EXECUTIVE REVISION OF JUDICIAL DECISIONS

I. INTRODUCTION: EXTRADITION AND THE EXERCISE OF BENIGN EXECUTIVE DISCRETION

On February 2, 1992, veteran Chicago police officers Anthony Lobue and Thomas Kulekowskis traveled to Canada on an unusual errand. Two attorneys had approached Lobue and Kulekowskis to assist their client in retrieving his physically and mentally disabled wife from her parents' home in Winnipeg.[1] The attorneys assured them that their client's wife, Tammy, had been declared incompetent, that their client was Tammy's legal guardian, and that an Illinois judge had authorized their client to repatriate her.[2] Lobue and Kulekowskis agreed on the condition that the attorneys first seek advice from the Canadian police, who responded that the dispute was not a "police matter."[3] Their expedition ended in failure when Tammy's mother reported that her daughter had been kidnapped and Canadian authorities stopped the group at the border. Tammy returned to Winnipeg, and Lobue and Kulekowskis returned to Chicago to face extradition proceedings.[4] Pursuant to the extradition procedure set forth by federal statute,[5] a federal magistrate certified the two men extraditable, and the Secretary of State issued surrender warrants against them.[6] In response, Lobue and Kulekowskis alleged that, by authorizing the Secretary of State to review the determinations of an Article III court, the extradition statute violated the separation of powers.[7] The district court for the District of Columbia agreed and declared the 148-year-old statute unconstitutional.[8]

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[1] *See* Lobue v. Christopher, 893 F. Supp. 65, 67 (D.D.C. 1995), *vacated*, Nos. 95-5293 & 95-5315, 1996 WL 206481 (D.C. Cir. Apr. 30, 1996); Brief of the Plaintiffs-Appellees at 1, Lobue v. Christopher, Nos. 95-5293 & 95-5315, 1996 WL 206481 (D.C. Cir. 1996).

[2] *See* Brief of the Plaintiffs-Appellees at 1, *Lobue* (Nos. 95-5293 & 95-5315).

[3] *Id.*

[4] *See id.* at 2.

[5] *See* 18 U.S.C. §§ 3181–3196 (1994).

[6] *See* Lobue v. Christopher, 893 F. Supp. 65, 67 (D.D.C. 1995), *vacated*, Nos. 95-5293 & 95-5315, 1996 WL 206481 (D.C. Cir. Apr. 30, 1996).

[7] *See id.* at 70–71.

[8] *See id.* at 78. The D.C. Circuit vacated the judgment on the ground that the district court lacked subject matter jurisdiction to hear the extraditees' declaratory judgment action as long as habeas corpus relief was available elsewhere. *See* Lobue v. Christopher, Nos. 95-5293 & 95-5315, 1996 WL 206481, at *1 (D.C. Cir. Apr. 30, 1996). The district court's decision in *Lobue* has met with skepticism from other federal courts. *See, e.g.*, *In re* Lang, 905 F. Supp. 1385, 1390–1401 (C.D. Cal. 1995); *In re* Lin, 915 F. Supp. 206, 211–15 (D. Guam 1995); *In re* Sutton, 905 F. Supp. 631, 634–37 (E.D. Mo. 1995).

Under the extradition statute, extradition cannot occur unless a judge first certifies that the individual is extraditable.[9] If the extradition judge finds that the requirements of applicable substantive law are met, the judge certifies this finding together with the evidence to the Secretary of State, who is then authorized to issue a surrender warrant but may decline to do so.[10] The statutory scheme thus sets forth a "'dual key' mechanism"[11] under which both the judiciary and the executive must concur in the decision to extradite. The checking function that the judiciary performs under the extradition statute comports with the separation of powers insofar as it prevents the executive from acting unilaterally to deprive individuals of their liberty.[12] The executive enjoys unchecked discretion, however, to decline to extradite. Extradition procedure thus suggests a conceptual category of cases in which the executive exercises what might be described as *benign* discretion — discretion that benefits a losing party at the expense of the government.[13]

This Note uses the concept of benign executive discretion to explore the nature and scope of the rule against executive revision of judicial decisions. It suggests two ways in which benign executive discretion subsequent to judicial decisions might be conceptualized to avoid separation of powers difficulties. Part II provides a brief history of the rule against executive revision. Part III suggests two related explanations for the rule and questions whether the rule can accomplish its purposes. Part IV then explores the notion that benign executive discretion may be understood simply as a means by which the government may waive the benefit of a judgment in its favor. Part V considers whether benign executive discretion may be constitutionally

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[9] *See Lobue*, 893 F. Supp. at 67–68. The extradition statute authorizes federal magistrates and certain state court judges as well as Article III judges to act as extradition judges. *See* 18 U.S.C. § 3184 (1994).

[10] Courts have interpreted the statute as authorizing the executive to decline to extradite on legal or other grounds, and the executive has in fact declined on numerous occasions. *See Lobue*, 893 F. Supp. at 69–70; Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313 *passim* (1962).

[11] Brief for the Appellants at 47, Lobue v. Christopher, Nos. 95-5293 & 95-5315, 1996 WL 206481 (D.C. Cir. 1996).

[12] The Court periodically approaches separation of powers questions from a functional "checks-and-balances" perspective that looks to whether a particular scheme maintains tension and interdependence among the branches, such as by denying any one branch the ability to act unilaterally. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578, 616–21 (1984).

[13] Benign discretion may cease to be "benign," of course, if the executive exercises it in a discriminatory or self-interested fashion; the systemic abuse of such discretion may give rise to a constitutional violation independent of the separation of powers. For instance, concerned with accounts of mistreatment of female prisoners by foreign nations, the executive might exercise its discretion to extradite only male defendants. A male defendant facing extradition might challenge such an exercise of ostensibly benign discretion by alleging an equal protection violation of the kind found in such cases as Regents of the University of California v. Bakke, 438 U.S. 265, 319–20 (1978), and Yick Wo v. Hopkins, 118 U.S. 356, 366–74 (1886).

justified by analogy to the pardon power. Finally, Part VI addresses the justiciability of challenges to benign executive discretion.

