 1950s, 60s, and 70s had a significant impact on how the government was able to carry out its functions (see Light 1999, for an extended discussion). Perhaps most significantly for our purposes, the legislation delegates substantial authority to the Bureau of the Budget to determine what agencies should gain and lose employees under the cap, and gave the Director of BOB wide latitude in making that determination:

> For the purposes of paragraph (1) [which lays out the numerical limit on employees], the Director may reassign vacancies from one department or agency to another department or agency when such reassignment is, in the opinion of the Director, necessary or appropriate because of the creation of a new department or agency, because of a change in functions, or for the more efficient operation of the government.

This relatively vague grant of authority is consequential due to the importance of personnel for the capacity and production of agencies (see, for example, Carpenter et al. 2012; Potter and Shipan 2013; Bolton, Potter and Thrower 2014) as well as evidence that suggests presidents act ideologically in their allocation of personnel resources across agencies (Bolton 2014). Furthermore, the act gives the Director of BOB significant regulatory authority to carry out the employment cap policy ("The Director shall prescribe such regulations as he deems necessary or appropriate to carry out the provisions of this section"). The employment cap provision is not the only instance of what we would argue count as delegations in this legislation. For instance, there are provisions in Title I that grant the Secretary of the Treasury power to exempt corporations from some tax requirements in the bill at his or her discretion (e.g. Section 6425(d)).

Now consider a bill that, by the EO measure has a Discretion Index of one, indicating delegation in all provisions and no constraints – the 1961 Inter-American Program Appropriation (PL 87-41). The purpose of this bill was to appropriate funds for the newly created Inter-American Program (which eventually became the Inter-American Foundation). The program was established to fund development projects in Latin American countries. We argue that this appropriation bill does, in fact, include constraints on how the program could use the money. The text of the statute itself includes a constraint directly after the legislation appropriates the money:

> For expenses necessary to carry out the provisions of sections 1 and 2 of the Act of September 8, 1960 (74 Stat. 869), $500,000,000, to remain available until expended: ***Provided*****, That the funds herein appropriated shall not be available to be loaned or reloaned at interest rates considered to be excessive by the Inter-American Development Bank or higher than the legal rate of interest of the country in which the loan is made.**

This has a significant impact on the discretionary zone in which the program could operate, though it would not be counted as a constraint in the EO measure because it is not focused on procedures. However, there are procedural (and other) constraints placed on the use of the appropriation in the Senate Appropriation Committee's report on the legislation. These reports are often treated the same as law and agencies take heed to instructions in these reports in order to ensure favorable relations with the appropriations committees (Schick 2008). Indeed, the report (12322 Senate Report 201) backs up the statutory language on interest rates and other constraints with the imposition of a reporting requirement on the program administrators, which is a constraint recognized by the EO measure:

> The Committees on Appropriations of the Senate and the House of Representatives should be provided with semiannual reports on the loans made with the funds appropriated in this bill. If exceptional cases should develop in connection with loans where it is necessary to limit first-year payments to interest such exceptional cases should be reported in the aforementioned semiannual report, together with the reasons why exceptions were made to the policy outlined herein.

These examples suggest that there are potentially significant delegations and constraints that are missed when only looking to the CQ summaries. The potentially arbitrary inclusion and exclusion of some delegations and constraints from the summaries raises concerns about their utility as the basis for a measure of discretion. To summarize, in addition to its clear strengths, the EO measure has some weaknesses that limit its utility for testing some empirical hypotheses that emerge from theories of legislative discretion. In particular, the issues that arise when trying to understand dynamic discretion, as well as the reliance on CQ summaries are roadblocks to using the EO measure.

Before turning to our own proposed measure of discretion, we first consider the other primary measure of discretion in the literature – the length of statutes. The assumption behind this operationalization of discretion is that statute specificity positively correlates with the length of a statute. That is, more words or more space devoted to a particular statute indicates that the legislature is giving instructions to the executive that limits its scope of action. This measure is employed most prominently by Huber and Shipan (2002). In particular, they examine changes to state Medicaid laws during the years 1995-1996. Clinton et al. (2012) use a similar measure in an examination of statutory discretion from 2007-2008.

In that case, they do not distinguish among policy areas, which leaves the possibility that confounders related to policy areas and discretion could lead to spurious correlations.

Perhaps the key drawback of page length measures is that they do not adequately account for delegation. The key assumption of the page length measure is all about constraint – longer statutes have more constraints. However, longer statutes may also have more delegations as well. Indeed, the results from Epstein and O'Halloran (1999) and our own results reported below suggest that delegation and constraints are actually significantly and positively correlated. Because word count or page length themselves tell us nothing about the level of delegation in a statute, their utility as a measure of discretion is limited.