II. ORIGINS OF THE RULE AGAINST EXECUTIVE REVISION

The Supreme Court has declared as a general principle that "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch,"[14] a principle that it has attributed to the opinions expressed in *Hayburn's Case*.[15] At stake in that case was the constitutionality of the Invalid Pensions Act of 1792,[16] which directed the federal circuit courts to entertain the pension applications of injured Revolutionary War veterans.[17] If the court found that a claimant qualified under the statute, the statute directed the court to submit this finding to the Secretary of War.[18] Notwithstanding a judicial determination of eligibility, the statute authorized the Secretary of War to withhold a pension if he suspected "imposition or mistake."[19] Although the Court itself never addressed the validity of the statute, a footnote to the decision set forth the opinions of the Justices in their capacity as circuit judges.[20]

Each of the circuit courts to address the validity of the Invalid Pensions Act rested its conclusion squarely upon the separation of powers. In refusing to act upon William Hayburn's claim for a pension, the Pennsylvania circuit court explained that, if it were to proceed under the statute, its "judgments" would be subject to "revision and controul . . . radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States."[21] The New York circuit court observed that "neither the *Legislative* nor the *Executive* branches, can constitu-

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[14] Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1453 (1995) (citing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)).

[15] 2 U.S. (2 Dall.) 409 (1792). For discussion of *Hayburn's Case* and its unusual procedural background, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 99–104 (4th ed. 1996) [hereinafter HART & WECHSLER], and Maeva Marcus & Robert Teir, Hayburn's Case: *A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527 *passim*.

[16] Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324).

[17] *See id.* § 2, 1 Stat. at 244.

[18] *See id.*

[19] *Id.* § 4, 1 Stat. at 244.

[20] The actual decision of the Court was to deny the Attorney General's motion to appear ex officio in order to seek a writ of mandamus directing the Pennsylvania circuit court to act on William Hayburn's petition for a pension. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409–10; Marcus & Teir, *supra* note 15, at 534–41. The judges of the circuit courts expressed their opinions on the validity of the statute in the form of letters to President Washington, which were subsequently reprinted in a footnote to the Court's decision. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n.†; Marcus & Teir, *supra*, at 529–34.

[21] *Hayburn's Case*, 2 U.S. (2 Dall.) at 411–12 n.†.

tionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner."[22] It concluded that the duties assigned by the statute were not judicial because any decisions rendered would be subject to "consideration and suspension" by the Secretary of War.[23] The North Carolina circuit court shared these sentiments: "inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the Secretary at War . . . this subjects the decision of the court to a mode of revision . . . unwarranted by the Constitution."[24]

Notwithstanding the absence of an actual decision on the merits in *Hayburn's Case*, the Supreme Court has subsequently confirmed the existence of a constitutional rule against executive revision of judicial decisions. In *United States v. Ferreira*,[25] the Court considered a series of enactments that directed federal judges to "receive and adjudicate" the claims of Spanish citizens in proceedings to recover war losses from the United States.[26] The statute provided that the judge was to determine an award and transmit this decision along with the evidence taken to the Secretary of the Treasury, who was to pay the claim only if he found it "just and equitable" to do so.[27] Relying at length on *Hayburn's Case*,[28] the Court concluded that the duties conferred by the act were "not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States."[29] Nearly a century later, in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*,[30] the Court addressed the proper construction of a statute providing for judicial review of administrative orders authorizing air carriers to operate overseas routes.[31] Rejecting an interpretation that gave the President the power to review judicial determinations, the Court asserted "the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or altera-

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[22] *Id.* at 410 n.†.

[23] *Id.* To save what it deemed an "exceedingly benevolent" act of Congress, the New York circuit court chose to read the statute as appointing judges to act as commissioners — an appointment the judges promptly accepted. *Id.*

[24] *Id.* at 413 n.†. Each of the courts also suggested, without explanation, that the statute subjected judicial decisions to legislative as well as executive revision. *See id.* at 410–13 n.†.

[25] 54 U.S. (13 How.) 40 (1851).

[26] *Id.* at 45.

[27] *Id.* at 46–47.

[28] *See id.* at 49–52.

[29] *Id.* at 48. Taking the approach of the New York circuit court in *Hayburn's Case*, *see supra* note 23, the Court construed the statute as directing judges to decide such claims in their capacity not as judges, but as commissioners appointed especially for that purpose. The Court held that it lacked jurisdiction to hear appeals from such nonjudicial decisions. *See Ferreira*, 54 U.S. (13 How.) at 47.

[30] 333 U.S. 103 (1948).

[31] *See id.* at 104–06.

tion by administrative action."[32] On similar grounds, the Court has also concluded that Congress cannot engage in legislative revision of judicial decisions[33] or direct courts to reopen final judgments.[34]

III. Two Related Explanations of the Rule Against Executive Revision

Unlike the situation posed by the extradition statute, those cases in which the Court has rejected executive or legislative revision of judicial decisions have involved the possibility that the government could *deny* a litigant the benefit of a favorable judicial decision. Whether the general rule against interbranch revision of judicial decisions also prohibits purely *benign* discretion requires some understanding of what the Court sought to protect in *Hayburn's Case* and its progeny. The rule against executive revision has helped the Court to define a particular role for the judiciary in the constitutional scheme — a role defined, in the grand tradition of *Marbury v. Madison*,[35] by the simultaneous assertion and rejection of judicial power.