Furthermore, examinations of the page length of statutes face the same problem as the EO measure in that it can be difficult to directly assign statutes to particular agencies. This is important for the analysis of hypotheses that examine outputs from agencies or employee behavior. The issue arises because many statutes reference multiple agencies. Determining which agency is the primary one, or how discretion breaks down among the agencies referenced in a piece of legislation, is not straightforward.

Overall, then, the existing measures of discretion have significantly increased our empirical understanding of the strategic dynamics of grants of discretion from the legislative to the executive branch. There are several features of these measures, however, that could be improved. First, repeated observations for agencies or well-defined policy areas would allow for more comparability of grants of discretion over time. Second, a clear conception of what constitutes a delegation and constraint ought to be central to the overall measure. Finally, a measure of discretion should only focus on increases in discretion but should also reflect decreases in discretion to the executive. Neither the EO nor the page length measures is able to detect negative changes in discretion. We believe the measure we present in the next section includes these three desiderata.

3 A New Measure of Discretion

In this section, we introduce our proposed measure of discretion. Unlike previous measures, our unit of analysis is not individual statutes. Rather, our measure is based upon congressional outputs during the annual appropriations process. In particular, we operationalize delegation as the amount of new budget authority that is appropriated by the chamber. We conceive of constraints as the specificity of the committee reports that accompany the appropriation. From this, we are able to obtain a measure of general discretion that is granted to every agency from Congress in every year of our dataset. This approach also allows us to observe when discretion increases or decreases, and because we are observing the same congressional action each year, i.e. appropriations, these comparisons are more appropriate than a focus on potentially temporally irregular and program-specific pieces of legislation.

We argue that new budget authority is an appropriate measure of delegation to agencies. Agencies require budget authority in order to enter into obligations throughout the year and thus carry out their missions. The size of the budget is clearly linked to the outputs and production of agencies and is a key concern of politicians that seek to control agency actions (see, for example, Schick 2008; McCarty 2004; Potter and Shipan 2013; Niskanen 1974). Without budget authority, most agencies are unable to pay and hire employees, distribute contracts, carry out enforcement, or otherwise operate.

Because of the importance of appropriations for agency functioning, however, Congress does not simply appropriate without instructions (MacDonald 2010). While one approach would be to examine appropriations statutes to look for constraints (such as limitation riders), we choose to look at the appropriations committee reports, which contain significant instructions about how agencies are to spend their funds. As Schick (2008) writes:

> "According to long-standing practice, detailed guidance on how funds are to be spent appears in appropriations committee reports rather than in the body of appropriations acts...The reports do not comment on every agency request or

item of expenditure. Guidance is most likely when the committee disagrees with the president's request or the distribution of money among activities specified by an agency in its budget justification or when it wants to earmark funds, restrict their use, or dictate policies or operations... Agencies are expected to follow the guidance of all reports..."

Even though these reports are not "law," in the sense that they are not statutes, they are nonetheless treated as such by agencies due to the repeated interactions between agencies and the appropriations subcommittees. If agencies act against committee reports, they may face retribution from the committee in the future such as in the form of more stringent constraints directly in the appropriations statute or reduced appropriations for priorities Schick (2008). Appendix A contains an example excerpt from an appropriations report. These reports contain clear instructions to agencies about how budget authority should be obligated as well as instructions about the submission of information to the subcommittee that would allow it to oversee agency activities. We argue that the length of these reports is positively correlated to the level of constraint that the subcommittee wishes to impose upon the agency given that it is accompanied by more instructions.

Thus, our measure of discretion incorporates both delegation (new budget authority in millions of dollars) and constraint (the length of the committee report for a particular agency).[2] We simply divide the former by the latter. The measure is then the amount of new budget authority per page in the appropriations committee report. Therefore, the discretion granted to agency i in year t is given by

$$\text{Discretion}_{it} = \frac{\text{New Budget Authority}_{it}}{\text{Pages}_{it}}$$

We collected this data for each agency for each fiscal year from 1980-2013 from appropriations committee reports accessed through the Library of Congress maintained on line by Thomas and Congressional Proquest. This time frame covers the appropriations bills passed out of committee from the Carter administration through Barack Obama's first term. The data

[2] Note that all dollar amounts are in 2009 dollars and we measure page length to the nearest half page.

was coded by the authors. Inter-coder reliability checks suggested a high correlation between coders, $\rho = 0.98$.

Note that the delegation measure includes only yearly obligational authority that is in the jurisdiction of the appropriations committee. This means that most types of direct spending dictated in authorizing legislation are excluded from the measure (e.g. Medicaid or Medicare). Exclusion of agencies where significant portions of their outlays are direct spending (such as the Social Security Administration or the Department of Health and Human Services) from analyses below does not have any substantive effects on the results. Similarly, we do not collect data for agency-years that use offsetting collections from user fees and other revenues (e.g. the Federal Communications and some financial regulatory agencies). The use of agency fixed effects also helps to allay concerns about the role of mandatory spending and the consequences of its exclusion from our measure as well as potential irregularities that might arise from agencies that use offsetting collections to finance some of their activities. We now examine this measure in more detail and validate it with a test of the ally principle.

The scatterplot in Figure 1 displays the relationship between delegations (appropriated budget authority) and constraints (report page length for an agency).[3] We find that there is a significant positive correlation between the two. The red line in the figure is a lowess smoother, which highlights the clear positive relationship between the two variables. In particular, a one percent increase in the amount appropriated is associated with a 0.4 percent increase in report length ($p < 0.001$). This is largely in line with the results reported in Epstein and O'Halloran (1999) as well. This correlation between delegation and constraint also serves to highlight the shortcomings of page length alone as a measure of discretion. While lengthier reports may suggest greater constraint, they also are associated with larger delega-

[3]Note that in the analyses presented below, we use the natural logarithm of the discretion measure as the dependent variable. Inspection of residuals from these models indicated that they were strongly positively skewed when we used the unlogged dependent variable. Because of this we also present plots and summaries based on the natural logarithm of the measure. In the text, we provide unlogged interpretations to aid understanding of the measure.

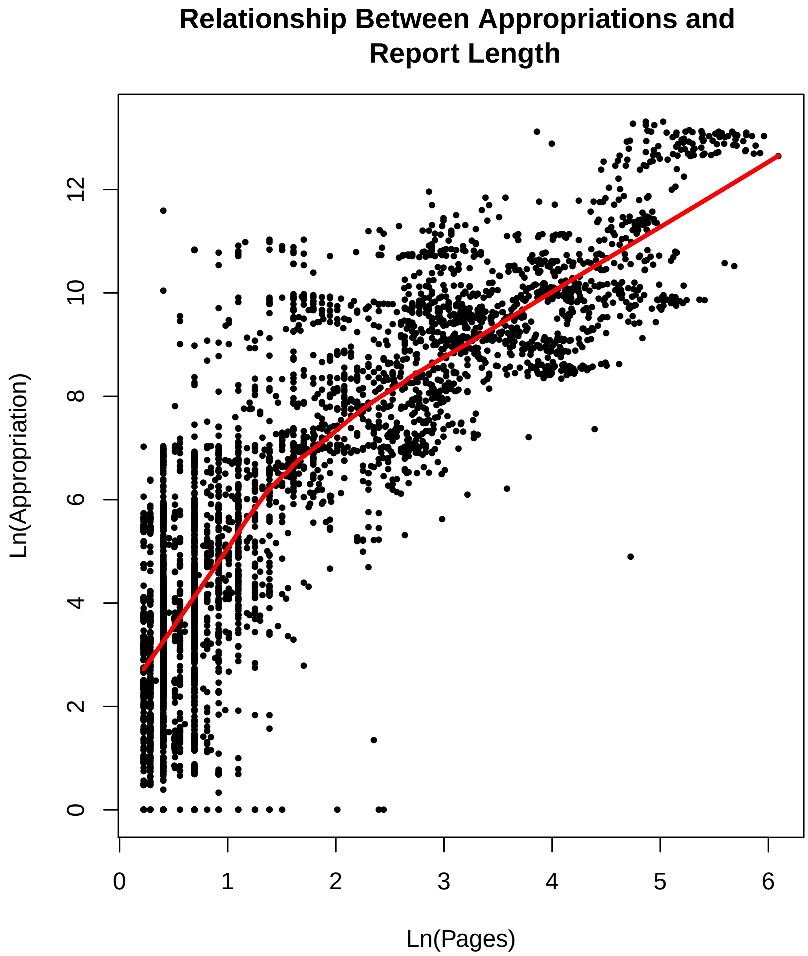

Figure 1: Relationship Between Appropriations and Report Page Length

tions of authority as well. Thus, a measure of discretion must account for both delegations and constraints.

Figure 2 displays the overall distribution of discretion across agencies. The average level of discretion in the sample is 4.895, which corresponds to about $133.6 million of budget authority per report page.