A. Judicial Refusal to Serve as an Adjunct to the Executive Branch

Viewed as a denial of judicial power, the rule against executive revision might be understood as part of the Court's early efforts to rebuff extrajudicial service[36] — efforts that, in turn, may have fueled the growth of non-Article III adjudication. In the absence of a modern-day Veterans' Administration and prior to the advent of administrative law judges, the federal judiciary must have appeared to Congress an obvious candidate to perform the work of determining pension eligibility — the sort of task now commonly performed by non-Article III bodies. The Court may have been motivated by a structural concern to prevent use of the judiciary as an adjunct to the executive branch. Thus viewed, the early articulation of a rule against executive revision may have had broad consequences for the present: at the same time that the Court's limited approval of non-Article III adjudication removed a significant obstacle to the development of the

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[32] *Id.* at 113–14.

[33] *See, e.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431 (1856) ("[An] act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . .").

[34] *See* Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1453–63 (1995); *infra* p. 2032.

[35] 5 U.S. (1 Cranch) 137 (1803).

[36] *See, e.g.*, HART & WECHSLER, *supra* note 15, at 103 (suggesting as a "connecting theme" between *Hayburn's Case* and other early refusals to perform extrajudicial service that "judicial independence requires that the Article III courts not be subject to enlistment by Congress or the Executive to act as subordinates to those two branches in the performance of their characteristic functions"); Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123 *passim* (recounting various efforts of the Court to avoid extrajudicial service and noting the general belief that *Hayburn's Case* precluded such service).

modern administrative state,[37] judicial refusal to participate in statutory schemes of the type in *Hayburn's Case* may have ensured that growth in the federal administrative apparatus would occur within the executive branch, not the judicial branch. Even prior to the New Deal, the Court had held that "a mere administrative decision" could not constitute "a judgment binding parties in a case" within the meaning of Article III,[38] and it has since reiterated that "executive or administrative duties of a nonjudicial nature" may not be imposed on Article III judges.[39]

The relationship between the rule against executive revision and the growth of non-Article III adjudication may reflect a general tension between the judiciary's need to protect itself from encroachment and its interest in avoiding service as an adjunct to the executive:[40] the more adjudicative work the judiciary refuses, the more Congress must delegate such work to non-Article III tribunals. Congress and the Court may thus bear joint responsibility for the growth of non-Article III adjudication: at the same time that Congress has sought for policy reasons to assign adjudicative work to non-Article III tribunals[41] and to maintain political controls over such adjudication,[42] the Court's resistance to interference with judicial decisions may also have caused Congress to assign such work to non-Article III tribunals.[43] Although the Court's interest in preventing interference with judicial decisions may be seen as the product of its broader interest in protecting itself from encroachment, the two interests combine to create an uneasy equilibrium: non-Article III adjudication may provoke the judiciary's fear of encroachment, but expansion of the judiciary into areas

[37] *See infra* note 44 (discussing the public rights doctrine).

[38] Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693, 698–99 (1927). Under the statutory scheme then in effect, patent and trademark decisions of the Court of Appeals of the District of Columbia lacked any binding effect in subsequent suits challenging the validity of a patent or trademark. *See id.* The Supreme Court characterized such decisions as "mere administrative decision[s]" from which no appeal could lie. *Id.* at 698.

[39] Morrison v. Olson, 487 U.S. 654, 677 (1988) (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976) (per curiam) (citing United States v. Ferreira, 54 U.S. (13 How.) 40 (1852), and Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792))).

[40] *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (plurality opinion) (holding that Congress's creation of non-Article III bankruptcy courts violated Article III).

[41] *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 236–40, 261–63 (1990).

[42] *See, e.g.*, Strauss, *supra* note 12, at 586–95 (describing the various political controls exercised over administrative agencies). A prominent case in which Congress attempted to exercise control over the outcome of non-Article III adjudication is INS v. Chadha, 462 U.S. 919 (1983), in which the Court struck down a statutory provision authorizing either house of Congress to repudiate by resolution an executive finding that an individual qualified for a compassionate suspension of deportation. *See id.* at 923–28. The Court held the provision invalid for failure to satisfy the Article I requirements of bicameralism and presentment. *See id.* at 944–59.

[43] *Cf.* Bator, *supra* note 41, at 237 & n.10 (describing the use of specialized tribunals to perform "advisory and administrative functions of a sort that could not be delegated to an article III court").

of specialized or advisory adjudication runs afoul of the judiciary's refusal to serve as an adjunct, which in turn leads the Court to accept non-Article III adjudication.[44]

B. Judicial Assertion of Power to Vindicate the Interests of Successful Litigants

Viewed as an assertion of judicial power, the rule against executive revision prevents the executive from interfering with the judiciary's ability to vindicate the rights of individuals. In the absence of limits on executive or legislative revision, the government could force litigants into an intolerable no-win situation: if a litigant were to lose in court, she would lose once and for all, but even if she were to win in court, she might still lose at the discretion of the political branches. For example, under the statutes at issue in *Hayburn's Case* and *Ferreira*, the courts could not declare that successful claimants enjoyed any right to an award. Because the only judgments with "binding and conclusive" effect[45] were those rendered against the claimant and in favor of the government, the statutes relegated the courts to the role of screening claims against the government and of placing the imprimatur of an impartial judiciary on the government's refusals to pay. In such situations, a court cannot "decide on the rights of individuals";[46] it can decide only that individuals have no rights. Any other decision

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[44] This uneasy equilibrium may help to explain the persistence and expansion of the public rights doctrine, under which suits against the government for "money, lands or other things," *Ex parte* Bakelite Corp., 279 U.S. 438, 452 (1929), or arising under a public regulatory scheme, *see* Thomas v. Union Carbide Agric. Prods., 473 U.S. 568, 593–94 (1985), need not be heard by Article III courts but may be committed to the executive or legislative branches. *See, e.g.*, Bator, *supra* note 41, at 246–53; Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 951–53 (1988); Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765 *passim* (1986). If the judiciary is unwilling to subject itself to the bureaucratic or political controls — such as executive revision — that accompany the role currently filled by legislative courts and administrative agencies, it may have no choice but to embrace the existence of a category of cases that can be heard by non-Article III tribunals.