We now turn our attention to an empirical test designed to establish the validity of our measure. One theoretical regularity that has emerged in the discretion literature is the "ally principle." The empirical hypothesis is that Congress will give more discretion to the executive branch during periods of unified government than during periods of divided

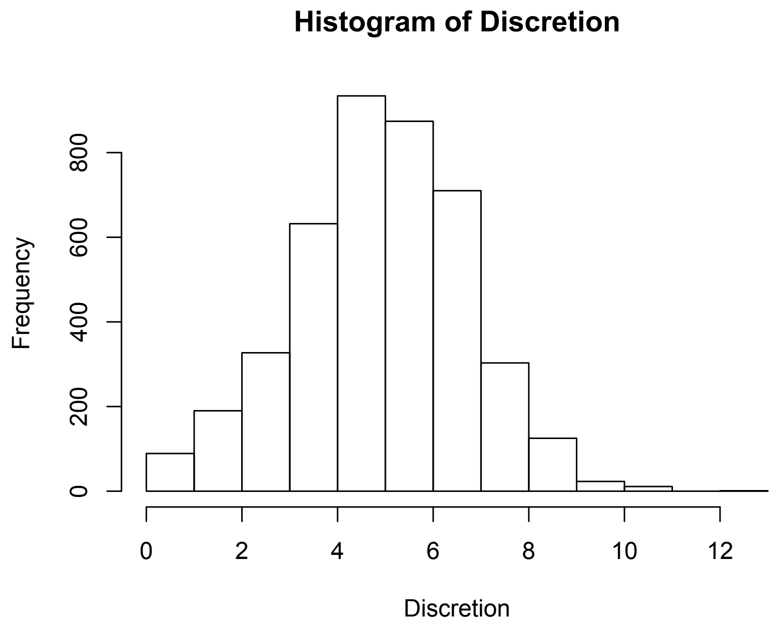

Figure 2: This histogram displays the distribution of discretion. The average level of discretion is $144 million of budget authority per page.

government. The logic behind this hypothesis is that Congress will suffer fewer agency costs from granting large levels of discretion when the executive is relatively ideologically aligned with it because the executive will try to implement a policy with an outcome closest to its ideal point (see Bendor, Glazer and Hammond 2001; Bendor and Meirowitz 2004, for an extended discussion). We note that in some strategic situations, the ally principle may not obtain (see, for example, Huber and McCarty 2004). Nonetheless, we test the hypothesis with the understanding that if circumstances exist in our dataset where the ally principle does not hold, it should only bias against us finding any statistically or substantively significant results. Following Epstein and O'Halloran (1999), we operationalize disagreement (*Chamber Disagreement*) in terms of whether or not the chamber issuing the report is of the same party as the president.[4] This variable takes the value of "1" if the chamber is controlled by

[4]Note that we focus on chamber disagreement rather than divided government because in each year we have an observation for each agency for each chamber, and there are occasions in our dataset where partisan control of the House of Representatives and the Senate differs (e.g. the 112th Congress).

the party opposed to the president and "0" otherwise.

Table 1: Ally Principle

Variable	Model 1	Model 2	Model 3	Model 4
Chamber Disagreement	-0.28***	-0.19***	-0.17***	-0.17***
	(0.06)	(0.04)	(0.03)	(0.03)
Agency Fixed Effects		✓	✓	✓
Trend			✓	✓
Agency-Specific Time Trends				✓
N	3,646	3,769	3,769	3,769

Coefficients reported from OLS regression model, with robust standard errors clustered by agency in parentheses. Significance codes: *p $<$ 0.10, **p $<$ 0.05, ***p $<$ 0.01, two-tailed tests.

Table 1 displays the results of four models assessing the ally principle using our measure of discretion. Model 1 is a simple bivariate regression of discretion onto the disagreement measure. Model 2 adds in agency fixed effects to control for unobserved, time-constant features of agencies that may also influence discretion. Model 3 adds a time trend to the model, and Model 4 includes agency-specific time trends to account for heterogeneity in trends across agencies. Across all four models, we find strong support for the ally principle. In other words, Congress appears to give more discretion to agencies when the president is aligned with the chamber majority. Specifically, we find that a change from agreement between the chamber and the president to disagreement is associated with between a 19 and 28% decrease in the amount of discretion afforded to an agency depending on the specification. Thus, we find support using our measure for this existing theoretical and empirical regularity. Overall, these results offer strong validation for the measure of discretion that we propose here.

4 Empirical Tests

In the previous sections, we introduced a new measure of discretion and described its improvements over earlier measures. Further, we validated our measure by testing the "ally principle," finding support for this longstanding theoretical principal. In the following section, we use this measure to test three additional theories of legislative-executive policymaking. Overall, we show that our appropriations-based measure is a useful tool in theory testing in a variety of areas.