Considered in a positive light, the combination of the public rights doctrine and the rule against executive revision may have the particular virtue of preserving both judicial reach over a broad range of disputes and judicial autonomy without requiring the judiciary to enforce and rely upon a formalistic and blurry distinction between executive and judicial functions. For example, instead of acknowledging that certain disputes may be committed to either executive or judicial resolution, the Court could opt to protect its independence by insisting on a strict separation of the executive and judicial functions and rejecting altogether the notion of concurrent judicial and executive authority over particular types of disputes. Such an approach would insulate the judiciary from the executive, however, only at the dramatic expense of both executive reach over disputes committed to the judiciary and judicial reach over disputes committed to the executive. By conditioning judicial resolution of cases capable of executive resolution upon a guarantee that such decisions will not be subject to executive revision, the rule against executive revision enables the judiciary to protect itself from executive domination without having to commit particular types of disputes to the exclusive resolution of either branch.

[45] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948).

[46] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

is open to revision. Executive and legislative revision conspire in such cases to make a farce of the judicial power.

In rare cases, courts may lack the legal authority to compel the other branches to honor judicially declared rights. In this unusual context, the Court has articulated a flexible test of Article III power that focuses on whether successful litigants stand to benefit from its exercise. In *Glidden Co. v. Zdanok*,[47] the Court upheld the Article III status of the Court of Claims despite the inability of that court to enforce its money judgments against the United States.[48] Having observed that no court could compel Congress to exercise its exclusive power under the Appropriations Clause to honor money judgments against the United States,[49] Justice Harlan's plurality opinion pragmatically insisted only that successful litigants could collect such judgments as a matter of practice. Given Congress's nearly perfect record of honoring money judgments against the United States,[50] proceedings before the Court of Claims were demonstrably not an exercise in futility for litigants, and the Court of Claims could thus be deemed an Article III court.

Although Justice Harlan characterized the problem in *Glidden* as one of the enforceability of judgments, the problem can be recast as one of legislative revision: by refusing to exercise its appropriations power, Congress could effectively revise money judgments against the United States by refusing to honor them in part or in whole. To resolve this formally intractable problem of legislative revision, the plurality resorted to a functional analysis that treated the practical ability to vindicate the interests of successful litigants as the sine qua non of an Article III court. Although the *Glidden* plurality was willing to overlook the legal impotence of the Court of Claims in the face of an insurmountable constitutional barrier, it nevertheless insisted upon the ability of Article III courts to declare rights of which successful litigants could avail themselves — as a matter of practice, if not of law.

C. *Vulnerability of the Rule Against Executive Revision*

The possibility that Congress may evade the rule against executive revision by formally redefining the right in question raises serious doubt as to the utility of the rule itself. Whether a court has declared a right and thus rendered a decision that cannot be subject to executive revision necessarily depends upon how Congress has defined the right to be judicially determined. Thus, if Congress had sought in *Hayburn's Case* to preserve executive discretion by explicitly defining the right at stake not as a right to a pension, but merely as a right to be *considered* by the executive for a pension, the executive's failure to

[47] 370 U.S. 530 (1962).

[48] *See id.* at 568–71 (plurality opinion).

[49] *See Glidden*, 370 U.S. at 569–70.

[50] *See id.* at 570–71.

award a pension to a successful litigant would no longer have constituted executive revision; executive revision would instead have consisted of a statutory provision authorizing the executive to decline to *consider* the claim of a successful litigant. Yet such formal redefinition of what constitutes the right at stake places the judiciary in the very role that the rule against executive revision ostensibly precludes — that of screening claims on behalf of the executive and of placing the imprimatur of judicial impartiality on discretionary government decisions. Moreover, the situation of the litigant who sues merely to obtain the right to an executive decision is functionally identical to the 'no-win situation' described above: if the litigant loses in her suit to be considered by the executive, she loses conclusively, but even if she wins, she might still lose at the discretion of the executive. Even if the rule against executive revision does not itself prevent such a result, however, courts might avoid rendering decisions in such cases by characterizing them as "advisory opinions" that cannot be rendered by Article III courts — a doctrinally convenient approach given the looseness with which the Court has used that term.[51]

The fact that the judiciary cannot grant the relief ultimately sought by a litigant, however, should not by itself render a suit nonjusticiable. Because the judiciary assumes an advisory role only when it is directed to decide the *same* question that the executive will proceed to decide anew, it need not refrain from participating in the intermediate stages of a decision as long as it resolves only questions that the executive will not revisit. In the context of administrative law, for example, it is well established that the judiciary may enforce executive observance of procedural requirements imposed by statute even though observance of such procedures cannot dictate a particular outcome.[52] In other cases, litigants may sue not to have the executive decide a question in a particular manner, but to have the executive decide a dispute to which the government is not a party. Such was the case in *Seminole Tribe v. Florida*,[53] in which the Court struck down on Eleventh Amendment grounds a federal statute that imposed on states a duty, enforceable in federal court, to negotiate in good faith with Indian tribes seeking to conduct gaming activities.[54] Arguing in dissent that the Court lacked subject matter jurisdiction, Justice Stevens observed

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[51] Although the Court has long insisted that Article III courts cannot render so-called "advisory opinions," *see, e.g.*, Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113–14 (1948); Muskrat v. United States, 219 U.S. 346, 351–63 (1911), the precise meaning of that phrase is uncertain. *See* HART & WECHSLER, *supra* note 15, at 93–98 (noting the difficulty of identifying advisory opinions); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 644–45 (1992) (illustrating the Court's "extremely sloppy" use of the phrase "advisory opinions" and suggesting that "[p]erhaps no other term of art has acquired so many different meanings").

[52] *See, e.g.*, United States v. Florida E. Coast Ry., 410 U.S. 224, 234–46 (1973).

[53] 116 S. Ct. 1114 (1996).

[54] *See id.* at 1119.

that the "maximum sanction" a court could impose under the statute for violation of the duty was "an order that refers the controversy to a member of the Executive Branch . . . for resolution"[55] and deemed it "extremely doubtful that the obviously dispensable involvement of the judiciary in the intermediate stages of a procedure that begins and ends in the Executive Branch is a proper exercise of judicial power."[56] Yet the statute at issue in *Seminole Tribe* did not authorize the executive to consider anew whether the state negotiated in good faith; rather, it directed the executive to prescribe procedures under which a tribe could conduct gaming activities.[57] In determining that a state has failed to negotiate in good faith, the judiciary renders no advice to the executive on the separate question of the procedures under which a tribe should be allowed to conduct gaming activities. The separation of powers should not prevent Congress from committing the resolution of distinct questions within a dispute to different branches.

IV. Justifying Benign Executive Discretion As a Form of Waiver

Understood as either a denial or an assertion of judicial power, the rule against executive revision ought not to bar executive exercise of benign discretion. Any formulation of a rule against executive or legislative revision must acknowledge that the government may waive the benefit of a judgment in its favor. The actual effect of even a "binding and conclusive" judgment is limited by the fact that it falls upon the parties, not the court, to assert the rights that the court declares: the judicial power guarantees only that a successful litigant *may* assert its rights, not that it *must* assert them. Otherwise, any failure by the government to enforce an injunction in its favor or to collect the full amount of a civil judgment would constitute executive or legislative revision of a judicial decision and thus violate the separation of powers. Executive discretion to forgo judicially authorized searches, arrests, and prosecutions might also be deemed a form of unconstitutional revision.[58] Yet it is well established that courts may

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[55] *Id.* at 1144 (Stevens, J., dissenting).

[56] *Id.* at 1144–45 (citing Gordon v. United States, 117 U.S. app. 697, 702–03 (1864) (posthumously reported draft opinion of Taney, C.J.), and United States v. Ferreira, 54 U.S. (13 How.) 40, 48 (1851)).

[57] *See Seminole Tribe*, 116 S. Ct. at 1120 & n.2 (citing Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(B)(vii) (1994)).

[58] The executive is in fact obligated to exercise its discretion and to consider the validity of a warrant before executing it. *See* United States v. Leon, 468 U.S. 897, 918–21 (1984) (holding that evidence seized pursuant to a defective warrant must be excluded if the executive lacked an "objectively reasonable belief" in the validity of the warrant).

render judgments declaring rights that the parties have yet to exercise and, indeed, may never exercise.[59]

The Court has recognized in a variety of contexts that the government enjoys a particular ability to forgo the benefit of a judgment in its favor. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[60] for example, the Court held that Congress could authorize the continued operation of a bridge that the Court had previously held to be an obstruction of interstate commerce.[61] In *Cherokee Nation v. United States*,[62] *Pope v. United States*,[63] and *United States v. Sioux Nation of Indians*,[64] the Court upheld statutes conferring jurisdiction on the Court of Claims to hear claims against the government that the Court of Claims had previously rejected.[65] In *Sioux Nation*, the Court specifically rejected arguments that such a statute amounted to legislative revision of judicial decisions:[66] "Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers."[67] Despite the narrow reading that the Court has since given *Sioux Nation*,[68] that decision suggests that the government's ability to waive its rights is, at least, no less than that of a private litigant.

The principle that the government may forgo the benefit of a judgment in its favor, on the one hand, and the Article III requirement that judgments must "affect the rights of litigants,"[69] on the other,

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[59] For example, a litigant may seek a declaratory judgment establishing his right to engage in action for which he has not been prosecuted, even when there is no guarantee that the litigant will ever exercise that right. *See* Steffel v. Thompson, 415 U.S. 452, 458–60 (1974).

[60] 59 U.S. (18 How.) 421 (1856).

[61] *See id.* at 431–32.

[62] 270 U.S. 476 (1926).

[63] 323 U.S. 1 (1944).

[64] 448 U.S. 371 (1980).

[65] *See id.* at 391–407; *Pope*, 323 U.S. at 9 (construing the statute as creating "a new obligation of the Government to pay . . . where no obligation existed before"); *Cherokee Nation*, 270 U.S. at 486 (asserting that Congress's power to waive the res judicata effect of a judgment against the United States "of course is clear").

[66] *See Sioux Nation*, 448 U.S. at 391–407.

[67] *Id.* at 407.

[68] *See* Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1458–59 & 1459 n.6 (1995); *infra* p. 2032 and note 77.

[69] Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam)) (internal quotation marks omitted). Although the Court has adopted no single formulation of the conditions essential to exercise of the judicial power, its formulations have consistently emphasized the necessary effect of judicial decisions on the rights of individuals. *See, e.g.*, Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113–14 (1948) (explaining that Article III courts can "render no judgments not binding and conclusive on the parties"); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 820 (1824) ("[T]he constitution, laws and treaties of the Union . . . seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals . . . ."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals . . . ."). The Court has often expressed the limits of its power in the form of a rule

might be synthesized into the following principle: judicial decisions must establish rights that prevailing litigants *may* enforce against their unsuccessful opponents. *Hayburn's Case* and its progeny develop one implication of this principle: neither the executive nor the legislature can deny a private party its rights under a judicial decision. The principles that judgments must establish enforceable rights and that litigants may waive their rights frame the permissible range of executive or legislative action with respect to judicial decisions: although the government cannot upset a judgment in favor of a private party, it can waive the benefit of a judgment in its own favor.