4.1 International Conflict

Previous theories of executive policymaking argue that the president tends to amass more power and influence during war (Corwin 1947; 1948; Rossiter 1956; Schlesinger 1973). Thus, we should expect Congress to give more discretion to the executive branch in these times. Why might we see greater congressional deference to the executive during periods of war or high combat intensity? One hypothesis is that the public "rallies around the flag" during periods in which the US is engaged in armed conflict. The result of this is that presidents exhibit higher approval ratings during these times (Brody 1991; Mueller 1970). Increased public support in turn has implications for increasing the president's legislative success (Canes-Wrone and De Marchi 2002; Rivers and Rose 1985). Alternatively, one might expect that during periods of armed conflict, national policy outcomes become more salient to legislators than local ones; this leads to more deference to the executive branch, which may have greater expertise in these areas (Howell, Jackman and Rogowski 2013; Howell and Jackman 2011). According to either logic, we expect that during times of increased military action, Congress should increase the discretion it gives to agencies in response to international crises.

To test the effect of increased military conflict, we include the logged number of U.S. casualties as the result of international hostile combat obtained from the Defense Casualty

Analysis System, an online database maintained by the Department of Defense. We believe that this is a reasonable measure for the degree of US military involvement in international conflict because increased fatalities usually correspond to a sudden international event or an increase in the intensity of combat action. This conforms to Mueller's conceptualization of a rally point, partly defined as "specific, dramatic, and sharply focused" (Mueller 1970, 21).

Another reason for not using a "war" indicator variable to test this hypothesis is that the designation of war during the time period we examine is much more fluid than in previous eras. For instance, conflicts have been ongoing in Iraq and Afghanistan for more than a decade. It is not clear how to decide what years are considered war or not. Previous studies, (e.g. Cohen 2012) have focused on the intensity of conflict in these two regions, which are at least partly a function of casualties. Similarly, should US actions like those in Kosovo be counted? The use of the casualties measure allows us to sidestep these measurement issues with a continuous measure that captures the intensity of US involvement in international conflict in any given year.

In addition to the logged number of fatalities, we also include other independent variables as controls. To control for the "ally principle", we include the Chamber Disagreement measure examined in the previous section. Additionally, we include a trend variable to control for the effect of time. Next, we include a dummy variable for the president's first year in office (Administration Change). Previous scholars have argued that the president exerts more influence during this "honeymoon" period following an election, due to increased support from the public as well as decreases in public criticism and opposition mobilization (Brody 1991; McCarty 1997; Mueller 1970). Because of this increased public and political support, we expect Congress to give greater discretion to the executive branch during these honeymoon periods.

We also include the annual unemployment and inflation rates as economic control variables. In times of economic distress, Congress may rely on the expertise of the executive branch for a quick response. Consistently, previous research finds that presidents engage

Table 2: The Effect of International Conflict on Executive Discretion

Variable	1
Chamber Disagreement	-0.16***
	(0.03)
Log(Combat Fatalities)	0.03***
	(0.01)
Administration Change	0.03
	(0.05)
Agency Conservatism	-0.43***
	(0.01)
Unemployment	0.02
	(0.02)
Inflation	0.03*
	(0.02)
Presidential Approval	0.00
	(0.00)
Trend	-0.00
	(0.00)
N	3,547
Agency Fixed Effects	✓

Coefficients reported from OLS regression model, with robust standard errors clustered by agency in parentheses and agency fixed effects (not shown). Significance codes: *p < 0.10, **p < 0.05, ***p < 0.01, two-tailed tests.

in more unilateral actions during a poor economy (Krause and Cohen 1997; 2000). Additionally, we include a control variable for the president's public approval rating, collected from the Gallup Poll. Consistent with previous literature, we expect Congress to give the president more leeway when he has good standing with the public (Rivers and Rose 1985). Finally, we control for the conservatism of the agency with the Clinton-Lewis agency ideal points (Clinton and Lewis 2008).

Table 2 displays the results of the effect of US military conflict on our measure of discretion, finding support for this theory. The results show that increases US casualties significantly correspond to increases in discretion given to agencies. Specifically, a doubling in combat fatalities is associated with a 3% increase in discretion to the executive branch. Thus, we find that Congress does tend to increase executive discretion in response to international crisis. Additionally, the results suggest that Congress may also increase discretion during economic crises as well, with inflation being positively associated discretionary grants to the executive.

4.2 Two Presidencies

Scholars not only argue that presidents exert greater influence during times of crisis, but also more generally in the area of foreign policy. The "two presidencies" thesis, first posited by Wildavsky (1966), states that Congress, along with other political and public actors, defers to the president in areas of foreign policy given his many informational and collective action advantages. As a result, the president is more influential vis-a-vis Congress in terms of budgetary success (Canes-Wrone, Howell and Lewis 2008) and the use of unilateral actions (Marshall, Pacelle et al. 2005). This influence can even extend to deference given to the president by the courts in foreign policy-related cases (Ducat and Dudley 1989; Genovese 1980; Yates and Whitford 1998).

To test this aspect of the two presidencies hypothesis, we first regress our measure of discretion onto an indicator for whether an agency's policy portfolio includes defense and international issues.[5]. We expect that the estimated coefficient should take a positive value. Model 1 in Table 3 displays the results of this analysis. As can be seen, there does indeed appear to be a positive relationship between an agency working in foreign affairs and the level of discretion granted to it by Congress. However, this effect is imprecisely estimated and is statistically insignificant.

[5]Note, that we do not include agency fixed effects in this model due to perfect collinearity with the Foreign

Table 3: Test of the "Two Presidencies" Thesis

Variable	1	2
Chamber Disagreement	-0.17***	-0.22***
	(0.04)	(0.06)
Foreign Agency	0.28	0.18
	(0.35)	(0.36)
Disagreement*Foreign Agency		0.16*
		(0.10)
Log(Combat Fatalities)	0.04***	0.04***
	(0.01)	(0.01)
Administration Change	-0.10	-0.10
	(0.07)	(0.07)
Agency Conservatism	-0.08	-0.08
	(0.15)	(0.15)
Unemployment	0.00	0.03
	(0.03)	(0.03)
Inflation	0.04*	0.04*
	(0.02)	(0.02)
Presidential Approval	0.00*	0.00*
	(0.00)	(0.00)
Trend	0.01**	0.01**
	(0.01)	(0.01)
N	3,547	3,547
Agency Fixed Effects	No	No

Coefficients reported from OLS regression models, with robust standard errors clustered by agency in parentheses. Significance codes: *$p < 0.10$, **$p < 0.05$, ***$p < 0.01$, two-tailed tests.

In light of this null finding, we explore the possibility of whether congressional deference to foreign policy agencies is conditional on whether or not Congress agrees ideologically with

Agency variable which also captures specific agency type the president. Previous studies argue that ideological battles between the president and Congress should only manifest in areas of domestic policy, given that Congress defers to the executive on foreign policy (Canes-Wrone, Howell and Lewis 2008; Marshall, Pacelle et al. 2005). In other words, there should be a higher level of bipartisanship in foreign policy than there exists for domestic policy.

Accordingly, we interact Foreign Agency with the Chamber Disagreement measure to assess the effect of political battles by policy area. Here, we find strong support for the "two presidencies" thesis. In foreign policy, the president's disagreement with Congress does not matter as much in influencing levels of discretion as it does in domestic policy. In fact, presidential-congressional disagreement exerts a negligible, statistically insignificant impact on discretion for agencies implementing foreign policy. On the other hand, ideological disagreement significantly decreases discretion levels by 22% for domestic policy agencies.

Overall, these findings offer some support for the theoretical arguments underlying the "two presidencies" thesis. Further, it counters the claims of many contemporary scholars who argue that this thesis is an artifact of the 1950s and no longer applicable in the modern age (Fleisher et al. 2000; Oldfield and Wildavsky 1989; Schraufnagel and Shellman 2001; Sigelman 1979). Here, we follow the arguments of recent scholars who call for other measures of presidential influence outside of the use of roll call votes (Canes-Wrone, Howell and Lewis 2008; Lindsay and Steger 1993) by offering a measure of executive discretion as a viable alternative. This has implications for measuring and testing theories of executive influence in other contexts.

4.3 Agency Insulation

Thus far, we have seen that regardless of the empirical test, the effect of Congress's ideological alignment with the president has a robust effect on discretion. However, the previous section shows that this relationship can be conditional on the policy area. In fact, other theories suggest that the impact of political disagreement on executive discretion is contingent on other factors related to the type of agency involved. In particular, scholars argue that the degree of agency insulation and presidential-congressional conflict are interdependent when influencing levels of discretion.

When Congress chooses to delegate authority to an agency, it may take into account the amount of control the president can exert over that agency. More insulated agencies enjoy less political control from the president, but there exists more uncertainty over the outcomes they implement (Epstein and O'Halloran 1999). Yet, less insulated agencies are more tightly controlled by the president and more likely to implement his policy preferences. This can result in unfavorable outcomes if Congress and the president disagree. Thus, Epstein and O'Halloran (1999) argue that when Congress and the president are aligned, Congress is more likely to delegate more authority to agencies directly under the president's control. On the other hand, they predict that under partisan division, Congress delegates to more insulated agencies. Consistent with this line of reasoning, Lewis (2003) also argues that Congress chooses to create more insulated agencies under divided government and less insulated agencies under unified government.