The permissible scope of executive revision can be illustrated with a variation on the facts of *Hayburn's Case*. The Invalid Pensions Act of 1792 might be modified to the following effect: if the court finds a claimant eligible for a pension, the Secretary of War must pay the pension, but if the court finds a claimant ineligible, the Secretary may nevertheless choose to pay the pension in order to mitigate any undue hardship that might otherwise result. The modified statute might also explicitly authorize the Secretary to exercise his discretion on the basis of his independent application of law to fact. Such a scheme should be constitutional insofar as it does not impair the ability of the judiciary to declare and secure the rights of individuals. Although literalistic adherence to the principle that judgments must be final[70] might lead to the conclusion that the Secretary could not exercise his discretion to grant a pension without violating the separation of powers, such a conclusion is inconsistent with the notion that the government may waive the benefit of a judgment in its favor. That notion necessitates a distinction between benign and nonbenign executive discretion — that is, a distinction between cases in which executive discretion nullifies a decision that favors the government, and cases in which executive discretion nullifies a decision that favors some other party. Only executive discretion that sacrifices the government's rights may be characterized as a form of waiver.

When benign executive discretion consists of the disbursement of money to unsuccessful litigants, as in the above variation on *Hayburn's Case*, such discretion can also be justified as a valid exercise of Congress's spending power. When the executive disburses money benefits at its discretion pursuant to statute,[71] its role may be described as simply that of distributing congressional largesse to those

against rendering so-called "advisory opinions," but this formulation is particularly unhelpful insofar as it is unclear what constitutes an "advisory opinion." *See supra* note 51.

[70] *See Plaut*, 115 S. Ct. at 1453–59.

[71] Because "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. CONST. art. I, § 9, cl. 7, any grant of a pension that is not also backed by a congressional appropriation would be no better than an empty promise on the part of the executive. Although Congress might choose to honor such a grant after it has been made, only Congress can bind itself in advance to do so. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 569–70 (1962) (plurality opinion) (noting that, although Article I "vests exclusive responsibility for appro-

who have lost in court. If Congress can confer on unsuccessful litigants sums of money in recognition of claims rejected by Article III courts, it is not clear why it cannot also direct the executive to distribute such largesse in a discretionary manner. The fact that an Article III court has found that a person has no legal right to certain money should not convert a subsequent act of government charity into a violation of the separation of powers.

The government's waiver of its rights under a judicial decision must be distinguished from its waiver of the res judicata effect of a judgment, which may implicate the structural independence of the courts. In *Plaut v. Spendthrift Farm, Inc.*,[72] the Court rejected an effort by Congress to reinstate securities actions that had been dismissed as time-barred.[73] It deemed the effort a "clear violation" of the finality of judgments required by the separation of powers[74] and proceeded to characterize res judicata as a legal defense based on the finality of judgments.[75] Even as it acknowledged that, under *Sioux Nation* and earlier decisions, "Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States,"[76] the Court implied that courts always retain the ability to raise the res judicata bar sua sponte, even when "seemingly prohibited" from doing so by statute.[77] Unlike a waiver of res judicata, benign executive discretion of the type under the extradition statute or in the above variation on *Hayburn's Case* does not require the courts to revisit previously decided issues and thus does not implicate the judiciary's "independent interest in preventing the misallocation of judicial resources and second-guessing prior panels of Art. III judges."[78] When the executive simply grants a benefit or privilege denied by judicial decision, it does not also direct the judiciary to reconsider the unfavorable decision itself.

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priations in Congress," "a general appropriations act . . . eliminates the need for subsequent separate appropriations to pay judgments").

[72] 115 S. Ct. 1447 (1995).

[73] *See id.* at 1450–51, 1463.

[74] *Id.* at 1456; *see id.* at 1453 (describing the "fundamental principle" of "finality of judicial judgments").

[75] *See id.* at 1459.

[76] *Id.* at 1458–59 (quoting United States v. Sioux Nation of Indians, 448 U.S. 371, 397 (1980)) (internal quotation marks omitted).

[77] *Id.* at 1459 n.6. Writing for the majority, Justice Scalia observed that the *Sioux Nation* Court "did not address" the fact that the statute at issue in that case "seemingly prohibited courts from raising the res judicata defense *sua sponte*"; nor, according to Justice Scalia, did the Court in *Sioux Nation* appear to perceive any "reason to raise the defense on its own." *Id.* Such "unexplained silences," he explained, "lack precedential weight." *Id.*

[78] *Sioux Nation*, 448 U.S. at 433 (Rehnquist, J., dissenting).

V. JUSTIFYING BENIGN EXECUTIVE DISCRETION BY ANALOGY TO THE PARDON POWER

Article II of the Constitution vests in the President the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[79] An aspect of English monarchical power deliberately retained by the Framers,[80] the power to pardon is a sweeping one that generally cannot be checked by the other branches: "To the Executive alone is intrusted the power of pardon; and it is granted without limit."[81] A pardon is effective any time after commission of the offense, including after conviction:[82] in the words of Justice Holmes, a pardon "affects the judgment" that imposed the penalty.[83] When used to remit fines, penalties, and forfeitures, the pardon power can restore property as well as liberty;[84] at the extreme, it can nullify the operation of a criminal statute[85] or provide a means by which the executive may escape accountability for its actions.[86] The breadth of

[79] U.S. CONST. art. II, § 2, cl. 1.

[80] *See, e.g.*, Schick v. Reed, 419 U.S. 256, 262–66 (1974); THE FEDERALIST No. 69, at 417 (Alexander Hamilton) (Clinton Rossiter ed., 1961); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 508 (1977).