Following these scholars, we can also test the degree to which Congress gives discretion to agencies based on their level of insulation. We use two different measures of agency insulation from the president. The first is an index of four agency characteristics adapted from (Canes-Wrone, Howell and Lewis 2008), *Insulation Index*. For each agency, we note how many of the following characteristics describe it:

- Agency is headed by a single administrator
- No partisan balance requirements
- Agency head does not have a fixed term
- Agency is in the Executive Office of the President or the Cabinet

Agencies are then assigned a score between 0 and 4 based on how many of these characteristics apply to them. A score of 4 would indicate significant presidential control over the agency.

An example of an agency with score of "4" is the Department of Labor. An agency with a score of "0" faces relatively little president control. The Federal Communications Commission has a score of "0." We also use a measure of insulation developed by Selin (forthcoming), *Insulation Scale*, which scales agency independence based on the structural characteristics of the agency. This scale is increasing in insulation, so relatively higher values correspond to greater insulation.

In order to test the insulation hypothesis, we examine whether partisan disagreement between the majority party in the chamber and the president is conditional on the insulation of the agency. To test this hypothesis, we interact the Chamber Disagreement used in the analyses above with each of the two insulation measures. Given the literature we cite above, we would expect that the effect of ideological disagreement becomes muted as agency independence from the president increases. With respect to the signs of the estimated interaction terms, we would expect it to be negative for *Insulation Index* and positive for *Insulation Scale*. We also include the same controls in this analysis as above. The results are shown in Table 4.

The results of this analysis are mixed. First, it does appear to be the case that the effects of partisan disagreements are diminished when an agency is more insulated. For instance, among agencies with a score of "0" on the *Insulation Index* variable, i.e. the agencies most insulated from presidential control, the effect of disagreement is essentially zero. The estimated effect is 0.4% a increase in discretion, though this is statistically insignificant. On the other hand, for agencies that are least insulated from the president, the effect of disagreement is a 22% decrease in the discretion given to an agency. This estimate is both statistically and substantively significant ($p = 0.001$).

On the other hand, it does not appear to be the case that the overall level of discretion given to less insulated agencies is lower. In the case of both measures, the level of discretion is actually decreasing in insulation. One reason for this may be that the least insulated agencies, i.e. Cabinet and independent agencies like the Environmental Protection Agency,

Table 4: Agency Insulation and Discretion

Variable	1	2
Chamber Disagreement	0.00	-0.20***
	(0.11)	(0.06)
Insulation Index (CHL)	0.36***	
	(0.08)	
Disagreement * Index (CHL)	-0.06*	
	(0.04)	
Insulation Scale (Selin)		-0.56***
		(0.18)
Disagreement * Scale (Selin)		0.10**
		(0.05)
Foreign Agency	0.01	0.16
	(0.35)	(0.34)
Ln(Combat Fatalities)	0.03***	0.03**
	(0.01)	(0.01)
Administration Change	-0.05	-0.03
	(0.07)	(0.08)
Trend	0.02**	0.02**
	(0.01)	(0.01)
Agency Conservatism	-0.19	-0.22*
	(0.13)	(0.13)
Unemployment	-0.00	0.00
	(0.03)	(0.03)
Inflation	0.02	0.02
	(0.02)	(0.02)
Presidential Approval	0.00	-0.00
	(0.00)	(0.00)
Intercept	3.71***	4.96***
	(0.45)	(0.35)
N	3,547	3,547
Agency Fixed Effects	No	No

Coefficients reported from OLS regression models, with robust standard errors clustered by agency in parentheses. Significance codes: *$p < 0.10$, **$p < 0.05$, ***$p < 0.01$, two-tailed tests.

tend to also have the largest policy portfolios. Because of this, it may be more difficult for Congress, given its limited capacity, to impose significant constraints on all of an agencies activities. While Congress could assign these activities to smaller agencies or create new, more insulated agencies to carry them out, there may nonetheless be economies of scale available in larger agencies that lead to better, more efficient performances that outweigh the policy losses associated with ceding some control to a president that is or may in the future be ideologically opposed to Congress.