[81] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872); *see, e.g.*, *Schick*, 419 U.S. at 263 ("[T]he draftsmen of Art. II, § 2, spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed.'" (quoting THE FEDERALIST No. 74 (Alexander Hamilton)); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867) ("The power . . . is unlimited, with the exception stated [for cases of impeachment]. . . . This power of the President is not subject to legislative control."). Criticism of the pardon power has often taken as its premise the absence of any checks on its use. *See, e.g.*, Duker, *supra* note 80, at 475, 525–38; Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 573–75, 611–39 (1991) (suggesting procedures and standards to promote "principled clemency decisions"); James N. Jorgensen, Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 345–47, 362–67 (1993) (suggesting that President Bush may have pardoned various Iran-Contra defendants "in order to suppress information concerning his own conduct").

Among the limits that do exist on the pardon power is that the president may not attach unconstitutional conditions to pardons. *See, e.g.*, *Schick*, 419 U.S. at 263–64; Patrick R. Cowlishaw, Note, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 152–56, 172–77 (1975). Pardons also cannot "affect any rights which have vested in others" as a result of the judgment against the offender, and any proceeds of a sale that have been paid over to the United States as a result of a judgment can be returned only upon an appropriation by Congress. Knote v. United States, 95 U.S. 149, 154 (1877). Finally, the executive pardon power is not as exclusive as the Court's language in *Klein* might suggest: Congress enjoys the concurrent power to pass acts of general amnesty. *See* Brown v. Walker, 161 U.S. 591, 601 (1896).

[82] *See, e.g.*, *Garland*, 71 U.S. (4 Wall.) at 380.

[83] Biddle v. Perovich, 274 U.S. 480, 486 (1927).

[84] *See, e.g.*, The Laura, 114 U.S. 411, 413–14 (1885); Confiscation Cases, 74 U.S. (7 Wall.) 454, 461–62 (1869).

[85] *See, e.g.*, EDWARD S. CORWIN, THE PRESIDENT 198 (Randall W. Bland, Theodore T. Hindson & Jack W. Peltason eds., 5th rev. ed. 1984) (discussing President Carter's grant of amnesty to those who evaded conscription during the Vietnam War); Duker, *supra* note 80, at 530 (discussing President Jefferson's announced course of pardoning those convicted under the Sedition Act).

[86] *See* Duker, *supra* note 80, at 530–33 (discussing President Ford's pardon of Richard Nixon); Jorgensen, *supra* note 81, at 362–67 (discussing President Bush's pardon of various Iran-Contra defendants).

the power can be illustrated by comparison to a statute authorizing the Attorney General to set free any person convicted of a federal crime if she determines that to do so would be in the national interest: in light of the executive's established power to grant amnesties without legislative consent,[87] such a statute would seem merely to duplicate the explicit grant of power found in Article II.

The existence and breadth of the pardon power demonstrate that the Framers endorsed the notion of executive power to confer liberty and property to which the recipient has no legal right. The explicit assignment of such power to the executive does not violate the constitutional scheme of separated powers but is rather an integral part of that scheme.[88] The Court has recognized the value and necessity of the power as a check on judicial decisionmaking: "It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it."[89] For that reason, the Court has upheld exercises of the pardon power even at the particular expense of the judiciary. For example, although the power of contempt is "[t]he power of a court to protect itself"[90] and "to vindicate the authority of the court,"[91] the executive has the power to pardon criminal contempts.[92] And insofar as a pardon "affects the judgment" that imposes a penalty, pardons themselves amount to constitutionally sanctioned executive revision of judicial decisions.

At the same time, because Article II guarantees only that the executive shall have the power to pardon "Offenses against the United States," the pardon power alone may not formally justify all forms of benign executive discretion. If failure to qualify for a pension does not constitute an "Offense[ ] against the United States," for example, it is unclear how the executive grant of a pension could be justified entirely as an act of pardon; nor do the Court's pardon decisions suggest any obvious precedent for such use of the pardon power. Moreover, given the constitutional requirement that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by

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[87] *See* Armstrong v. United States, 80 U.S. (13 Wall.) 154, 155–56 (1872); Duker, *supra* note 80, at 519.

[88] *See* Biddle v. Perovich, 274 U.S. 480, 486 (1927) ("[A pardon] is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.").

[89] *Ex parte* Grossman, 267 U.S. 87, 121 (1925).

[90] *Id.* at 122.

[91] *Id.* at 111.

[92] *See id.* at 108–22. The Court has distinguished "criminal contempts," which are imposed "to vindicate the authority of the court and to deter other like derelictions," from "civil contempts," which are imposed "for the benefit of the complainant" in a civil suit. *Id.* at 111. The Court has held only the first category of contempts susceptible to pardon. *See id.*

Law,"[93] the executive cannot unilaterally obligate the United States to honor such a grant.[94] Thus, at least in cases involving the disbursement of money, congressional approval may be not merely relevant, but decisive as to the constitutionality of benign executive discretion.

Even if the absence of congressional approval is fatal to certain types of benign executive discretion, however, the *presence* of such approval should sustain the discretion. If the executive pardon power standing alone cannot formally justify every executive exercise of benign discretion, that power must still be combined with all of Congress's concurrent authority when Congress directs the executive to exercise such discretion. As Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*,[95] executive power waxes and wanes with the presence or absence of congressional approval: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[96] Thus, because Congress enjoys broad and unquestioned spending power,[97] a statute directing the executive to exercise benign discretion in granting pensions can be justified not only by analogy to the pardon power, but also as a legislative direction to execute the charitable will of Congress in individual cases.[98] If the grant of a pension falls within a "zone of twilight" in which the scope of executive power standing alone is unclear,[99] the fact that Congress has directed the executive to exercise benign discretion should be relevant, if not decisive, as support.

More generally, the justifications of benign executive discretion offered in Part IV and in this Part should be viewed not as mutually exclusive, but as cumulative. Combined executive and congressional power may be further combined with the notion that the government may waive its rights as additional support for executive exercise of benign discretion. Thus, for example, as support for its holding in *Sioux Nation*, the Court combined precedent establishing Congress's power to waive res judicata with Congress's enumerated power to define and "to pay the Debts . . . of the United States."[100] Executive exercise of benign discretion enjoys the support not only of the government's ability to waive its rights under a judgment in its favor, but

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[93] U.S. CONST. art. I, § 9, cl. 7.

[94] *See supra* note 71.

[95] 343 U.S. 579 (1952).

[96] *Id.* at 635 (Jackson, J., concurring) (citation omitted).

[97] *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371, 397 (1980) (noting "a substantial body of precedent affirming the broad constitutional power of Congress to define and 'to pay the Debts . . . of the United States'" (quoting U.S. CONST. art. I, § 8, cl. 1)).

[98] *See supra* p. 2031–32.

[99] *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

[100] *Sioux Nation*, 448 U.S. at 397 (quoting U.S. CONST. art. I, § 8, cl. 1); *see also id.* at 401 (noting the Court's similar approach in Pope v. United States, 323 U.S. 1, 9–10 (1944)).

also of the executive's explicit power of grace and any additional powers that Congress may exercise.

VI. JUSTICIABILITY OF SEPARATION OF POWERS CHALLENGES TO BENIGN EXECUTIVE DISCRETION

In order to invoke the "judicial Power" of the federal courts, a plaintiff must allege a "Case[ ]" or "Controvers[y]" within the meaning of Article III.[101] In elaborating these limits, the Court has articulated a constitutional doctrine of standing that requires plaintiffs to allege an "injury in fact" that is "concrete and particularized,"[102] "distinct and palpable,"[103] and "actual or imminent, not 'conjectural' or 'hypothetical.'"[104] The requirement of injury would appear to preclude separation of powers challenges to benign executive discretion: it is not apparent how the threatened exercise of benign discretion — the threatened conferral of liberty or property to which the recipient has no legal right — could inflict injury adequate for standing purposes. The Court has indicated that the separation of powers may go unenforced when its violation does not result in individual injury.[105]

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101 U.S. CONST. art. III, § 2, cl. 1.

102 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

103 Allen v. Wright, 468 U.S. 737, 751 (1984) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975))).

104 *Defenders of Wildlife*, 504 U.S. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983))). Plaintiffs must also demonstrate that the injury "fairly can be traced to the challenged action of the defendant," Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976), and that it "is likely to be redressed by a favorable decision," *id.* at 38.

105 *See* Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 217–27 (1974); *Ex parte* Lévitt, 302 U.S. 633, 633–34 (1937) (per curiam). In *Schlesinger*, the Court denied standing to armed forces reservists who alleged that members of Congress belonged to the reserves in violation of the Incompatibility Clause and were subject as a result of their reserve membership to "undue influence by the Executive Branch, in violation of . . . the independence of Congress implicit in Art. I." *Schlesinger*, 418 U.S. at 212 (footnote omitted); *see id.* at 209–12. The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. I, § 6, cl. 2. The Court held that the alleged injury to "an interest . . . held in common by all members of the public" was too "abstract" to sustain standing to sue, *Schlesinger*, 418 U.S. at 220, and explicitly rejected the suggestion that the absence of others who might successfully assert standing to enforce the Incompatibility Clause could itself justify a finding of standing. *See id.* at 227. In *Lévitt*, the Court denied standing to a member of the Supreme Court bar who alleged that the appointment of Hugo Black to the Court violated the Incompatibility Clause because Black had served in the Senate at the same time that Congress had increased the retirement pay of Supreme Court justices. *See id.* at 219–20 (discussing *Lévitt*). The Incompatibility Clause provides that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." U.S. CONST. art. I, § 6, cl. 2. The Court relied upon the "established principle" that an individual seeking to invoke the judicial power "must show that he has sustained or is immediately in danger of sustaining a direct injury" as a result of the challenged action; "a general interest common to all members of the public" was "not sufficient." *Lévitt*, 302 U.S. at 634.

Standing doctrine cannot prevent courts from considering the constitutionality of benign executive discretion, however, insofar as an allegation of executive revision is also an objection to subject matter jurisdiction to which a court must respond.[106] Because Article III courts cannot render decisions subject to executive revision, the fact of executive revision not only renders a statute unconstitutional, but also deprives the court of subject matter jurisdiction. Thus, although individuals facing extradition face an imminent loss of liberty that would constitute an obvious injury for standing purposes, they cannot logically be required to establish standing in order to allege executive revision for the simple reason that they attempt not to invoke the judicial power, but to resist its exercise. Moreover, even if neither the government nor the litigant objects to the presence of benign executive discretion in a statute, a court can still establish the unconstitutionality of such discretion by deciding sua sponte that it lacks subject matter jurisdiction under the statute — an approach demonstrated by *Hayburn's Case* itself.

VII. CONCLUSION

Even when it results in what might be characterized as executive revision of a judicial decision, executive exercise of benign discretion poses no threat to the separation of powers. Application of the rule against executive revision to cases involving benign executive discretion is necessary neither to preserve judicial independence from the executive nor to ensure the ability of the judiciary to vindicate the rights of successful litigants. Efforts to analogize the exercise of such discretion to classic cases of impermissible executive revision must contend not only with the principle that the government may deny itself the benefit of a judicial determination, but also with the textual warrant for benign executive discretion provided by the pardon power. The unfortunate case of officers Lobue and Kulekowskis suggests not that benign executive discretion ought to be unconstitutional, but rather that there arise occasions calling for its exercise.

[106] Parties cannot waive objections to subject matter jurisdiction, and courts must raise such objections sua sponte if the parties fail to do so. *See, e.g.*, FED. R. CIV. P. 12(h)(3); Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152 (1908).