5 Discussion and Conclusion

Discretion is among the most important concepts in explaining separation of powers politics and executive policymaking. Executive activities ranging from enforcement to regulation to even so-called “unilateral” actions require discretionary grants from Congress. In order to more fully understand these topics, it is vitally necessary to have reliable measures of discretion that can be used to test theories that incorporate it. Yet scant attention has been given in measuring delegation, discretion, and constraints, even though legislative-executive theories based on these concepts are abundant.

To bridge this gap between theory and empirical testing, we introduced a new measure of discretion that is based upon the annual appropriations process. Relative to other measures of discretion, this measure incorporates repeated observations for agencies, accounts for both increases and decreases in annual discretion, and includes both delegations and constraints. As a validation of our measure, we used it to test whether or not the well-known ally principle result holds and find strong support. When the party controlling a chamber of Congress is different from the president’s party, agencies receive significantly less discretion than when the parties are the same.

We then turn our attention to three existing theoretical questions in the literature and use our measure to test them. First, we examine whether Congress grants more discretion during periods with greater intensity of armed conflict. We find that that they do. As the number of American military deaths caused by hostilities increases, Congress delegates more discretion to the executive branch. Then, we turn our attention to the “two presidencies” thesis, which suggests that presidents face less constraint and less partisan opposition in the area of foreign affairs. We find mixed support for these hypotheses. We find no statistically distinguishable difference between levels of discretion in the domestic and foreign affairs policy areas. However, we do find that partisan differences are muted in foreign policy. Finally, we examine whether the insulation of agencies from presidential control affects the level of discretion that Congress grants to the executive branch. We find that more insulated agencies actually receive less discretion than their more insulated counterparts. However, we also examine the extent to which partisanship impacts discretion levels for each type of agency, and find that it is most salient in less insulated agencies.

Overall, we believe that the measure of discretion we have proposed in this paper can be widely applied in testing theories of executive discretion in American politics. Future research can readily incorporate this measure into investigations of how bureaucrats respond to increases and decreases in discretion and how presidential unilateralism in particular policy areas is conditioned by the levels of discretion, to name just two examples. This measure can also be used to test broader theories of separation of powers and policymaking that rely on grants of discretion, such as presidential policymaking, executive influence in Congress, and the president's war time powers.

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A Appropriations Committee Report Example

Below, we reproduce an except from House Report 112-589 describing appropriations for the Environmental Protection Agency (EPA). The report contains detailed information about how the appropriated funds are to be spent and specific information that the subcommittee requires to oversee the agency's activities. We argue that this type of language, which is typical of appropriations committee reports, can plausibly be considered constraints on agency language and that the length of these reports is positively correlated to the amount of constraint the committee intends to place on the agency.

Hydraulic Fracturing- In 2010, the Committee urged EPA to research whether there is a relationship between hydraulic fracturing and drinking water. The Committee understands EPA has incorporated a review of environmental justice impacts into this study, which the Committee finds to be outside the scope of the 2010 language and an inappropriate use of funds. No funds have been provided in the bill to research environmental justice impacts related to hydraulic fracturing, and EPA shall discontinue the use of any resources that may have been diverted to this subactivity. The Committee directs the Agency to release the study's findings with respect to whether there is a relationship between hydraulic fracturing and drinking water following appropriate public comment as directed in House Report 112-151 and peer review.

Integrated Risk Information System (IRIS).–The Committee strongly supports the goals of EPA's IRIS Program and believes a transparent, robust, and reproducible approach for synthesizing scientific information is an important element of influential Federal scientific assessment programs. However, it has become increasingly clear that fundamental improvements in the policies and practices of the IRIS program are necessary to ensure that the assessments developed are firmly based on up-to-date scientific knowledge, meet the highest of standards of scientific inquiry, and are evaluated in accordance with acceptable scientific approaches. Therefore, building from the directives in the fiscal year 2012 Interior, Environment, and Related Agencies conference report, the Committee directs the Agency to take the following actions:

(a) For draft and final IRIS assessments released in fiscal year 2013, the Agency shall include documentation describing how the Chapter 7 recommendations of the National Academy of Sciences (NAS) have been implemented or addressed, including an explanation for why certain recommendations were not incorporated.

(b) The Agency shall issue a progress report to the House and Senate Committees on Appropriations and relevant Congressional authorizing committees no later than March 1, 2013, describing the IRIS Program's implementation of the National Research Council's Chapter 7 recommendations.

(c) Accordingly, the Committee directs EPA to re-evaluate, using acrylonitrile and other relevant assessments as case studies, the methods previously used to evaluate and interpret the body of available scientific data, including the weight-of-evidence approach, and include in the report called for in section (b) a chapter on whether there are scientifically more appropriate methods to assess, synthesize and draw conclusions regarding likely human health effects associated with likely exposures to the substances.